KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 73**

Date: **2024 04 25**
File No.: QBG-RG-01216-2020
Judicial Centre: Regina

BETWEEN:

THE DIRECTOR UNDER *THE SEIZURE OF CRIMINAL PROPERTY ACT, 2009*
APPLICANT

- and –

PATRICK WARNECKE
RESPONDENT

- and –

KEVIN BARTON and the CHIEF OF POLICE OF THE REGINA POLICE SERVICE
RESPONDENTS

Counsel:

Meghan McAvoy	for the applicant
Mark Baerg	for the respondent Patrick Warnecke
No one appearing	for the respondents Kevin Barton and the Chief of Police of the Regine Police Service

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DECISION
April 25, 2024

ROBERTSON J.

Contents Paras

INTRODUCTION

[1] This decision follows a hearing of a long-delayed application for forfeiture of $21,297.65 seized by the Regina Police Service [RPS] from a marihuana dispensary business in 2018.

[2] The applicant is the Director under *The Seizure of Criminal Property Act, 2009* [Director]. The Director's application is brought under *The Seizure of Criminal Property Act, 2009*, SS 2009, c S-46.002 [*Act*]. The Director's application was put on hold pending resolution of criminal proceedings related to the seizure and an application challenging the constitutionality of federal legislation. With those matters resolved, the Director renewed the application.

[3] For the reasons which follow, the application is granted because the Director established that the cash was proceeds of unlawful activity and the respondent failed to establish that forfeiture would be contrary to the interests of justice.

BACKGROUND

Affidavit Evidence

[4] The application was originally filed in 2020, supported by affidavits filed by the applicant Director from:

i. Tammy E. Pryznyk, Director, sworn July 25, 2020

ii. Cpl. Sean Slater sworn July 23, 2020 [Slater Affidavit]

iii. Cpl. Chad Hesse sworn July 16, 2020

iv. Sgt. Kimberly Stewart sworn July 23, 2020;

[5] The respondent, Patrick Lee Warnecke [Mr. Warnecke], filed affidavits sworn February 15, 2024, and April 11, 2024.

[6] The Director filed a Supplemental Affidavit of Tammy E. Pryznyk sworn April 15, 2024.

Relevant events

[7] From the materials filed and the court file, the following chronology of relevant events can be constructed:

2018	
March 28	Regina Police Service seize $21,297.65 from Best Buds Society marihuana dispensary at 1353 and 1355 Cornwall Street, Regina, Saskatchewan
2020	
July 29	Director files notice of application seeking forfeiture of $21,297.65 cash [Director's Application]
August 14	Chambers: Director's Application adjourned by consent to September 29, 2020
September 29	Chambers: Director's Application adjourned by consent *sine die*
2022	
October 17	Klatt J. provides oral decision on the *Canadian Charter of Rights and Freedoms* [*Charter*] challenge, declaring ss. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*] unconstitutional and of no effect to the extent it prohibited an on-line licensed producer from in-person sale of medical cannabis to an individual with a medical document within the meaning of the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 (since rep): *R v Warnecke* (21 October 2022) Regina, CRM-RG-00064-2020 (Sask QB)
October 21	Klatt J. issues written decision confirming oral decision of October 17: *R v Warnecke*, 2022 SKKB 232.

2023

July 10	Klatt J. dismisses application for judicial stay of *CDSA* charges against Patrick Warnecke [*Warnecke Unreported 2023*]
December 19	Chambers: Director's Application adjourned to January 25, 2024, to allow time for Kevin Barton to respond to application

2024

January 25	Chambers: Kilback J. reserves decision
January 25	Kilback fiat adjourning the Director's Application to February 29, 2024, to allow Mr. Warnecke to file application and Director to file response
February 15	Notice of Application filed by Patrick Warnecke seeking an order to set aside the Director's Application or, in the alternative, for an order under Rule 3-53 of *The King's Bench Rules* to apply all Rules applicable to a statement of claim, including the addition of third parties and the disclosure of documents and questioning [Warnecke Application]
February 29	Chambers: no endorsement (I presume the Warnecke Application was then heard by Keene J. with decision reserved)
March 12	Keene J. fiat dismissing Warnecke Application and directing scheduling of Director's Application: *Director Under the*

	Seizure of Criminal Property Act, 2009 v Warnecke, 2024 SKKB 43 [*Warnecke 2024*]
March 11	Federal Crown stays *CDSA* charges against Mr. Warnecke
April 2	Chambers: Layh J. adjourns Director's Application to April 18, 2024
April 18	Chambers: Robertson J. hears Director's Application with decision reserved

ISSUES

[8] The issue is whether the court should grant the Director's Application and order the cash forfeit. This issue depends upon the answer to whether Mr. Warnecke, who claims ownership of the seized cash, can establish that "it clearly would not be in the interests of justice" to make a forfeiture order.

