COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. Norwood Estate, 2021 ONCA 493
DATE: 20210706
DOCKET: C68474

Huscroft, Paciocco and Jamal JJ.A.

BETWEEN

Attorney General of Ontario

Applicant/Moving Party
(Respondent)

and

Michael Norwood (Estate of) and 947014 Ontario Inc.

Respondents/Respondents on Motion
(Appellants)

and

Rosa Norwood

Interested Party

Geoffrey Adair, Alan Brass and Erica Tanny, for the appellants

Antonin I. Pribetic and Paul Kim, for the respondent

Robert Meagher, for the interested party

Jessica L. Kuredjian and Robert Sniderman, for the intervener Canadian Constitution Foundation

Heard: May 12, 2021 by video conference

On appeal from the order of Justice Charles T. Hackland of the Superior Court of Justice, dated June 4, 2020, with reasons reported at 2020 ONSC 3510.

Paciocco J.A.:

OVERVIEW

[1] Michael Norwood ("Michael") faced narcotics-related criminal charges, but died before he could stand trial. As a result of those charges, and before Michael's death, the Attorney General of Canada ("Canada") seized Michael's home at 11 Cassone Court (the "Cassone Court property") and commenced proceedings to secure its forfeiture. Pending Canada's forfeiture proceedings, the Cassone Court property was sold on consent. The proceeds were paid into Canada's Seized Property Management Directorate.

[2] After Michael's death, Canada terminated its forfeiture proceedings. Before the proceeds of sale of the Cassone Court property could be returned to Michael's estate, the Attorney General of Ontario ("Ontario") commenced proceedings under the *Civil Remedies Act, 2001,* S.O. 2001, c. 28 (the "*Civil Remedies Act*" or the "Act"), seeking its own forfeiture order. The proceeds of sale of the Cassone Court property were subsequently paid into court.

[3] Michael's mother, Rosa Norwood ("Rosa"), notified Ontario of her claim to an interest in the Cassone Court property. Before Ontario's forfeiture claim could be resolved, Ontario agreed with Rosa that she should receive $120,000 from the sale proceeds. On May 6, 2020, pursuant to s. 18.1 of the *Civil Remedies Act*,

Ontario moved for approval of this proposed “settlement”. Michael’s estate (the “Estate”) and 947014 Ontario Inc. (“947”), a company Michael controlled before his death, opposed Ontario’s motion and the payment of funds to Rosa. On June 4, 2020, the motion judge granted an order approving the “settlement” between Ontario and Rosa, which required payment of $120,000 to Rosa’s counsel in trust.

[4] The Estate and 947 are the appellants in this appeal. Ontario is the respondent. Rosa is an interested party and relies on Ontario’s submissions; she advanced no oral or written submissions of her own.

[5] The appellants contend that the motion judge erred in approving the agreement between Ontario and Rosa prior to a judicial determination that Ontario’s forfeiture claim was successful.

[6] I agree. In my view, properly interpreted, to constitute a “settlement in relation to a proceeding under this Act” in the meaning of s. 18.1(1) of the *Civil Remedies Act*, the proposed agreement must relate to the *in rem* property interests being litigated in the underlying forfeiture proceedings. Although Ontario and Rosa could settle their relative *in personam* claims, they could not, between themselves, settle the *in rem* interests of others, such as the Estate’s interest in the Cassone Court property. Put another way, their so-called “settlement” was not a settlement in the meaning of the Act at all, and therefore not properly subject to judicial approval under s. 18.1.

[7] Things would have been different, however, if before approving the agreement the motion judge had determined that the sale proceeds of the Cassone Court property were the proceeds and/or instruments of unlawful activity, and that forfeiture was not clearly contrary to the interests of justice. Such a determination would have given Ontario a higher right to the Cassone Court property to the exclusion of all others, subject to Rosa's outstanding claim that she was a "legitimate" or "responsible owner". Ontario and Rosa could then have entered into an agreement resolving the *in rem* property interests in the proceeds of the Cassone Court property being litigated in the forfeiture proceedings under the *Civil Remedies Act*, an agreement which would have constituted a "settlement" in the meaning of s. 18.1.

