COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. 855 Darby Road, Welland (In Rem), 2019 ONCA 31
DATE: 20190121
DOCKET: C64650

Rouleau, Watt and Paciocco JJ.A.

BETWEEN

Attorney General of Ontario

Applicant (Respondent)

and

855 Darby Road, Welland, and All Contents (in rem)

Respondent (Appellant)

Ryan Naimark and Alex Nikolaev, for the appellant

Lisa Will, for the respondent

Heard: October 22, 2018

On appeal from the order of Justice J.T. Akbarali of the Superior Court of Justice, dated November 6, 2017 with reasons reported at 2017 ONSC 4953.

Rouleau J.A.:

Overview

[1] This appeal involves the civil forfeiture of the property situated at 855 Darby Road, Welland as well as various Hells Angels Motorcycle Club (HAMC) paraphernalia that were seized on the premises under the *Civil Remedies Act, 2001*, S.O. 2001, c. 28 (*CRA*). On an application by the provincial Crown, the

application judge ordered forfeiture of the property on the basis that it was both proceeds and an instrument of unlawful activity.

[2] The appellant 855 Darby Road, Welland, and all contents (*in rem*) argues that the application judge committed numerous errors in reaching the decision to order forfeiture of the property. In its submission, the appeal should be allowed and the application for civil forfeiture dismissed.

[3] For the reasons that follow, I would dismiss the appeal.

Facts

[4] In 2001, Gerald Ward, Richard Ward (who died in 2005), Tim Panetta and Randy Beres purchased 855 Darby Road, Welland. The purchasers modified the property, which had been used as a machine shop, and rented it to the Niagara Prospect Chapter of the HAMC to which all four belonged. As part of the renovations made to the property, opaque sheeting was installed on part of the existing fencing, the first floor windows were replaced with cement blocks and the front door was replaced with a cement-filled steel door. Security cameras were also installed.

[5] Sometime after 2001, the Niagara Prospect Chapter of the HAMC became a full patch chapter of the HAMC.

[6] The Hells Angels members and prospects were required to pay dues for membership. These dues were used to pay bills related to the property, including regular mortgage payments.

[7] Following a police operation in 2006, a number of Niagara HAMC Chapter members, including Gerald Ward, were arrested for drug trafficking-related offences. Mr. Beres had left the Hells Angels by this point, although he remained an owner of the property. As for Mr. Panetta, he remained an owner of the property and a HAMC member at all relevant times.

[8] Mr. Ward pleaded guilty to the drug offences and was convicted at trial of instructing the commission of an offence for a criminal organization. At Mr. Ward's trial, the Crown filed an expert report on the structure, organization, hierarchy, purposes and activities of the HAMC prepared by Detective Sergeant Kenneth Davis. The trial judge relied on D/S Davis's report to conclude that the HAMC is a criminal organization.

[9] At the outset of those criminal proceedings, the federal Crown had placed restraint orders on some of Mr. Ward's property, including vehicles, cash, his matrimonial home and 855 Darby Road. In exchange for Mr. Ward pleading guilty to the drug charges, the federal Crown agreed to propose a reduced sentence and seize only one of his vehicles and the cash. It would then lift the restraint orders on the balance of the property, including 855 Darby Road.

[10] After the federal Crown lifted the restraint order on 855 Darby Road, the Attorney General for Ontario commenced *CRA* proceedings seeking forfeiture of 855 Darby Road as well as various HAMC paraphernalia seized from the premises.

[11] On the provincial Crown's application, the judge first considered the appellant's challenge to the admissibility of some of the Crown's evidence. She found that although no Acknowledgement of Expert's Duty ("Form 53") had been filed as ordinarily required by r. 53.03(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, D/S Davis's expert evidence could be received by the court. In the application judge's view, D/S Davis fell into the category of participant experts and, pursuant to this court's decision in *Westerhof v. Gee Estate*, 2015 ONCA 2006, 124 O.R. (3d) 721, participant experts need not execute a Form 53 or comply with r. 53.03(2)'s other requirements for their evidence to be admissible.

[12] The application judge also rejected the suggestion that the expert evidence tendered by the Crown, including the evidence of D/S Davis, should be rejected because it contained many statements of information and belief. The appellant argued that these statements of information and belief were inadmissible pursuant to r. 39.01(5) as they related to contentious facts not otherwise proven.