POSITION OF PARTIES

Director

[9] The Director has already satisfied her burden to establish that the cash is proceeds or an instrument of unlawful activity. Forfeiture then follows unless the respondent establishes that forfeiture is clearly contrary to the interests of justice.

[10] Mr. Warnecke operated his business illegally for 25 months in flagrant contravention of the law, despite warnings from police. As Justice Klatt stated, individuals do not get to pick and choose the laws they will obey. The rule of law provides that all citizens are both equally subject to the law and entitled to equal benefit of the law. Forfeiture is appropriate and consistent with the purpose of the *Act*.

Mr. Warnecke

[11] Mr. Warnecke operated a retail cannabis store to fill physician prescriptions for medicinal cannabis to patients. The business served 6,000 patients, so served a social purpose and community need. The business was "technically unlicensed", but only because Health Canada would not issue a license. In operating, the business was only "minimally breaking the law".

[12] Although Mr. Warnecke made a living from the business revenue, he suffered a net financial loss, considering all expenses, including his legal expenses. His constitutional challenge, which was partially successful, was a public service and encouraged law reform. The *CDSA* charges were stayed. His actions are not deserving of punishment. The court should consider: 1. reasonableness of the breaches and the party's conduct; 2. the gravity of the breach; and 3. the principle of proportionality. Forfeiture in these circumstances would be contrary to the interests of justice.

ANALYSIS

[13] The parties agree, as I do, that the court has already decided that the cash is proceeds of illegal activity. That was determined by Keene J. and confirmed by Layh J. when scheduling the hearing of the application. The issue to be addressed then is the "interests of justice" component of the test for forfeiture. I will review the legislative history and framework and relevant case law before turning to that question.

The Seizure of Criminal Property Act, 2009

Purpose

[14] The *Act* repealed and replaced *The Seizure of Criminal Property Act*, SS 2005, c S-46.001 (rep) [*2005 Act*]. The then Minister of Justice, Frank Quennell, Q.C., in his second reading speech on Bill 110, explained its purpose:

> Mr. Speaker, this Bill provides that where the property's the product of or is owned by an individual or business that's committing unlawful acts, that property will be subject to forfeiture by an order of the court. The Bill provides that a police chief in Saskatchewan can apply to the Court of Queen's Bench for an order forfeiting the proceeds of any unlawful activity.
>
> In this context, proceeds of any unlawful activity means any activity that would constitute either a provincial or federal offence where the property in question is obtained, in whole or in part, indirectly or directly, through such activities. Under this new civil process, rather than viewing the forfeiture of illegal property as an aspect of the punishment for a crime, this Bill recognizes the property that's being used for or which is the product of unlawful activities should not be retained by the individuals committing these crimes.
>
> Accordingly the police chief may make an application to the court to establish on a balance of probabilities that the property is either an instrument or proceeds of an unlawful activity. If the police chief is successful in establishing one of these criteria, the property will be forfeited to the Crown . . . [inaudible] . . . Saskatchewan and liquidated. The proceeds of that liquidation will then be used to pay for the cost of the liquidation proceedings for the Crown and for the cost of proceedings undertaken by the police chief.
>
> Mr. Speaker, this is a court controlled process that permits legitimate interest holders to be protected and allows the owner of a property to demonstrate that it's not the product or the instrument of unlawful activities. If, however, if they are unable to show that the property in question is not the product or instrument of unlawful activities or that they are not a member of a criminal organization, that property will be forfeited in the manner I have described.
>
> Mr. Speaker, gangs and other organized crime activities are motivated by profit. By removing these profits and the tools used to make that profit from the hands of criminals, this government is committed to continuing to create a hostile environment for organized crime and other criminal gang activity in the province.
>
> (Saskatchewan, Legislative Assembly, *Debates and Proceedings* (*Hansard*), 25th Leg, 1st Sess (25 April 2005) at 2670)

[15] In moving second reading of Bill No. 65 on November 25, 2008, which resulted in the current *Act*, then Minister of Justice Don Morgan, Q.C., spoke to the changes from the *2005 Act* to the current *Act*:

> Hon. Mr. Morgan: — Thank you, Mr. Speaker. I rise today to move second reading of *The Seizure of Criminal Property Act, 2008*. Under the existing seizure of criminal property Act, property that is either the proceeds of unlawful activity or that is being actively used for an

> unlawful activity is in theory subject to forfeiture by order of the court. However since coming into force in 2005, the current legislation has rarely been used by the chiefs of police as originally intended. Our legislation, with the support of dedicated funding for a provincially led process, is intended to ensure that the Act will be used as a civil method to access proceeds of crime.
>
> Mr. Speaker, the biggest change that this Bill will provide is that the Crown will be able to bring applications for forfeiture under the Act rather than asking the chiefs of police to do so. This will reflect a significant change in the level of government support and a commitment to the civil forfeiture process. To assist with this change, two new positions — director and asset manager — will be created to ensure that the Act will be used actively as an effective and efficient tool against organized crime.
>
> (Saskatchewan, Legislative Assembly, *Debates and Proceedings* (*Hansard*), 26th Leg, 2nd Sess (25 November 2008) at 1837)

[16] As stated by Minister Morgan, the main change from the *2005 Act* to the current *Act* was establishing the position of the Director to bring applications, rather than leaving it to individual chiefs of police. The criteria for an order remained the same.

