

COURT OF APPEAL FOR ONTARIO

*In the Matter of the Proceeds of 1989 Merviale Avenue and 11 Cassone
Court (in rem)*

B E T W E E N:

MICHAEL NORWOOD (ESTATE OF) and 947014 ONTARIO
INCORPORATED

Appellants
(Respondents)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Applicant)

FACTUM OF THE INTERVENOR

April 26, 2021

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PART I - OVERVIEW

1. The extraordinary powers provided by the *Civil Remedies Act, 2001*¹ (the “**Act**”) play a role in our justice system that requires careful limits in its application and protection for those impacted. In this appeal, this Honourable Court has the opportunity to identify and correct the proper interpretation of the Act, and in particular, the application of the Act’s settlement scheme. Such a determination will have a decisive impact on the rights of Ontarians whose property is subject to civil forfeiture proceedings and when such property can be disposed of by the Crown.

2. This appeal concerns whether a court can approve a settlement under s. 18.1 of the Act² prior to a determination that the funds and/or assets being disbursed to a settling party were the “proceeds of unlawful activity”, as defined in s. 2 of the Act. In *Attorney General of Ontario v 947014 Ontario Inc. & Michael Norwood (Estate)*,³ Hackland J. interpreted s. 18.1 as permitting the disposition of seized funds prior to any determination that those assets were the proceeds of crime.

3. The settlement of seized funds prior to any determination that those funds are the proceeds of unlawful activity is a novel use of s. 18.1. Such novel interpretations require due consideration of any implications, including impacts on the rules of natural justice and procedural fairness, that may arise as a consequence of that interpretation.

¹ *Civil Remedies Act, 2001* S.O. 2001, c. 28.

² *Civil Remedies Act, 2001*, S.O. 2001, c. 28., s. 18.1, Schedule “B”.

³ *Attorney General of Ontario v. 947014 Ontario Inc. & Michael Norwood (Estate)*, 2020 ONSC 3510 (CanLII), Moving Party’s Book of Authorities (“**CCF BOA**”), Tab 1.

4. With respect, Hackland J. failed to give due consideration to the implications of this interpretation in the lower court ruling. In particular, Hackland J. failed to consider that this novel interpretation of s. 18.1 is not only inconsistent with the purpose and scheme of the Act, but would also run contrary to the principles of natural justice and procedural fairness. If this court approves the lower court interpretation of s. 18.1, it would effectively remove any burden that the Act places on the Attorney General to tender evidence that the assets are tainted by crime, and thereby permit the Attorney General to dispose of any assets as they see fit, so long as they can arrange a settlement with third parties. For this reason alone, this court must reject the lower court's broad interpretation of the Act, and should read into the Act and confirm that s. 18.1 must be interpreted narrowly.

PART II - FACTS

5. The CCF accepts the facts as stated by the Estate of Michael Norwood and 947014 Ontario Inc. (together, the "**Appellants**").

PART III - ISSUES

6. The CCF accepts the issues as stated by the Appellants. The CCF's submissions will be restricted to the first issue identified by the Appellants: Did the Honourable Justice Hackland err in his interpretation of section 18.1 of the *Civil Remedies Act*?

PART IV - LAW AND ARGUMENT

7. Under the Act, the provincial government has the power to seize property from individuals where there is reason to believe that the property at issue was used as "an

instrument of unlawful activity” or “the proceeds of unlawful activity”.⁴ If, on application by the Crown, the court agrees, the assets or revenues generated therefrom will be distributed to the rightful owner of those assets, or to provincial governments and their law enforcement agencies. Should the assets not be determined to be the proceeds of crime, they will be returned to the owner.

8. Section 18.1 of the Act is not standalone; it must be interpreted in a manner consistent with the purpose and scheme of the rest of the Act. Indeed, it would be nonsensical for the legislature to have created a scheme for the forfeiture and eventual disposition of assets tainted by crime, but to simultaneously create the means for the Attorney General to evade the scheme of the act and dispose assets at will.