[13] Finally, the application judge held that the agreed statement of facts from Mr. Ward's guilty plea in the criminal proceedings could be admitted and relied on by the Crown as part of its case.

[14] The application judge then turned to the merits of the application and, on two different bases, concluded that 855 Darby Road ought to be forfeited to the Crown. First, she found that 855 Darby Road was an instrument of unlawful activity because it had been used as a safe space to plan unlawful activity. Second, she held that 855 Darby Road constituted proceeds of unlawful activity. The record established that the mortgage payments on the property had been funded in part from dues paid by HAMC members. These dues, in turn, were shown to have come from the unlawful for-profit activities of the members.

[15] The application judge also held that some of the seized HAMC paraphernalia qualified as instruments of unlawful activity. The paraphernalia used or worn to intimidate rival gangs and the public and signal the wearer's trustworthiness to the criminal community fell into this category.

[16] The application judge further rejected the appellant's arguments that the responsible owner and legitimate owner exceptions in the *CRA* apply to spare 855 Darby Road and the HAMC paraphernalia from forfeiture.

[17] Finally, the application judge rejected the appellant's submission that the plea agreement between Mr. Ward and the federal Crown, in which the federal Crown agreed to lift the restraint orders over 855 Darby Road and several other properties, resulted in forfeiture being clearly not in the interests of justice. As a

result, the application judge ordered forfeiture of 855 Darby Road and the identified category of HAMC paraphernalia.

Issues

[18] On appeal, the appellant raises the same three evidentiary issues and the same issues on the merits as it did in the court below. They are as follows:

1. Evidentiary issues:

   (a) Did the application judge err in admitting D/S Davis's evidence absent a Form 53?

   (b) Did the application judge err in admitting the Crown's expert evidence despite its reliance on disputed hearsay evidence contrary to r. 39.01(5)?

   (c) Did the application judge err in admitting the agreed statement of facts from Mr. Ward's criminal proceedings?

2. Issues on the merits:

   (a) Did the application judge err in holding that 855 Darby Road constituted proceeds of unlawful activity and in rejecting the legitimate owner exception?

   (b) Did the application judge err in holding that 855 Darby Road was an instrument of unlawful activity and in rejecting the responsible owner exception?

(c) Did the application judge err in holding that the HAMC paraphernalia were instruments of unlawful activity and in rejecting the responsible owner exception?

(d) Did the application judge err in holding that the plea agreement between Mr. Ward and the federal Crown did not make it clearly not in the interests of justice to order forfeiture of 855 Darby Road?

Analysis

(1) Evidentiary issues

(a) Did the application judge err in admitting the expert evidence of D/S Davis absent a Form 53?

[19] As part of its case on the application, the Crown tendered an affidavit sworn by D/S Davis. The affidavit was, with minor differences, the same expert report that D/S Davis had prepared and that was tendered as evidence by the federal Crown at Mr. Ward's criminal trial. A copy of that previous expert report was appended as an exhibit to D/S Davis's affidavit.

[20] The appellant argues that the application judge erred in accepting D/S Davis's evidence because no Form 53 expert acknowledgement was provided as required by r. 53.03(2.1). Subrule 53.03(2.1) provides that the report of an expert that a party intends to call at trial shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

    i. a description of the factual assumptions on which the opinion is based,

    ii. a description of any research conducted by the expert that led him or her to form the opinion, and

    iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

[21] Subrule 53.03(2.1) applies to expert evidence that a party seeks to lead at the trial of an action. Prior to 2015, there was conflicting case law as to whether this rule also applied to expert evidence sought to be led on a motion or an application. That conflict was resolved with the 2015 amendment to the Rules, which introduced r. 39.01(7). That provision reads:

> Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03(2.1).

[22] Strictly speaking, r. 39.01(7) requires that the "information" contained in r. 53.03(2.1) be included as part of the opinion evidence provided by the expert.

Although a report and a signed Form 53 may not be required by r. 39.01(7), it is nonetheless clear that the same information outlined in r. 53.03(2.1), including an acknowledgement of duty by the expert, needs to be included in the evidence tendered by the expert.

[23] As noted earlier, the application judge determined that D/S Davis's evidence should be accepted despite the absence of a Form 53. In her view, compliance with r. 53.03(2.1) was not required because D/S Davis was a participant expert. In *Westerhof*, this court explained that participant experts could testify to their involvement and observations without having to comply with r. 53.03(2.1).