Constitutionality

[17] In *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 SCR 624, the Supreme Court of Canada upheld the constitutionality of Ontario's civil forfeiture legislation. In doing so, the Supreme Court commented at paras. 3-4 and 23 on the validity and purpose of such provincial legislation:

> [3] The present appeal provides an opportunity to apply the principles of federalism affirmed in those recent cases. The *CRA* [*Remedies for Organized Crime and Other unlawful Activities Act, 2001*, S.O. 2001, c. 28] was enacted to deter crime and to compensate its victims. The former purpose is broad enough that both the federal government (in relation to criminal law) and the provincial governments (in relation to property and civil rights) can validly pursue it. The latter purpose falls squarely within provincial competence. Crime imposes substantial costs on provincial treasuries. Those costs impact many provincial interests, including health, policing resources, community stability and family welfare. It would be out of step with modern realities to conclude that a province must

> shoulder the costs to the community of criminal behaviour but cannot use deterrence to suppress it.
>
> [4] Moreover, the *CRA* method of attack on crime is to authorize *in rem* forfeiture of its proceeds and differs from both the traditional criminal law which ordinarily couples a prohibition with a penalty (see *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783) and criminal procedure which in general refers to the means by which an allegation of a particular criminal offence is proven against a particular offender. The appellant's answer, however, is that the effect of the *CRA in rem* remedy just adds to the penalties available in the criminal process, and as such the invalidly interferes with the sentencing regime established by Parliament. It is true that forfeiture may have *de facto* punitive effects in some cases, but its dominant purpose is to make crime in general unprofitable, to capture resources tainted by crime so as to make them unavailable to fund future crime and to help compensate private individuals and public institutions for the costs of past crime. These are valid provincial objects. There is no operational conflict between the forfeiture provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, and the *CRA*. It cannot reasonably be said that the *CRA* amounts to colourable criminal legislation. Accordingly, I would dismiss the appeal.
>
> …
>
> [23] In essence, therefore, the *CRA* creates a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality. The practical (and intended) effect is also to take the profit out of crime and to deter its present and would-be perpetrators.

Statutory criteria for forfeiture

[18] "Instruments of unlawful activity", "proceeds of unlawful activity" and "unlawful activity" are defined by clauses 2(i), (p) and (u) of the *Act*.

> **Interpretation**
>
> **2** In this Act:
>
> …
>
> (i) "**instrument of unlawful activity**" means property that:
>
> (i) has been used to engage in unlawful activity that, in turn, resulted in the acquisition or production of property or in serious bodily harm to a person; or
>
> (ii) is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result

> in the acquisition or production of other property or in serious bodily harm to a person;
>
> …
>
> (p) "**proceeds of unlawful activity**" means:
>
> (i) property acquired directly or indirectly, in whole or in part, as a result of unlawful activity, whether the property was acquired before or after the coming into force of this Act; and
>
> (ii) an increase in the value of property, or a decrease in a debt obligation secured against property, if the increase or decrease resulted directly or indirectly from unlawful activity;
>
> …
>
> (u) **"unlawful activity"** means an act or omission that is an offence pursuant to:
>
> (i) an Act, an Act of any province or territory of Canada or an Act of the Parliament of Canada; or
>
> (ii) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence pursuant to an Act or an Act of the Parliament of Canada if it were committed in Saskatchewan;
>
> [Emphasis in original]

[19] Section 7 of the *Act* provides that "unless it would clearly not be in the interests of justice, the court shall make an order forfeiting property to the Crown if the court finds that the property is proceeds of unlawful activity or an instrument of unlawful activity":

> **Forfeiture order**
>
> **7**(1) Subject to section 8, and unless it clearly would not be in the interests of justice, the court shall make an order forfeiting property to the Crown if the court finds that the property is proceeds of unlawful activity or an instrument of unlawful activity.
>
> (2) In order to make a forfeiture order in an application for forfeiture of property that is alleged to be proceeds of unlawful activity, the court:
>
> (a) is not required to be satisfied that the property was acquired in connection with a specific unlawful act; and
>
> (b) is not required to be satisfied that an increase in the value of property or a decrease in a debt obligation secured

> against the property arose as the result of a specific unlawful act.

Application process

[20] Section 3 of the *Act* establishes the process and criteria which the Applicant Director must follow and satisfy to obtain a forfeiture order:

i. Application to the Court of King's Bench: ss. 3(1)

ii. Property found in Saskatchewan: ss. 3(2)(a)

iii. Describing property with sufficient detail to make it readily identifiable: ss. 3(3)(a)

iv. Naming as respondents the owner of the property, any person in possession of the property, and a person with a prior registered interest, and any person the director has reason to believe has an interest in the property: ss. 3(3)(b).