[8] Put simply, absent a finding of unlawful activity, there was no "settlement in relation to a proceeding under [the] Act" between Ontario and Rosa for the motion judge to approve. Therefore, I conclude that the motion judge erred in approving the agreement between Ontario and Rosa. Accordingly, I would set aside the motion judge's order of June 4, 2020.

MATERIAL FACTS & PROCEEDINGS BELOW

[9] On October 7, 1993, Michael acquired the property at 11 Cassone Court, Ottawa (formerly Nepean). On September 22, 1995, a charge was registered against the Cassone Court property in favour of Michael's mother, Rosa. Rosa's

charge against the Cassone Court property was discharged twelve years later, on October 10, 2007.

Procedural history leading to the settlement approval motion

[10] In February 2015, after a prolonged drug-trafficking investigation, Michael's Cassone Court residence was searched and the property itself was seized. So too was the Silver Dollar nightclub, which Michael owned and operated through 947.

[11] As a result of its investigation, Canada laid drug-related charges against Michael, and instituted forfeiture proceedings against the Cassone Court property and the Silver Dollar, pursuant to s. 17 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and ss. 462.38(2) and 490(9) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[12] On October 19, 2015, Canada obtained a restraint order relating to the seized properties. The next day, October 20, 2015, Michael executed a promissory note in favour of Rosa in the amount of $138,000. On October 23, 2015, Michael directed his counsel to register a collateral charge against the Cassone Court property in Rosa's name, also for $138,000.

[13] Rosa claims that the promissory note and collateral charge retroactively evidenced an informal arrangement between herself and Michael, dating back to the mid-1990s, through which she provided her son with $138,000. Rosa asserts that, in return, Michael renovated the Cassone Court property to provide her with

an apartment, promised her she could reside there until her death, and agreed to repay her from the proceeds of sale if the property were ever sold. However, when Rosa attempted to register the collateral charge, she was unsuccessful because Canada's restraint order against the Cassone Court property was in place.

[14] Subsequently, Michael and Canada agreed that the Cassone Court property would be sold. The sale closed in July 2016 for $243,098.88. The net proceeds of sale were paid into Canada's Seized Property Management Directorate, along with the net proceeds of the Silver Dollar, which had also been sold.

[15] On October 4, 2016, an order was made releasing some of the property Canada had seized from Michael to his criminal lawyer to assist in paying his legal fees, including $105,099 of the proceeds of sale of the Cassone Court property: *R. v. Norwood*, 2016 ONSC 6207. In making that order, Parfett J. (who was not the motion judge who made the order now under appeal), found that Michael had "a possessory right in the seized property [including the Cassone Court property] to the exclusion of anyone else and no other means or assets with which to pay his legal expenses": at para. 30.

[16] Michael died around one year later, on October 17, 2017. On February 8, 2019, Canada secured another order from Parfett J. terminating its forfeiture proceedings and ordering the return of the remaining proceeds of sale of the Cassone Court property, approximately $145,000 plus interest, to the Estate.

Ontario's forfeiture application and Rosa's claim

[17] On February 15, 2019, before the proceeds contemplated in Parfett J.'s order could be paid to the Estate, Ontario began forfeiture proceedings pursuant to the *Civil Remedies Act* relating to the proceeds of sale of both the Cassone Court property and the Silver Dollar.

[18] On February 21, 2019, Rosa's counsel wrote to Ontario to advance Rosa's $138,000 claim against the proceeds of sale from the Cassone Court property.

[19] On March 7, 2019, Ontario obtained an interim preservation order relating to the proceeds of sale of the Cassone Court property and the Silver Dollar. That preservation order was renewed, on consent, in October 2019.

The proposed "settlement" and the settlement approval motion

[20] On April 24, 2020, Ontario made an offer to settle Rosa's claimed interest in the forfeiture proceedings by payment of $120,000 from the proceeds of sale of the Cassone Court property. The Estate rejected the offer. Rosa accepted it.

[21] On May 6, 2020, Ontario brought an "urgent motion" pursuant to s. 18.1 of the *Civil Remedies Act* for approval of its proposed settlement with Rosa. The motion was heard before Ontario had served an application record setting out the evidentiary basis for its underlying forfeiture application.

[22] The Estate opposed the approval motion, contending that Rosa's claim was without merit. It maintained that, by hearing the motion before the Estate could

challenge the forfeiture proceedings, the court would effectively deprive the Estate of a defence in those proceedings.