[24] On appeal, the appellant argues that the application judge erred in her interpretation of *Westerhof*. In its submission, D/S Davis was not a participant expert and compliance with the rule was a prerequisite to the admissibility of his evidence. I agree with the appellant's submission that D/S Davis was not a participant expert but, as I will explain, I have concluded that the evidence ought nonetheless to be admitted.

[25] In *Westerhof*, Simmons J.A. described the participant expert exception as follows, at para. 60:

> …[A] witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:

- the opinion to be given is based on the witness's observation of or participation in the events at issue; and
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

[26] Although D/S Davis's evidence satisfies some of the criteria set out by Simmons J.A., in my view it fails in at least one respect. Specifically, the opinion is not based on D/S Davis's observation of or participation in the events at issue.

[27] It is to be recalled that the witnesses found to be participant experts in *Westerhof* were the parties' treating physicians. Simmons J.A. observed that such treating physicians have in the past been "referred to as 'fact witnesses' because their evidence is derived from their observations of or involvement in the underlying facts": para. 61.

[28] In the present case, D/S Davis had little or no involvement in the underlying facts. Nothing in D/S Davis's affidavit indicates that he made observations with respect to 855 Darby Road aside from reviewing information he assembled after the fact. He neither appears to have been involved in the search conducted at 855 Darby Road, nor does he appear to have observed the property being used in such a way that it would qualify as an instrument of unlawful activity. D/S Davis's affidavit is concerned with the broader questions of whether the HAMC is a criminal organization and of how the HAMC operates and carries out its activities. In

Mr. Ward's criminal trial, where D/S Davis's original report was filed, the trial judge described it as providing "a national perspective of the HAMC": *R. v. Ward*, 2008 CarswellOnt 9690 (Sup. Ct.), at para. 39.

[29] In addition, even if D/S Davis had, to some limited extent, direct involvement in the investigation of the HAMC's activities leading to the arrest of Mr. Ward and ensuing forfeiture litigation, his affidavit goes well beyond his participation in those events. Where a participant expert goes beyond his observation and involvement in the underlying facts, the *Westerhof* exception for participant experts no longer applies: *Westerhof*, at para. 63.

[30] Concluding that the application judge erred in applying the participant expert exception to D/S Davis's evidence does not, however, end the matter. Failure to provide an expert's acknowledgement of duty is not necessarily fatal to the admissibility of that evidence. Had the application judge not accepted that D/S Davis was a participant expert exempted from the requirement of providing a Form 53 acknowledgement, she nonetheless had the discretion to excuse this non-compliance with the Rules and receive D/S Davis's evidence: rr. 2.03, 53.03(3). From my reading of her reasons, it is apparent that she would have done so. For the reasons that follow, I have concluded that despite the application judge's error, it is open to this court to find that D/S Davis's evidence was properly admitted, albeit for different reasons, and I would do so: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(a).

[31] In my view, the appellant suffered no real prejudice from D/S Davis's failure to provide the Form 53 acknowledgement. I say so for several reasons. First, the affidavit substantially complies with all of the other informational requirements of r. 53.03(2.1). D/S Davis's area of expertise, qualifications and experience are set out in his affidavit. His opinion as well as a detailed explanation of the basis for the opinion are also well explained. The only omission of any significance is the absence of the acknowledgement required by r. 53.03(2.1)(7).

[32] While I consider the requirement that experts provide such an acknowledgement to be important, it is only one component of r. 53.03(2.1). The mischief sought to be addressed by r. 53.03(2.1) is much broader than the requirement that an expert acknowledge his or her duty to the court. As explained in *Westerhof*, the amendments to the Rules that introduced r. 53.03(2.1) were implemented to ensure "the neutrality and expertise of expert witnesses, as well as adequate disclosure of the basis for an expert's opinion": para. 2.

[33] The basis of D/S Davis's opinion is well set out in the affidavit. Further, any concern that D/S Davis is the type of "hired gun" or "opinion for sale" witness that gave rise to the Civil Justice Reform Project's recommendation leading to the adoption of the rule is attenuated: see *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007), at p. 75. D/S Davis's opinion was originally prepared for the criminal prosecution of Mr. Ward and not for use in this proceeding. There can be no

concern that, in drafting the opinion, D/S Davis somehow tailored his evidence to favour the respondent's case for civil forfeiture. The affidavit filed in this proceeding is, in effect, a repeat of the opinion tendered in the criminal proceeding.