Evidence and standard of proof

[21] Sections 7, 11, 12 and 38.1 of the *Act* contemplate evidence to establish the property to be proceeds of unlawful activity or an instrument of unlawful activity. Section 38.1 expressly allows evidence based on information and belief.

[22] Section 11 of the *Act*, reproduced below, provides that the standard of proof is on the balance of probabilities.

> **Standard of proof**
>
> **11** Except as otherwise provided in this Act, in an application made pursuant to this Act, the standard of proof is to be on the balance of probabilities.

[23] In *F.H. v McDougall,* 2008 SCC 53 at para 40, [2008] 3 SCR 41, the Supreme Court confirmed the civil standard of proof as proof on a balance of probabilities:

> (4) The Approach Canadian Courts Should Now Adopt
>
> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. …
>
> [*per*: Rothstein, J. for the Court]

Shifting onus of proof

[24] The Court of Appeal for Saskatchewan has held that while the Director has the onus of proof to establish that the property is proceeds or an instrument of unlawful activity, once that is established, then the onus shifts to the claimant to establish that forfeiture would clearly be contrary to the interests of justice. See: *Saskatchewan (Seizure of Criminal Property Act, Director) v Kotyk*, 2013 SKCA 140 at paras 28-29, [2014] 3 WWR 38 [*Kotyk*], reversing *Director v Kotyk,* 2013 SKQB 182; and *Mihalyko (Re),* 2012 SKCA 44 at paras 21-23, 348 DLR (4th) 756 [*Mihalyko*], reversing *Saskatchewan (Seizure of Criminal Property Act, 2009) v Mihalyko,* 2011 SKQB 170, 372 Sask R 300:

> [21] It is however implicit that having accepted that the property was an instrument of unlawful activity the chambers judge accepted the onus had shifted to the respondent and, in the end, found the respondent had satisfied the onus required pursuant to s. 7(1) of the *Act* [*The Seizure of Criminal Property Act, 2009*]. The question of onus was considered in *Ontario (Attorney General) v. 1140 Aubin Road (Windsor),* 2011 ONCA 363, 333 D.L.R. (4th) 326 ("McDougall") when considering the "legitimate owner exception" under the *CRA* [*Civil Remedies Act, 2001,* SO 2001, c 28]. Doherty J.A. stated at para. 58 that "[t]he statute is crystal clear. The party relying on the 'legitimate owner' exception bears the burden of proving that the exception applies." That analysis, in my opinion, is

> equally applicable to the onus required of a claimant to an exemption pursuant to s. 7(1).
>
> [22] Similarly here, once the property has been found to be either proceeds of unlawful activity or an instrument of unlawful activity, the party relying on the exception that it clearly would not be in the interests of justice to make the order for forfeiture bears the burden of proving that the exception under s. 7(1) applies. This is consistent with the general presumption in the construction of statutes that the person seeking the benefit of an exception bears the onus of establishing that exception. See: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at p. 483.
>
> [23] In my opinion, a finding that the burden shifts to the owner or rests with the owner after the Director has established the criteria entitling him to an order for forfeiture to prove the exemption on a balance of probabilities is also consistent with judgments dealing with similar legislation in Ontario (see: *McDougall, supra* [*Ontario (Attorney General) v. 1140 Aubin Road (Windsor)*, 2011 ONCA 363, 333 D.L.R. (4th) 326] at paras. 16-18) and Alberta (see: *Alberta (Minister of Justice and Attorney General) v. Sykes*, 2011 ABCA 191, 334 D.L.R. (4th) 193 at para. 46).

Statutory presumptions

[25] Sections 14-17 of the *Act* provide presumptions that property is proceeds or instruments of unlawful activity, as surmised below:

- Section 14: participation by a person in unlawful activity that resulted in, or is likely to have resulted in, the person receiving a financial benefit and acquiring property that is the subject of the application or caused a change in its value;

- Section 15: property owned or possessed by a criminal organization or a member of a criminal organization or was transferred to such person for below market value;

- Section 16: property used to engage in unlawful activity that, in turn, resulted in acquisition or production of other property or caused serious bodily harm to a person;

- Section 16.2: vehicle used in vehicle-related offence and owner's driver's licence suspended twice in past ten years;

- Section 16.3: restricted or prohibited weapon found on property in possession of gang member;

- Section 16.4: sexual offence occurring on property;

- Section 17: rebuttable presumption that a person is a member of a criminal organization if found guilty or convicted of a criminal organization offence, as defined by s. 2 of the *Criminal Code*, RSC 1985, c C-46.