The order under appeal

[23] On June 4, 2020 the motion judge ruled against the Estate, granting an order approving the "settlement" between Ontario and Rosa and directing payment of $120,000 in trust to Rosa's counsel (the "order under appeal").

[24] The motion judge's reasons for granting the order under appeal do not disclose a detailed exercise of statutory interpretation relating to s. 18.1. Notably, the motion judge's reasons do not expressly contemplate whether he had the authority to approve the proposed settlement between Ontario and Rosa. The sole basis the motion judge offered for rejecting the Estate's submission that the approval motion should not be heard in the face of an outstanding contested forfeiture application was that s. 18.1 confers courts with a broad power to approve settlements. In support of his view, the motion judge stated that "[n]otably, it is not required [under s. 18.1] that any amount to be paid out of the preserved funds be first established to be proceeds of crime".

ISSUES ON APPEAL

[25] The appellants advance three submissions with respect to the order under appeal.

[26] First, their “principal” submission is that the motion judge erred in law in determining that the approval of a settlement under s. 18.1 of the *Civil Remedies Act* did not require a prior determination that the funds seized were the proceeds of unlawful activity.

[27] Second, the appellants argue that Rosa is not a “legitimate owner” or “responsible owner” of the Cassone Court property, but a mere creditor incapable of entering into a settlement within the meaning of s. 18.1 of the Act, and that the motion judge erred in finding otherwise.

[28] Third, the appellants submit that the motion judge erred in deciding the approval motion based on hearsay evidence from a lawyer about the nature of the agreement between Rosa and Michael. On this ground, the appellants raise other related legal objections to the motion judge’s findings that I need not recount.

[29] For reasons that follow, I would accept the first ground of appeal. As this disposes of the appeal, I will not comment on the second and third grounds. Suffice it to say that my silence should not be taken as either a favourable or unfavourable comment on the appellants’ remaining grounds of appeal or on the motion judge’s reasoning relating to those issues.

ANALYSIS

[30] Section 18.1(1) of the *Civil Remedies Act* authorizes a court to approve a “settlement in relation to a proceeding under this Act”. In my view, the agreement

between Ontario and Rosa was not a “settlement in relation to a proceeding” under the *Civil Remedies Act* and therefore not properly subject to judicial approval.

[31] I will begin the analysis that leads me to this conclusion by setting out or describing the relevant provisions of the Act.

A. THE MATERIAL PROVISIONS OF THE *CIVIL REMEDIES ACT*

Purpose of the Act

[32] The purpose of the *Civil Remedies Act* is specified in s. 1, as follows:

> 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. [Emphasis added.]

Forfeiture

[33] Although the *Civil Remedies Act* provides in some cases for damages or monetary payments, forfeiture is the primary mechanism to accomplish its purpose.

[34] The Act does not define “forfeiture”. However, in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 18, Binnie J. described forfeiture under the *Civil Remedies Act* as “the transfer of property from the owner to the Crown”. As such, until forfeiture occurs and the consequential transfer of property from the owner to the Crown has taken place, Ontario’s rights in the subject property do not materialize, nor are the rights of others expunged.

[35] The *Civil Remedies Act* provides for three categories of forfeiture of property linked to unlawful activity: proceeds of unlawful activity (Part II); instruments of unlawful activity (Part III); and vehicles linked to vehicular unlawful activity (Part III.1). The nature of the required link between the subject property and the unlawful activity varies with each category; hence my practice at times in this judgment of speaking generally about the requisite link between the property and the unlawful activity.

Unlawful activity

[36] Unlawful activity is defined under Parts II and III, in ss. 2 and 7(1), as follows:

> “unlawful activity” means an act or omission that,
>
> > (a) is an offence under an Act of Canada, Ontario or another province or territory of Canada, or
> >
> > (b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario,
>
> whether the act or omission occurred before or after this Part came into force.

Forfeiture of property that is proceeds or an instrument of unlawful activity

[37] Ontario brought its forfeiture application relating to the proceeds of the Cassone Court property and the Silver Dollar pursuant to Parts II and III of the *Civil Remedies Act*. The application is based in part on the allegation that, in Michael's hands, the Cassone Court property was the proceeds and/or an instrument of unlawful activity. As ss. 3 and 8 provide, for forfeiture under either Part II or III to occur, a court must find that the property is tainted by unlawful activity.