[34] Finally, it can hardly be said that the appellant suffered any prejudice from the absence of acknowledgement given that the affidavit was filed years before the hearing of the application and no steps were taken to cross-examine D/S Davis on the issue of his impartiality or on any apparent failure on his part to fairly and objectively present the facts and opinions contained in it. As a result, I would reject this ground of appeal.

(b) Did the application judge err in admitting the Crown's expert evidence despite its reliance on disputed hearsay evidence contrary to r. 39.01(5)?

[35] The appellant argues in this court, as it did on the application, that the Crown's experts, D/S Davis and Detective Constable Bassi, based their opinions on hearsay (*i.e.*, on information they had received and believed rather than on first-hand observation). Much of this information was, in the appellant's submission, contentious. Subrule 39.01(5) provides that affidavits used on an application "may contain statements of the deponent's information and belief with respect to facts that are not contentious." The appellant submits that, pursuant to r. 39.01(5), the application judge ought to have struck the contentious portions of the affidavits. When the appellant was asked by the application judge to identify the parts of the affidavits that were alleged to be contentious the appellant, in effect, pointed to the

entirety of D/S Davis's affidavit. In the appellant's submission, therefore, once the contentious hearsay contained in the affidavits is removed, the opinions tendered are totally undermined and ought to be rejected.

[36] In my view, the application judge did not err in admitting the affidavits and opinions of D/S Davis and D/C Bassi. After carrying out a *Mohan* analysis, the application judge found that both were qualified to give expert evidence, and expert witnesses are treated differently from usual fact witnesses. Those differences bear on the application of r. 39.01(5). This is because the affidavit of a usual fact witness is offered to prove facts. A factual witness who does not have personal knowledge of facts should not attest to facts unless the factual claims are admissible under a hearsay exception or are not contentious. In contrast, many statements of fact contained in an expert report are offered not to prove the stated facts but to disclose the factual foundation underpinning the expert opinion. As explained in *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42, an expert's opinion "more often than not will be based on second-hand evidence." The testimony "as to circumstances upon which the opinion is based is not introduced, and cannot be introduced, in order to establish the veracity of the second-hand evidence. It is thus not hearsay evidence": at p. 43. The hearsay rule does not, therefore, operate to exclude second-hand information tendered as part of an expert's report. Nor does r. 39.01(5). To the extent that the expert opinion rests on second-hand material, the value of the opinion may be affected but not its admissibility.

[37] Contrary to the appellant's submission, the trial judge was not required to strike the contentious portions of the Davis and Bassi affidavits.

(c) Did the application judge err in admitting Mr. Ward's agreed statement of facts from his criminal prosecution?

[38] The appellant argues that the application judge ought not to have admitted the agreed statement of facts tendered in relation to Mr. Ward's guilty plea in his criminal proceedings. In support of this submission, the appellant relies on *R. v. Caesar*, 2016 ONCA 599, 339 C.C.C. (3d) 354.

[39] In my view, *Caesar* has no application to the present case. In *Caesar*, the accused was seeking to tender evidence of the facts underlying a *non-party*'s guilty plea. She sought to do so either through an agreed statement of facts or by calling the officer in charge of the investigation who had attended at the time of the guilty plea. The non-party in question, although available to testify, had not been called as a witness by the accused and she did not reach an agreement with the Crown about tendering the evidence as an agreed statement of facts. The proposed means of introducing the evidence therefore amounted to hearsay that did not meet the tests of necessity and reliability. The circumstances of the present case are totally different and are more akin to *R. v. Baksh* (2005), 199 C.C.C. (3d) 201 (Ont. Sup. Ct.), aff'd 2008 ONCA 116, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 155. In *Baksh*, the Crown was permitted to introduce evidence from an accused's own agreed statement of facts for the truth of its contents. The

statement, which the accused signed in the course of a previous trial, was a voluntary admission and was not subject to an express or implied limitation as to its use. The statement could therefore be relied on in the subsequent proceeding, but it could not be treated as conclusive. The defence was entitled to explain, attack or otherwise counter the evidence.