Adverse inference

[26] The court may draw an adverse inference from the failure of the respondent to provide a credible explanation for their possession of the property, especially large amounts of cash. In *Kotyk* at paras 38-40, Herauf J.A. for the Court of Appeal accepted that the chambers judge could draw an adverse inference from a failure to explain in the face of a strong circumstantial case:

> **(iii) Adverse Inference**
>
> [38] The Director submits the Chambers judge should have gone further than stating that "Kotyk had not claimed return of the funds nor … taken a position in respect of this application." According to the Director, Kotyk's lack of any kind of answer to a very strong circumstantial evidence case should be considered as a circumstance in support of a forfeiture order.
>
> [39] Admittedly, common sense suggests that anyone who is the subject of an erroneous seizure by the state of money would make an effort to get the money back. Reference can be made to two Ontario cases: *Ontario (Attorney General) v. $43,120 in Canadian Currency (In Rem)*, 2011 ONSC 3076; *Ontario (Attorney General) v. $1,650 Canadian Currency (In Rem)*, [2008] O.J. No. 2076 (QL), where it was held that strong circumstantial evidence in forfeiture cases calls for a credible and reasonable answer. The often quoted paragraph in

> *R. v. Jenkins* (1908), 1908 CanLII 243 (BC SC), 14 C.C.C. 221 (B.C.S.C.) at p. 230 is apposite as well:
>
> > It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having enveloped a man in a strong and cogent net-work of inculpatory facts, that man is bound to make some explanation or stand condemned.
>
> [40] In strong circumstantial evidence cases such as this, the failure of the respondent to engage in the process and provide at least some explanation to counter the substantial body of evidence against him should have merited the consideration of the Chambers judge.

[27] See also: *Ontario (Attorney General) v 8477 Darlington Crescent*, 2011 ONCA 363 at paras 45 and 51, 333 DLR (4th) 326 [*Darlington*].

"The interests of justice"

[28] In *Mihalyko,* the Court of Appeal for Saskatchewan considered "the interests of justice" component of the test in ordering forfeiture of a 1998 Chevrolet Blazer. Mr. Mihalyko was driving the truck when he sold two prescribed Oxycontin tablets to an undercover police officer for $60. Mr. Mihalyko immediately used the money to fuel the truck, putting $63 worth of gasoline in the gas tank. He was then arrested, and the truck seized.

[29] The chambers judge found that Mr. Mihalyko was a person of modest means, not a regular trafficker of Oxycontin and the drug sale was an isolated incident brought on by his impecuniosity. The chambers judge declined to order forfeiture, finding the forfeiture was disproportionate to the offence and therefore contrary to the interest of justice.

[30] Vancise, J.A., writing for the Court of Appeal at paras 29-35 of *Mihalyko,* stated that "the interests of justice" determination required the respondent to show that "the result would be draconian and unjust or manifestly harsh on a balance of probabilities".

> [29] Thus, the "interests of justice" determination is not just a balancing of the pros and cons of making the order of forfeiture. It is more than that. The word "clearly" must, as Doherty J.A. stated, be given some meaning and I am inclined to his opinion that the applicant or party seeking the leave must demonstrate that in the circumstances of each case before the court that the forfeiture would be a "manifestly harsh and inequitable result."
>
> [30] The application of the word "clearly" qualifies the interests of justice test and must modify the standard. It means that the person seeking the exemption must demonstrate that the forfeiture would be draconian and unjust or manifestly harsh.
>
> …
>
> [34] In considering whether or not to grant relief from the forfeiture pursuant to s. 7(1), it is necessary to consider all factors that are relevant to the interests of justice. Those factors, as identified by Doherty J.A. in [*Darlington*], include the conduct of the party whose property is the subject of the forfeiture application; the value of the party's interest in the property compared to the value of the property that is tainted by the unlawful activity; and, the interplay between the purposes of the legislation and the exercise of the interests of justice discretion.
>
> [35] Having generally set out the factors to be taken into account in determining whether or not it is clearly in the interests of justice that the order of forfeiture not be made, one must decide whether the respondent satisfied the burden that the result would be draconian and unjust or manifestly harsh on a balance of probabilities.

[31] The Court of Appeal went on at paras. 37-42, to find the chambers judge had erred in not having sufficient regard to the paucity of evidence presented by the respondent, the shifting onus of proof, and the public interest. The Court of Appeal noted the absence of discussion of the interests of society that would be furthered by forfeiture and the need for general deterrence, to remove profit from crime to compensate the victims of crime, and to reduce criminal activity in the area affected.

[32] The Court of Appeal in *Mihalyko* concluded by acknowledging that forfeiture might seem "excessive" if only viewed in relation to the values of the pills sold and truck seized, but more was at stake:

> [43] At first blush, the value of the Blazer may be excessive compared to the value of the drug sold but that is not all that must be considered. The competing value is that of society from the harm that

> results from trafficking in controlled substances. The chambers judge failed to consider the not inconsiderable amount of evidence filed by the Director concerning the effect of such criminal activity in the area. He also failed to note the lack of evidence of any hardship on the respondent as a result of the loss of the Blazer beyond its value. As was noted, he contended that he needed the Blazer to drive his mother to and from work but that turned out to be false given that she bought her own car some three weeks after the seizure of the Blazer.
>
> **VI. Conclusion**
>
> [44] For all these reasons, I am of the opinion that the chambers judge erred in finding that the forfeiture of the Blazer to the Crown clearly would not be in the best interests of justice. As noted, the respondent failed to demonstrate that taking all the relevant facts into consideration the forfeiture would be draconian and unjust or manifestly harsh.