[38] Section 2 of the Act defines "proceeds of unlawful activity" as "property acquired directly or indirectly, in whole or in part, as a result of unlawful activity".

[39] Section 7(1) defines "instrument of unlawful activity" as 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", which "includes any property that is realized from the sale or other disposition of such property".

[40] Section 3(1), under Part II, states:

> In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario <u>if the court finds that the property is proceeds of unlawful activity</u>. [Emphasis added.]

[41] Section 8(1), under Part III, is identical except that the requisite finding supporting forfeiture is that the property is "an instrument" of unlawful activity.

Legitimate owner, uninvolved interest holder and responsible owner

[42] Section 3(3), the provision referred to in s. 3(1), has been amended since the order under appeal was made.[1]

[43] Namely, the term "legitimate owner" in s. 3(3) has now been replaced by the term "uninvolved interest holder", as follows:

> If the court finds that property is proceeds of unlawful activity and a party to the proceedings proves that he, she or it is a legitimate owner [now, an uninvolved interest holder] 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. [Emphasis added.]

[44] Likewise, the definition of "uninvolved interest holder" now in force under s. 2 is identical to the former definition of "legitimate owner", which was as follows at the time of the order under appeal:

> "legitimate owner" [now, "uninvolved interest holder"] means, with respect to property that is proceeds of unlawful activity, 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 and was deprived of possession 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

[1] The amendment is inconsequential; it is nothing more than a change in terminology. However, I must describe the change because later in these reasons I will address recent authority where the new terminology is used.

> that the property was proceeds of unlawful activity, or
>
> (c) acquired the property from a person mentioned in clause (a) or (b).

[45] The term “responsible owner” is used under Part III in ss. 8(1) and 8(3), the comparable provisions to ss. 3(1) and 3(3) with respect to instruments of unlawful activity.

[46] Section 7(1) defines “responsible owner” as follows:

> “responsible owner” means, with respect to property that is an instrument of unlawful activity, a person with an interest in the property who has done all that can reasonably be done to prevent the property from being used to engage in unlawful activity, including,
>
> (a) promptly notifying appropriate law enforcement agencies whenever the person knows or ought to know that the property has been or is likely to be used to engage in unlawful activity, and
>
> (b) refusing or withdrawing any permission that the person has authority to give and that the person knowns or ought to know has facilitated or is likely to facilitate the property being used to engage in unlawful activity.

Standard of proof in proceedings under the *Civil Remedies Act*

[47] Part V is the “General” part of the *Civil Remedies Act*. Under Part V, s. 16 specifies that, subject to exceptions not relevant to this appeal, findings of fact in proceedings under the Act “shall be made on the balance of probabilities”.

[48] When the requisite standard of proof is applied to the material factual issues referred to in the preceding sections, the scheme of the Act as it relates to forfeiture

applications under Parts II and III can be described in the following simple terms. If Ontario establishes on the balance of probabilities that the subject property is the proceeds and/or an instrument of unlawful activity, the court is authorized and required to make an order forfeiting the subject property, subject to the following two exceptions arising from elements of Parts II and III of the Act referenced above.

Exceptions to forfeiture

[49] The first exception, pursuant to ss. 3(1) and 8(1), provides that no forfeiture order may be made if the court finds that such an order would clearly not be in the interests of justice.

[50] Pursuant to ss. 3(3) and 8(3), the second exception is engaged if a claimant satisfies the court on the balance of probabilities that they are a “legitimate owner” (now, an “uninvolved interest holder”) or a “responsible owner” of property that has been proven as the proceeds or an instrument of unlawful activity, respectively. If so satisfied, the court must make an order that is necessary to protect the legitimate or responsible owner’s interest in the property, unless it would clearly not be in the interests of justice to do so.

Special purpose account

[51] Where Ontario succeeds in obtaining forfeiture by proving the subject property is the proceeds or an instrument of unlawful activity, and where the

forfeited property has been converted into money, ss. 6 and 11 provide for its payment into a “special purpose account”.