[40] Mr. Ward is one of the owners of 855 Darby Road who, in this proceeding, is seeking to prevent his property from being forfeited. In substance, he is a party to the proceeding. As a result, factual admissions made by him are admissible in the proceeding and can properly affect the shared interests of his co-owners.

[41] Indeed, Mr. Ward testified on the application and was given the opportunity to comment on the agreed statement of facts from his criminal proceeding tendered by the respondent. The application judge explained that in assessing the weight to be given to the agreed statement of facts, she would consider Mr. Ward's evidence in which he sought to explain and qualify the statements contained therein. I see no error in the application judge's admission and treatment of the agreed statement of facts.

(2) Issues on the merits

(a) Did the application judge err in holding that 855 Darby Road constituted proceeds of unlawful activity and in rejecting the legitimate owner exception?

[42] The appellant maintains that there was insufficient evidence to conclude that the property's mortgage was paid down using the proceeds of unlawful activity. In its view, the application judge's finding is the result of pure speculation. Nothing short of a tracing of monies sourced in criminal proceedings directly into the acquisition of the property was required.

[43] I disagree. A precise tracing and proof that every payment made in acquiring the asset was funded from criminal activity are not required. Pursuant to s. 3(1) of the *CRA*, an order forfeiting property is made where the property is found to be proceeds of unlawful activity. Section 2 of the *CRA* defines proceeds of unlawful activity as "property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity".

[44] The Crown, therefore, need only prove that property was acquired *in part* as a result of unlawful activity. Should a difference exist between the value of an interest in the property and the value of the property that is tainted by unlawful activity, that consideration is more properly weighed when determining whether forfeiture is clearly not in the interests of justice: *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, 333 D.L.R. (4th) 326, at paras. 98, 104-106.

[45] The evidence led by the Crown clearly established that the mortgage on 855 Darby Road was paid down using monthly dues paid by members of the Niagara HAMC Chapter. It was also clear from the evidence that during the period in which they paid their dues, Mr. Ward and other HAMC members had been convicted of various for-profit offences, including trafficking in drugs. Based on this evidence and the balance of the record showing widespread criminal activity within the HAMC, it was open to the application judge to draw the inference that the mortgage was indeed paid down at least in part using funds acquired through unlawful activity. A precise forensic tracing of specific criminally-acquired funds into identifiable payments made to the mortgage was not required.

[46] The appellant further argues that the application judge erred in finding that the legitimate owner exception provided in the *CRA* did not apply. The relevant statutory provision is as follows:

> **3(3)** If the court finds that property is proceeds of unlawful activity and a party to the proceeding proves that he, she or it is a legitimate owner of the property, the court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the legitimate owner's interest in the property.

[47] Section 2 of the Act defines a legitimate owner as:

> a person who did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the person, and who,
>
> (a) 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,

> (b) 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
>
> (c) acquired the property from a person mentioned in clause (a) or (b);

[48] The appellant notes that there is no suggestion in the evidence that the original acquisition of the property by the owners was funded by illegally obtained funds. In the appellant's view, the application judge erred in inferring that because the owners of the property had participated in meetings (referred to as "church" meetings) of the Niagara HAMC Chapter held at 855 Darby Road they must have had knowledge of, participated in or facilitated the criminal activity of dues-paying members. Without this inference, there is no basis for rejecting the legitimate owner exception.

[49] I would dismiss this ground of appeal. The record clearly establishes that Mr. Ward, a dues-paying member of the HAMC, was involved in drug trafficking. The record also fully supports the application judge's finding that at various times, Mr. Beres and Mr. Panetta participated in the "church" meetings at the club. The inference drawn by the application judge that criminal ventures were discussed and planned at such meetings was available on this record.

[50] The owners of the property would therefore have known that a not insignificant part of the dues collected and used to fund the mortgage payments were proceeds of unlawful activity. As a result, whether (or not) the owners were

themselves personally involved in unlawful activity, they facilitated the unlawful activity of others and knowingly used the proceeds of that activity for the payment of the mortgage. The appellant has not met the onus of showing that any of the owners were "legitimate owners" as defined in the *CRA*. Evidence that it was possible for them to pay down the mortgage without resort to unlawful activity is not sufficient to discharge this onus: *Ontario (Attorney General) v. $104,877 in U.S. Currency (In rem)*, 2016 ONCA 71, 129 O.R. (3d) 312, at para. 7.