(A) A BROAD INTERPRETATION OF SECTION 18.1 WOULD BE INCONSISTENT WITH THE PURPOSE AND SCHEME OF THE CIVIL REMEDIES ACT

9. It is well-established law that legislation must be interpreted “in their grammatical and ordinary sense *harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*” [*emphasis added*].⁵ To that end, the interpretation of any provision of any legislation must be consistent with the general scheme of the legislation or the “values that would otherwise have been dictated by the terms of the” legislation.⁶

⁴ *Civil Remedies Act, 2001*, S.O. 2001, c. 28., ss. 2 and 7, Schedule “B”.

⁵ *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, CCF BOA, Tab 2, para. 21.

⁶ *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 (CanLII), [2018] 2 SCR 595, CCF BOA, Tab 3, para. 29; *Municipal Property Assessment Corporation v Loblaw Properties Limited*, 2017 ONSC 1299 (CanLII), CCF BOA, Tab 4, para. 39.

10. The Act was analyzed by the Supreme Court of Canada in *Chatterjee v Ontario (Attorney General)*.⁷ In *Chatterjee*, the Supreme Court characterized the dominant purpose of the Act (and civil forfeiture generally) as being: “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.”⁸

11. Further to this point, the Supreme Court of Canada in *Chatterjee* noted that the purpose of the Act is four-fold:

- (a) Compensating victims;
- (b) Keeping property that was acquired as a result of unlawful activities;
- (c) Preventing property from being used to engage in unlawful activities; and
- (d) Preventing injury to the public.⁹

12. The Supreme Court of Canada explicitly stated that the first two purposes above “contemplate the re-distribution of property *tainted by crime*” [*emphasis added*].¹⁰ Through proceedings under the Act, the Government may seek to prevent persons from

⁷ *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 SCR 624, CCF BOA, Tab 5.

⁸ *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 SCR 624, CCF BOA, Tab 5, para. 4.

⁹ *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 SCR 624, CCF BOA, Tab 5, para. 17.

¹⁰ *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 SCR 624, CCF BOA, Tab 5, para. 17.

keeping property acquired as a result of unlawful activities, and/or to compensate persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities.¹¹

13. The purposes of the Act – and the Supreme Court of Canada’s interpretation of the Act in *Chatterjee* – presuppose that the assets at issue are the proceeds of or tainted by crime.¹² If the seized assets were unrelated to crime, the civil forfeiture regime would neither control crime nor compensate the victims of crime. This understanding is consistent with past decisions discussing the Act, including *Ontario (Attorney General) v \$29,900 in Canadian Currency (in rem)*¹³ and *Ontario (Attorney General) v 269 Weldrick Road West (in rem)*.¹⁴ These cases clarify that proceedings under the Act – and, in the case of *Ontario (Attorney General) v 269 Weldrick Road West (in rem)*, s. 18.1 proceedings in particular – must strictly satisfy the substantive requirements of the Act.

14. The Supreme Court of Canada has made clear that, in approaching any exercise of statutory interpretation, the objective of the court interpreting the statute is “to *harmonize* the components of legislation, as much as is possible, *in order to minimize internal inconsistency*” [*emphasis added*].¹⁵ Accordingly, any interpretation of s. 18.1 should, to the extent possible, be consistent with the rest of the Act.

¹¹ *Civil Remedies Act*, 2001 S.O. 2001, c. 28., s. 1, Schedule “B”.

¹² See, e.g., *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 SCR 624, CCF BOA, Tab 5, para. 23.

¹³ *Ontario (Attorney General) v \$29,900 in Canadian Currency (in rem)*, 2017 ONSC 2003 (CanLII), CCF BOA, Tab 6. See paras. 26 and 27.

¹⁴ *Ontario (Attorney General) v. 269 Weldrick Road West (in rem)*, 2020 ONSC 4605 (CanLII), CCF BOA, Tab 7. See paras. 17 and 18.

¹⁵ *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 SCR 670, CCF BOA, Tab 8, para. 23.