[52] Money from a special purpose account may be used to compensate Ontario for its costs incurred in the proceedings, and/or to make payments for designated purposes, including compensating persons who suffered losses as the result of the impugned unlawful activity, assisting victims of unlawful activity generally, or compensating Ontario, a municipal corporation, or a public institution for pecuniary losses suffered as a result of unlawful activity.

[53] Finally, three further provisions found in Part V are relevant to this appeal.

Actions *in rem*

[54] First, s. 15.6(1) provides:

> All proceedings, including proceedings for an interlocutory order, under Parts II, III and III.1, whether by action or application, are *in rem* and not *in personam*.

Where possession unlawful

[55] Second, s. 18 stipulates that a person cannot have a claim in property subject to proceedings under the Act if their possession of the subject property is unlawful:

> For the purposes of a proceeding under this Act, a person cannot claim to have an interest in property … if, under the law of Canada or Ontario, it is unlawful for the person to possess the property.

Settlements

[56] Third, s. 18.1 – the provision authorizing court approval of settlements which is the primary focus of this appeal – provides as follows:

> (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 of the Attorney General or of any other party to the proceeding with the Attorney General's consent.
>
> (2) For greater certainty, the power to approve a settlement under subsection (1) includes a power to approve a settlement that provides for the full or partial forfeiture of the property that is the subject of the proceeding.
>
> (3) For greater certainty, the power to approve a settlement under subsection (1) includes a power to approve a settlement that provides for payment of a monetary amount instead of the full or partial forfeiture of property that is the subject of the proceeding.

[57] Of note, ss. 18.1(1) and (2) were added to the *Civil Remedies Act* shortly after the Divisional Court's decision in *Ontario (Attorney General) v. $29,900 in Canadian Currency (in rem)*, 2017 ONSC 2003, 137 O.R. (3d) 221 (Div. Ct.). In that case, Nordheimer J. (as he then was) upheld the application judge's decision below refusing to approve Ontario's proposed agreement that would have resulted in the partial forfeiture of $4,000 to a claimant who had not proved she was the legitimate owner of any of the subject property. Nordheimer J. explained his reasoning as follows, at para. 36:

> In my view, the application judge was correct in concluding, once he was satisfied that the monies were proceeds of unlawful activity, that the entire amount had to be forfeited, absent any evidence that could satisfy the

> court that any other order was necessary, either in the interests of justice [under the terms of s. 3(1)], or in order to protect the interests of the legitimate owner of the monies [under the terms of s. 3(3)]. [Emphasis added.]

[58] Sections 18.1(1) and (2), enacted in 2018, now authorize the approval of proposed agreements for partial forfeiture like the one refused in *$29,900 in Canadian Currency (in rem)*, a point I will revisit below.

B. THE CORRECT INTERPRETATION OF SECTION 18.1

[59] Ontario submits that any agreement between the Attorney General and any party to forfeiture proceedings constitutes a settlement within the meaning of s. 18.1, even if Ontario has not yet secured a finding that the property is the proceeds of unlawful activity.

[60] I do not agree. In my view, correctly interpreted, s. 18.1 authorizes courts to approve settlements that relate to the *in rem* interests in property subject to forfeiture proceedings (in my analysis that follows, I will refer to this as the "*in rem* settlement interpretation"). As I will explain, before Ontario can achieve an agreement that settles the *in rem* interests in the subject property, it must first secure a finding that the required link between that property and unlawful activity exists.

[61] In the case before us, the requisite finding was that the proceeds of the Cassone Court property were the proceeds and/or instruments of unlawful activity.

Absent such a finding, I would find that the motion judge erred in granting the order under appeal.

Prior judicial interpretation of s. 18.1

[62] The authority put before us on this appeal supports this view.

[63] While Ontario relies in its submissions on *AGO v. $80 Cdn., et al.*, 2021 ONSC 988, that decision is not consistent with Ontario's position. In fact, it is consistent with the *in rem* settlement interpretation I have just described. In *$80 Cdn.*, one of five respondents to Ontario's s. 18.1 settlement approval motion, Ms. Flynn, was the registered owner of a vehicle from which the subject property was seized. Nicholson J. approved a settlement between Ontario and Ms. Flynn releasing some of the subject property to her, but not before satisfying himself on the balance of probabilities that all the property at issue was either the proceeds or an instrument of unlawful activity: at para. 24.