[33] This decision is instructive in reminding this Court to keep the big picture in mind when considering individual applications. While this Court must always seek to avoid visiting injustice upon any individual, the community is also entitled to justice under the rule of law.

[34] In *British Columbia (Director of Civil Forfeiture) v Wolff*, 2012 BCCA 473 at paras 38-39 [*Wolff*], the British Columbia Court of Appeal referred to both *Darlington* and *Mihalyko* in explaining the proper application of the "interests of justice" test in the British Columbia statute.

> [38] I respectfully agree with these observations. Thus it seems to me that the approach of the trial judge in attempting to decide the question of relief from forfeiture primarily with reference to the purposes of the Act – in particular, compensation – was misguided. As mentioned earlier, the question for the court under s. 6 is not whether the Director is able to demonstrate that forfeiture would serve any or all of the statutory purposes. Rather, it is whether the offender is able to show that forfeiture would in all the circumstances be "clearly not in the interests of justice", or would be manifestly harsh and inequitable.
>
> [39] Obviously, the purposes of the legislation will be relevant to the interests of justice. As the Court stated in *Saskatchewan (Seizure of Criminal Property Act, 2009, Director) v. Mihalyko*, 2012 SKCA 44 at para. 34, the "interplay between the purposes of the legislation and the exercise of the interests of justice discretion" must be considered. But so must several other factors. In *Rai*, [*British*

> *Columbia (Director of Civil Forfeiture) v. Rai* 2011 BCSC 186] the Court provided a "non-exhaustive list":
>
> 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. [At para. 111.]
>
> To this list one might add the offender's personal or family circumstances and the effect of forfeiture on them, the relationship between the property sought to be forfeited and the unlawful conduct in question, and the reputation of the administration of justice.

[35] In *The Director of Criminal Property and Forfeiture v Ramdath,* 2021 MBCA 23 at para 45, the Manitoba Court of Appeal came to a similar conclusion on the construction to be given to the Manitoba statute:

> [44] Once the director satisfies the judge that a section 7 or section 14 order should be granted, the onus shifts to the defendant to convince the judge that it "would clearly not be in the interests of justice" to do so. The standard of proof for this part of the analysis is neither the "balance of probabilities" standard nor the "reasonable grounds to believe" standard, but a much higher threshold: the "clearly" standard. At this point in the analysis, the threshold the defendant has to meet to convince the judge not to issue either a section 7 or section 14 order is high.
>
> [45] When considering the "clearly not in the interests of justice" test, the jurisprudence establishes that, in the context of a forfeiture proceeding, the defendant must demonstrate that, in the circumstances, the order being sought "would be a manifestly harsh and inequitable result" (*Ontario (Attorney General) v 8477 Darlington Crescent*, 2011 ONCA 363 at para 85). Moreover, given the preliminary nature of the proceedings at the section 7 stage, I agree with the jurisprudence from the other provinces that the "clearly" standard should be applied even more stringently here than at the section 14 stage (*Ontario (Attorney General) v $51,000 CDN (in rem),*2012 ONSC 4958 at para 38; *Attorney General of Ontario v*

> *$7,950.05 in Canadian Currency (in rem)*, 2017 ONSC 5855 at paras 37-38; and *Hobbs* at para 10, citing *$7,950.05 in Canadian Currency* at para 38).

Has the Director met the test?

[36] The criteria to be applied on an application for forfeiture is whether, on a balance of probabilities:

1. The property is proceeds of unlawful activity or an instrument of unlawful activity; and

2. It clearly would not be in the interests of justice to make the order.

[37] The onus of proof is on the Director to establish the statutory criteria, with the burden of proof being the civil standard of a balance of probabilities. Even if the evidence establishes that the property is proceeds or an instrument of unlawful activity, the court retains discretion to refuse an order if it "clearly would not be in the interests of justice" to make the order. This preserves the legitimacy of forfeiture orders and public confidence in the law.

Unlawful activity

[38] As discussed above, this Court has previously ruled that the cash is proceeds and/or an instrument of unlawful activity. In *Warnecke 2024* at para 22, Keene J. found that the cash is the proceeds and/or instrument of unlawful activity:

> [22] The Director argues that the Property is the proceeds and/or instrument of unlawful activity as defined by the SCPA [*The Seizure of Criminal Property Act, 2009*]. I agree. …

[39] Layh, J., in the endorsement for April 2, 2024, referred to this finding in limiting the scope of the next hearing of the Director's Application.