15. It would be incoherent for the legislature to have created the Act with the explicit purpose of compensating individuals and institutions for the costs of past crime, but to have also intended that s. 18.1 apply to *all* seized assets, regardless of whether they are deemed tainted by crime. An interpretation that allows for s. 18.1 to apply to assets that have not been deemed to be the instruments of crime would create an internal inconsistency in the Act that should not be condoned by this court. Put colloquially, it is putting the cart before the horse. Instead, this court should accept the interpretation of the section that is entirely consistent and cohesive with the rest of the Act.

16. The purpose, scheme, and substantive requirements of the Act are explicitly tied to the determination of seized assets as the proceeds of crime *before* the Government may distribute those assets. The broad interpretation of s. 18.1 put forward by Hackland J. would fly in the face of this purpose and scheme.

(B) A BROAD INTERPRETATION OF SECTION 18.1 WOULD VIOLATE THE RULES OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS

17. Procedural fairness, often referred to as natural justice, has come to be regarded as the “bedrock of administrative law”. Procedural fairness is always owed to parties directly affected by a proceeding. In *Baker v. Canada (Minister of Citizenship and Immigration)*, the leading case on procedural fairness, the Supreme Court of Canada stated:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process,

appropriate to the statutory, institutional, and social context of the decision.¹⁶

18. To give s. 18.1 the broad interpretation as proposed by Hackland J., without also considering that parties (in the case at bar, the Estate) may be denied a fair hearing and the opportunity to be heard pursuant to the principle of *audi alteram partem*, would fly in the face of Canadians' procedural fairness rights. More specifically, distributing property seized pursuant to the Act prior to a determination that the property at issue is tainted by crime, as otherwise required in the Act, would deprive the owner of that property without giving them an opportunity to be heard on whether the government has *any* right to distribute their property at all.

19. In addition to denying certain parties the right to be heard, the interpretation of s. 18.1 proposed by Hackland J. would also remove *any* burden of proof imposed on the Attorney General. The Act clearly prescribes that an offence under the Act can be found to have been committed even where no person has been charged with a criminal offence, where the charges were withdrawn or stayed, or where the person was acquitted.¹⁷ However, any finding of fact relating to proceedings under the Act need to be proven on a balance of probabilities.¹⁸ To that end, when considering an order for forfeiture and/or disposition of seized assets, the Attorney General must "supply the court with sufficient evidence to enable a finding [that the assets are the instrument of crime] to be made."¹⁹

¹⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, CCF BOA, Tab 9, para. 28.

¹⁷ *Civil Remedies Act*, 2001 S.O. 2001, c. 28., s. 17(2), Schedule "B".

¹⁸ *Civil Remedies Act*, 2001 S.O. 2001, c. 28., s. 16, Schedule "B".

¹⁹ *Attorney General of Ontario v. \$8,740 In Canadian Currency*, 2016 ONSC 3773 (CanLII), CCF BOA, Tab 10, para. 24.

The Attorney General must meet its evidentiary burden before any further steps can be taken with respect to the funds.

20. This issue is brought into sharp focus on the specific facts before this court. In this matter, a settlement was reached between the Attorney General and a third party, Rosa Norwood, on the basis of an assertion from Ms. Norwood that she was the “legitimate owner” of the assets. The rightful ownership of the assets at issue is a dispute between Ms. Norwood and the Estate of Michael Norwood. The Act does not permit the Attorney General to insert itself into such a dispute and determine how the dispute should be resolved, especially in cases where the other party is denied the opportunity to be heard. The Attorney General does not have the right to sidestep the scheme of the Act, avoid meeting its burden of proof, and deny affected parties their right to be heard.

21. If the interpretation put forward by Hackland J. stands, the Attorney General will have unchecked power to distribute seized assets at will whenever a potential settlement with third parties is reached, even in cases where the Attorney General lack the evidence to prove that those assets are tainted by crime or where rightful ownership of the assets is in dispute. It is unthinkable that the legislature would have intended such a possible abuse of power, especially as part of a scheme where the property owner is denied the right to be heard.