[64] Similarly, in *Ontario (Attorney General) v. 269 Weldrick Road West (in rem)*, 2020 ONSC 4605, Ontario sought the forfeiture of property as either the proceeds or instruments of unlawful activity. Ontario entered into an agreement to release a motor vehicle and around $280,000 out of approximately $550,000 liquidated from seized assets to a claimant whose common law spouse had been convicted of fraud and forgery offences. Ontario maintained that Sanfilippo J. could approve the agreement without inquiring into the substantive requirements of the *Civil*

Remedies Act, including whether the subject property was the proceeds or instruments of unlawful activity. Sanfilippo J. disagreed. Like Nicholson J. in *$80 Cdn.*, before approving the settlement Sanfilippo J. made a finding on the balance of probabilities that the subject property was either the proceeds or instruments of unlawful activity: at para. 27.

[65] In my view, the judges who rendered these decisions were correct to make the requisite unlawful activity findings before approving the proposed settlements before them. As I have indicated and will explain in more detail below, the need for a finding of unlawful activity arises from a correct statutory interpretation of the words "a settlement in relation to a proceeding under this Act" in s. 18.1 of the *Civil Remedies Act*.

The governing legal principles in interpreting s. 18.1

[66] There is no dispute about the legal principles governing the interpretive exercise to be conducted on this appeal. Watt J.A. stated the core rule in *R. v. Stipo*, 2019 ONCA 3, 144 O.R. (3d) 145, at paras. 175-76:

> It is well settled that statutory interpretation cannot be founded on the wording of the legislation alone. Instead, the approach is that advocated by Elmer Driedger in his *Construction of Statutes* (2nd ed., 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the

> scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See, *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 18.
>
> This preferred approach recognizes the significant role that context must play when courts construe the written words of a statute. No statutory provision is an island in itself. Its words take their colour from their surroundings: *Bell ExpressVu*, at para. 27. All issues of statutory interpretation involve the fundamental question of what Parliament intended. To discover what Parliament intended, we look at the words of the provision, informed by its history, context and purpose: *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 20.

Ontario's proposed interpretation of s. 18.1

[67] Ontario urges that the modern approach to statutory interpretation, as articulated in *Stipo*, favours its proposed interpretation of s. 18.1. It advances three supporting arguments in this regard: (1) the ordinary and grammatical meaning of s. 18.1(1) gives courts broad discretion to approve settlements without a prior finding of unlawful activity; (2) this broad interpretation aligns with the object and purpose of the Act and the intention of the legislature; and (3) the expansive authority flowing from this interpretation will be duly confined by the Attorney General's obligation to act in the public interest and by the proper bounds of judicial discretion.

[68] I would reject these submissions. I am persuaded that the broad interpretation of s. 18.1 that Ontario offers is incorrect and that the *in rem* settlement interpretation I have articulated is correct.

[69] In outlining the analysis that leads me to this conclusion, I will address each of Ontario's arguments in turn. It is convenient to begin with Ontario's last point.

(1) The Role of the Attorney General and the Approving Judge

[70] Ontario urges us to have confidence that the broad settlement authority it claims s. 18.1 provides will not be used unfairly because, (a) the Attorney General, in his or her dual role as Minister of Justice, is obliged to act fairly and in the public interest when agreeing to settlements, and (b) judges must exercise their discretion reasonably in approving settlements.

[71] I would not accept this submission. The fact that the Attorney General is also the Minister of Justice and therefore bound to act reasonably and responsibly is irrelevant to the proper interpretation of s. 18.1. The underlying challenge in interpreting a legislative provision is to identify the meaning intended by the legislation. The task is not to determine whether a public official with delegated legislative power would properly exercise that power.

[72] For the same reason, the fact that judicial discretion must be exercised reasonably is equally irrelevant in identifying the proper interpretation of legislation. Our interpretive task with respect to s. 18.1 is to determine the reach of the legal

authority that the legislation confers on the judge asked to approve a settlement. Confidence that appellate review is available if a judge acts unreasonably within the scope of the authority conferred by legislation plays no role in the interpretation of that legislation.