> Matter is adjourned to April 18th, 2024, with the understanding that Mr. Baerg will consider whether or not he needs to file further

> materials to deal with the singular issue of application of s. 7 of the Act. An issue that will not come before the court is the determination that Justice Keene made at paragraph 22 of his decision that the Director argues that the property is proceeds and/or instruments of unlawful activity, as defined by the Act. I agree that there will be no argument then that the $21,000 is the proceeds and/or instrument of unlawful activity.

[40] The parties agree that the cash is proceeds of unlawful activity, so I need not consider that part of the test for forfeiture. Instead, I can turn directly to the question of whether forfeiture would clearly not be in the interests of justice. The onus is on Mr. Warnecke to establish that criteria to avoid forfeiture.

The interests of justice

[41] In determining whether forfeiture would be clearly contrary to the interests of justice, I will consider whether forfeiture would serve the purposes of the *Act*, as well as some of the factors identified by the Court of Appeal of British Columbia in *Wolff* at paras 39-40 (quoted above).

[42] The purposes of the *Act* are three-fold:

1. To take the profit out of unlawful activity;

2. To deter unlawful activity; and

3. To fund public services for victims of crime and policing.

[43] Would the purposes of the *Act* be served by forfeiture? I am satisfied that forfeiture would serve these purposes. The cash was revenue from unlawful activity. Forfeiture takes the profit out of that illegal activity. Forfeiture serves general deterrence as a warning for others who might be tempted to engage in unlawful activity. The forfeited funds will be used to fund services for victims of crime and policing in Saskatchewan.

[44] The principle of proportionality requires the court consider the value of the seized property against the unlawful activity. In this regard, the court must consider not only the private interest of the respondent, but also the public interest in terms of the impact of the unlawful activity on the community. I accept that the loss of the seized cash has adverse impact on Mr. Warnecke, but that loss is the natural and inevitable consequence of his decision to defy the law.

[45] The Slater Affidavit, at paras. 4, 7 and 8, records that in January 2018 the Chief of Police of the Regina Police Service held a press conference to issue a public warning that police would be taking action against illegal store front marihuana dispensaries. In February 2018, police officers delivered a warning letter to the Best Buds business and mailed a copy to Mr. Warnecke. The business remained open, continuing the unlawful activity. On March 28, 2018, police executed a search warrant on the business premises, resulting in the seizure of the cash.

[46] Justice Klatt, in her decision of July 10, 2023 (*Warnecke Unreported 2023*), at paras. 30-31, commented on the decision of the then accused, including Mr. Warnecke, to operate in disregard for the law.

> [30] While the evidence satisfies me that the accused assisted numerous customers in supplying cannabis products, they were not free to do so without compliance with the regulatory scheme then in place. The federal government had a legitimate interest in ensuring that if medical cannabis was more widely accessible, those licenced producers would comply with standards and requirements to ensure public health and safety.
>
> [31] The accused were not entitled to pick and choose the laws they would comply with, even in the face of reform. …

[47] During argument, there was discussion about whether and when citizens might be justified in breaking the law. Mr. Warnecke's counsel quoted from Louis D. Brandeis, Justice of the United States Supreme Court, that "If we desire respect to the law, we must first make the law respectable". He referred to farmers pardoned in 2012 for prior convictions of offences for selling their wheat and barley outside the then

Canadian Wheat Board. The point, as I took it, is that laws change and what might be unlawful can become lawful. And indeed, licensed retail cannabis stores now abound.

[48] Reference was also made to the current case of the Saskatchewan's Legislature unanimous decision to disregard federal laws which have withstood constitutional challenge. (Bill 151, being *The SaskEnergy (Carbon Tax Fairness for Families) Amendment Act, 2023*, SS 2023, c 50, passed unanimously on third reading on December 4, 2023, and given royal assent December 6, 2023: Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 29th Leg, 4th Sess (4 December 2023) at 4892). This example is troubling, in that our leaders should set a good example. The saying comes to mind, "If gold rusts, what will iron do?". It is not asking much of those who make laws themselves obey the law.

[49] These examples do not convince me that law enforcement should cease because others fail to respect the law. As Director's counsel said, "two wrongs don't make a right".

[50] The rule of law is our defence against anarchy and nihilism. No one is above the law. It applies to everyone, including and especially those who exercise public authority. The means will rarely justify the end because the means employed will determine the ultimate end. Law-breaking, unchecked and unchallenged, erodes respect for the law. And when respect for the law fails, disorder follows until restored by force. Force is a poor substitute for public and general respect for the law.

[51] In Robert Bolt's 1954 play, *A Man for All Seasons*, Sir Thomas More, Chancellor of England under Henry VIII, responds to a plea from his secretary, Will Roper, not to the let the law stand in the way of action against an adversary. More, in response, identifies the folly of ignoring legal restraints:

> What would you do? Cut a great road through the law to get after the Devil? ... And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country is planted thick with laws from coast to coast, Man's laws, not God's, and if you cut them down – and you're just the man to do it – do you really think you could stand upright in the winds that would blow then? Yes, I give the Devil benefit of law, for my own safety's sake!