(b) Did the application judge err in holding that 855 Darby Road was an instrument of unlawful activity and in rejecting the responsible owner exception?

[51] As I have concluded that the forfeiture was justified pursuant to s. 3 of the *CRA*, I need not address the alternate basis for forfeiture, that forfeiture pursuant to s. 8 of the *CRA* was made out as the property was "an instrument of unlawful activity."

(c) Did the application judge err in holding that the HAMC paraphernalia were instruments of unlawful activity and in rejecting the responsible owner exception?

[52] The appellant argues that the application judge erred in finding that certain of the Hells Angels paraphernalia forfeited to the Crown were instruments of unlawful activity. Section 8 of the *CRA* provides that forfeiture is available where, subject to the responsible owner exception and the interests of justice, "the court finds that the property is an instrument of unlawful activity."

[53] In the appellant's submission, the application judge's finding is based on D/S Davis's evidence, evidence that ought to have been rejected either for non-compliance with r. 53.03(2.1) or for non-compliance with r. 39.01(5). As I have concluded that the evidence of the D/S Davis was properly admitted, I see no basis to interfere with the application judge's finding that the Hells Angels paraphernalia are instruments of unlawful activity. The evidence of D/S Davis clearly demonstrates that, as the application judge found at para. 109, the paraphernalia forfeited were "used to intimidate rival gangs and the public, and to signal the wearer's trustworthiness to the criminal community" and "used to engage in unlawful activity that is likely to result in the acquisition of other property, including money from drug transactions." The requirements under s. 8 of the *CRA* are made out.

[54] I also see no basis to interfere with the application judge's finding that none of the owners fell within the responsible owner exception to forfeiture. The owners were full patch members of the HAMC. Although by the time the property was seized Mr. Beres was no longer a member of the Hells Angels, he would have been well aware of the uses made of the paraphernalia to intimidate others, mark their territory and signal to the criminal community that they were trustworthy business partners. There is no basis for concluding that the responsible owner exception applies and I would therefore dismiss this ground of appeal.

(d) Did the application judge err in holding that the plea agreement between Mr. Ward and the federal Crown did not make it clearly not in the interests of justice to order forfeiture of 855 Darby Road?

[55] The appellant argues that allowing the provincial Crown to sidestep a plea agreement reached with the federal Crown is inherently unfair and should have led the application judge to conclude that, pursuant to s. 3 of the *CRA*, it would "clearly not be in the interests of justice" to make a forfeiture order. In the appellant's submission, the evidence established that an agreement was reached between Mr. Ward and the federal Crown to return 855 Darby Road to Mr. Ward in exchange for his guilty plea. It was also clear that Mr. Ward was unaware of the divisibility between the federal and provincial Crowns and in these circumstances, fairness dictated that, in the interests of justice, the forfeiture order ought not to be made.

[56] The appellant submits that pursuant to this court's decision in *Ontario (Attorney General) v. 714 Railton Avenue*, 2014 ONCA 397, 310 C.C.C. (3d) 448, a person such as Mr. Ward who was induced to enter into a plea agreement believing, reasonably, that he would not have to forfeit 855 Darby Road, should not thereafter find this agreement circumvented by allowing forfeiture to the provincial Crown. Such a result is clearly not in the interests of justice.

[57] I disagree. In *Railton*, the trial judge found as a fact that the federal Crown had misled or at least lulled the accused into a false sense of security. In that case, the court found that the accused had reasonably believed that, in exchange for

entering into a plea agreement, a final decision had been made that he would not have to forfeit his home: see paras. 11 and 23. No such finding was made in the present case. To the contrary, as explained by the application judge, it was apparent from the transcripts of the criminal proceedings that forfeiture of 855 Darby Road was not addressed on the record and no explicit promise was made to Mr. Ward. That finding was available to the application judge on the evidence. As a result, I see no basis to interfere with the application judge's disposition of this issue.

Conclusion

[58] For these reasons, I would dismiss the appeal and award the respondent costs fixed in the amount of $13,000, together with $913 for disbursements and applicable taxes on disbursements.

Released:

"PR"

"JAN 21 2019"

"Paul Rouleau J.A."
"I agree David Watt J.A."
"I agree David M. Paciocco J.A."