(2) The Grammatical and Ordinary Meaning of the Words

[73] Ontario also argues that the ordinary and grammatical meaning of s. 18.1 is clear and gives courts broad discretion to approve any settlement in a forfeiture proceeding. Ontario points out that s. 18.1(1) does not expressly require a finding that the subject property is the proceeds or an instrument of unlawful activity before a settlement may be approved. In making this submission, Ontario relies on the opening words of s. 18.1(1): “Despite anything to the contrary in this Act, the court may approve a settlement…”. It calls this phrase “unambiguously expansive”, arguing that the phrase, and indeed s. 18.1 itself, would be rendered meaningless if settlements could be approved only after a finding of unlawful activity has been made.

[74] I do not accept Ontario’s position that the grammatical and ordinary meaning of the words used in s. 18.1 supports its proposed expansive interpretation. The words of the Act are to be read in their entire context. Section 18.1(1) does not simply say, “Despite anything to the contrary in this Act, the court may approve a settlement”. Crucially, it provides that, “Despite anything to the contrary in this Act,

the court may approve a settlement in relation to a proceeding under this Act" (emphasis added).

[75] In this regard, it is important to recall that a "proceeding" under the applicable parts of the *Civil Remedies Act* is an *in rem* proceeding engaged to settle title to property that is allegedly linked to unlawful activity. It is not an *in personam* proceeding conducted to resolve disputes between individuals about their relative rights. When the words "a settlement in relation to a proceeding under this Act" are read in this context, it is clear that they describe a settlement that relates to the *in rem* interests in the property being litigated in the proceedings. This is what I have already characterized as the "*in rem* settlement interpretation". In my view, to constitute a "settlement" relating to the *in rem* interests in the property, an agreement must resolve the *in rem* rights in the subject property. In other words, it must be capable of settling, to the exclusion of all others, the rights of the parties before the approving judge.

[76] Quite clearly, the agreement between Ontario and Rosa could not resolve the *in rem* rights in the subject property. Even leaving aside the potential *in rem* interests of non-parties to the litigation, the Estate claims an interest in the proceeds of sale of the Cassone Court property that has not been displaced by any forfeiture order. An agreement between Ontario and Rosa might well settle their personal dispute relating to ownership of the Cassone Court property, but that agreement is incapable of resolving the Estate's *in rem* rights in that property.

Therefore, on a proper contextual, grammatical, and ordinary reading of the language of s. 18.1, in my view the agreement between Ontario and Rosa could not be a “settlement in relation to a proceeding under this Act.”

[77] I see nothing in the language of s. 18.1 or elsewhere in the Act that could alter this conclusion. Section 18.1 does not, by its terms, authorize some of the parties in the *in rem* proceeding to “settle” the *in rem* claims of all others in the subject property. The only authority s. 18.1 provides is that of courts to approve settlements “in relation to a proceeding under this Act”. Since I would find that the personal agreement between Ontario and Rosa is not a settlement within the meaning of s. 18.1, the motion judge had no authority under s. 18.1(1) to approve that agreement.

[78] Things would be different, however, if before approving the agreement the motion judge had made a finding that the proceeds of sale of the Cassone Court property were proceeds and/or instruments of unlawful activity and that forfeiture was clearly not contrary to the interests of justice. Had that determination been made, subject to Rosa’s outstanding claim that she was a “legitimate” or “responsible owner”, Ontario would have had a claim to the subject property to the exclusion of all others, including the Estate. Since, in this scenario, only Ontario and Rosa would have had outstanding claims to the Cassone Court property, they could have agreed to settle the *in rem* interests in that property.

[79] Ontario resists the *in rem* settlement interpretation just described. It argues that to require an "unlawful activity" finding before a settlement can be approved would denude s. 18.1 of meaning. If Ontario were right about this, the *in rem* settlement interpretation would be contrary to the "well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage": *R v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28.

[80] However, I do not agree with Ontario on this point. Once a determination has been made that the subject property is linked to the applicable unlawful activity, the grammatical and ordinary language of s. 18.1 permits a wide range of settlements between Ontario and those asserting claims to the property. As I have indicated, if Ontario had shown that the proceeds of the Cassone Court property are the proceeds and/or instruments of unlawful activity, Ontario would have been free to settle with Rosa on the agreed upon terms, or any other lawful terms.