22. Where legislation provides for a mechanism which would impact Canadians’ property rights, courts must ensure that those rights are safeguarded. Regardless of whether the current burden of proof is sufficient – which is not a question currently before

this court – the Act should not be interpreted as allowing the Attorney General to dispose of seized assets as of right.

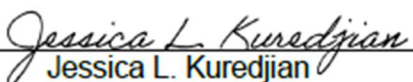
23. The Government cannot do an end run around the Act and dispose of any seized assets as they see fit; they must first provide sufficient evidence for a court to determine that those assets are proceeds of crime. Hackland J.'s broad interpretation of s. 18.1 would allow the Government the unchecked power to ignore property owners' rights and dispose of their assets without needing to comply with the rest of the Act; that interpretation cannot stand.

PART V - ORDER REQUESTED

24. The CCF submits that the appeal should be granted.

25. The CCF further submits that as part of its reasons, this Honourable Court should explicitly reject the trial judge's interpretation of s. 18.1 of the Act. The Court should read into the Act and confirm that s. 18.1 must be interpreted in a manner that is consistent with the purpose and scheme of the Act, and which explicitly bars extrajudicial settlements prior to a final determination that the seized assets are the proceeds of crime.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2021.



Jessica L. Kuredjian

April 26, 2021

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Attorney General of Ontario v. 947014 Ontario Inc. & Michael Norwood (Estate)*, 2020 ONSC 3510 (CanLII)
2. *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817
3. *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 (CanLII), [2018] 2 SCR 595
4. *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 SCR 624
5. *Municipal Property Assessment Corporation v Loblaw Properties Limited*, 2017 ONSC 1299 (CanLII)
6. *Ontario (Attorney General) v \$29,900 in Canadian Currency (in rem)*, 2017 ONSC 2003 (CanLII)
7. *Attorney General of Ontario v. \$8,740 In Canadian Currency*, 2016 ONSC 3773 (CanLII)
8. *Ontario (Attorney General) v. 269 Weldrick Road West (in rem)*, 2020 ONSC 4605 (CanLII)
9. *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27
10. *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 SCR 670

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAW*Civil Remedies Act, 2001, S.O. 2001, c. 28*

Purpose

- 1** The purpose of this Act is to provide civil remedies that will assist in,
- (a) compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities;
 - (b) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities;
 - (c) preventing property, including vehicles as defined in Part III.1, from being used to engage in certain unlawful activities; and
 - (d) preventing injury to the public that may result from conspiracies to engage in unlawful activities. 2001, c. 28, s. 1; 2007, c. 13, s. 26.

[...]

Definitions

- 2** In this Part, [...]

“proceeds of unlawful activity” means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity, whether the property was acquired before or after this Act came into force, but does not include proceeds of a contract for recounting crime within the meaning of the *Prohibiting Profiting from Recounting Crimes Act, 2002*;

[...]

Definitions

- 7 (1)** In this Part, [...]

“instrument of unlawful activity” means property that 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 of other property or in serious bodily harm to any person, and includes any property that is realized from the sale or other disposition of such property;

[...]

Standard of Proof

16 Except as otherwise provided in this Act, findings of fact in proceedings under this Act shall be made on the balance of probabilities. 2001, c. 28, s. 16.

Proof of offences

17 (1) [...]

Same

(2) In proceedings under this Act, an offence may be found to have been committed even if,

- (a) no person has been charged with the offence; or
- (b) a person was charged with the offence but the charge was withdrawn or stayed or the person was acquitted of the charge. 2001, c. 28, s. 17 (2).

[...]

Settlements

18.1 (1) Despite anything to the contrary in this Act, the court may approve a settlement in relation to a proceeding under this Act, on the motion or application of the Attorney General or of any other party to the proceeding with the Attorney General's consent. 2018, c. 17, Sched. 6, s. 1.

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