[52] In turning to listed factors not already addressed, there is the question of fairness. I consider in this regard Mr. Warnecke's success in his constitutional challenge and the staying of the *CDSA* charges. Those events factor against forfeiture; but the fact remains that the cash is proceeds of unlawful activity.

[53] In *Director (Under the Seizure of Criminal Property Act, 2009) v Negash*, 2021 SKQB 240, Currie J. considered the impact of a finding of breach of ss. 10(b) of the *Charter* in the arrest of the claimant, during which $46,640 was seized. Currie J. concluded at paras. 73-75 that the s. 7 "interests of justice" exception did not preclude forfeiture of that money:

> [73] Mr. Negash says that a forfeiture would be all of draconian, unjust and manifestly harsh, because the *Charter* breaches resulted in his unlawful detention and unlawful search of his vehicle.
>
> [74] As discussed above, I have found only one *Charter* breach, and in the circumstances of that breach I have concluded that it does not lead to exclusion of evidence. The s. 24(2) analysis that I conducted is helpful in considering whether "it clearly would not be in the interests of justice" to order forfeiture in light of that *Charter* breach. That analysis included a consideration of the effect of the breach on Mr. Negash and the interests of society in the matter. In light of the evidence indicating that forfeiture is appropriate, including the lack of explanation from Mr. Negash, I conclude that it is not established that ordering forfeiture of the cash would be draconian, unjust or manifestly harsh.
>
> [75] The s. 7 "interests of justice" exception does not apply. Making the order for forfeiture remains appropriate.

[54] In terms of the degree of culpability, complicity, knowledge, acquiescence, or negligence, Mr. Warnecke had a high degree of culpability. He was the owner of the business. He chose to open and operate the business without a licence

and with full knowledge of the illegality. He could have avoided the seizure had he closed shop after warnings from police. Forfeiture is not unfair in these circumstances.

[55] In terms of the problem in the community of the sort of unlawful activity in question, I take note of the unusual step taken by the Chief of Police in issuing a public appeal and warning. The Slater Affidavit at para. 4, states that "While many of Regina's illegal dispensaries heeded this warning and closed up shop, a small handful remained open". Democratic policing prefers persuasion to enforcement, where circumstances permit. Forfeiture sends the message to those business operators who did heed the warning that they did the right thing, both in terms of the law and self-interest.

[56] Mr. Warnecke in his affidavits identifies his own health struggles and the toll the legal battles have taken on him and his family, including financially. In terms of Mr. Warnecke's personal or family circumstances and the effect of forfeiture on them, I accept that forfeiture has an adverse impact.

[57] In *Director Under the Seizure of Criminal Property Act, 2009 v Olivares*, 2019 SKQB 113 [*Olivares*], Mitchell J. denied forfeiture of $714 of $2,665 seized from a man on social assistance. While ordering forfeiture of $2,001 as proceeds of unlawful activity (trafficking fentanyl), Mitchell J. found that $714 of the cash was money received from social assistance, so not proceeds of unlawful activity. In *obiter* at para. 38, Mitchell J. stated that, if required, he would have also denied forfeiture of that money under the "interests of justice" test:

> [38] Counsel for the Director conceded at the hearing, it was open to me to find that depriving Mr. Olivares of his social assistance benefits would be "manifestly harsh" and "inequitable". In the event I arrived at that conclusion, then no forfeiture order should be made respecting this money as it "clearly would not be in the interests of justice" to do so.
>
> [39] I agree with counsel for the Director that no forfeiture order should be made respecting the $714; however, I arrive at this conclusion without having to resort to the "interests of justice" exception in ss. 7(1).

[58] In *Saskatchewan (Seizure of Criminal Property Act, 2009) v Tropeau*, 2013 SKQB 361 [*Tropeau*], Elson J. denied forfeiture where he found that the forfeiture of a van used in the theft of copper wire would cause disproportionate harm to its owners, since they would be deprived of their ability to work. In dismissing the application on the basis of the" interests of justice" criteria, he described his decision at para. 33 as an "exceptional case".

[59] For reasons already stated, I do not view the facts of this case as comparable to those in *Olivares* or *Tropeau*.

[60] In terms of the relationship between the property sought to be forfeited, the unlawful conduct in question, and the reputation of the administration of justice, I find that the reputation of the administration of justice is the paramount interest and synonymous with "the interests of justice". Having regard to the submissions of the parties and the factors reviewed above, I conclude that forfeiture of the cash is not clearly contrary to the interests of justice.

CONCLUSION

[61] I therefore grant the Director's Application and order forfeiture of the cash.

[62] I thank counsel for their submissions.

J.
D.N. ROBERTSON