[81] Similarly, I do not accept Ontario's position that this interpretation renders meaningless the phrase, "Despite anything to the contrary in this Act". Once Ontario establishes the requisite link between the subject property and unlawful activity to support forfeiture, this broad language empowers courts to approve any settlement that Ontario enters into, even where the agreed outcomes are not otherwise contemplated by the Act. As Nicholson J. explained in *$80 Cdn.*, at para. 29, s. 18.1 now permits courts to approve settlements based on "compromise"

between the parties, thereby avoiding “all or nothing” outcomes. This kind of compromise settlement was not permissible prior to the passage of s. 18.1, as confirmed by Nordheimer J.’s 2017 decision in *$29,900 in Canadian Currency (in rem)*.

[82] Section 18.1 also now permits courts to approve settlements that approximate a claimed amount, without a determination of the precise entitlement contemplated by the *Civil Remedies Act*: *$80 Cdn.*, at paras. 32-33. Moreover, under s. 18.1 courts may approve payments to claimants without first showing that their claim as an uninvolved interest holder or responsible owner has merit: *$80 Cdn.*, at para. 31.[2]

[83] I am therefore persuaded that the grammatical and ordinary meaning of s. 18.1 is incompatible with Ontario’s interpretation and compatible with the *in rem* settlement interpretation I have described.

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[2] I have serious reservations about the holding to the contrary in *269 Weldrick Road West (in rem)*, 2020 ONSC 4605, at paras. 18, 23, 29. When Sanfilippo J. held that he could not approve a settlement without first deciding whether the claimant was a “lawful owner”, he had not been alerted that s. 18.1 was not in force when the Divisional Court decision in *$29,900 in Canadian Currency (in rem)* was rendered. He mistakenly believed himself bound by that decision. Sanfilippo J. subsequently issued a supplementary endorsement in which he noted that, had it come to his attention that s. 18.1 was enacted after the decision in *$29,900 in Canadian Currency (in rem)*, this “might have affected the analysis … but does not change my decision”: 2020 ONSC 4657, at para. 4. To be clear, for the reasons I provide in this judgment, it is my view that Sanfilippo J. was correct to insist on proof that the seized property was either the proceeds of unlawful activity or the instrument of unlawful activity, and that he was entitled to approve the settlement before him. The reservations I have about his reasoning relate to his insistence that, before he could approve the settlement, it had to be proved that the claimant was a lawful owner. For the purposes of this appeal, however, this issue need not be resolved.

(3) The Scheme and Object of the Act and the Legislature's Intention

[84] Finally, Ontario urges that the broad interpretation it offers is in keeping with the object and purpose of the *Civil Remedies Act* and with legislative intent, since settlements are to be encouraged in preference to litigation. It argues that interpreting s. 18.1 to confer broad settlement approval authority advances the purposes of the Act and the intention of the legislature by promoting efficiency and flexibility in achieving the benefits of forfeiture, including compensation and support for victims.

[85] I would not accept these submissions, either. As I will explain, in my view the *in rem* settlement interpretation, not Ontario's interpretation, is consistent with the scheme of the Act, the object of the Act, and the intention of the legislature. I will begin with the "object", or purpose, of the Act.

(i) The object of the *Civil Remedies Act*

[86] Professor Ruth Sullivan describes formal purpose statements appearing in the body of legislation as the "most direct and authoritative evidence of legislative purpose": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada, 2014), at §9.45.

[87] Section 1 contains the formal purpose statement appearing in the *Civil Remedies Act*. Reproduced above, at para. 32 of these reasons, s. 1 characterizes

each of the four express purposes of the Act as providing civil remedies to address certain harms arising from “unlawful activities”.

[88] In *Chatterjee*, while exploring the *vires* of the *Civil Remedies Act*, Binnie J. had occasion, at para. 23, to comment on its purposes:

> In essence, therefore, the [*Civil Remedies Act*] 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 present and would-be perpetrators.

[89] In my view, Ontario’s interpretation is not in keeping with the object of the *Civil Remedies Act* as articulated in s. 1 and *Chatterjee*. To the contrary, it would enable property to be forfeited without any regard to whether it is tainted by unlawful activity. In contrast, the *in rem* settlement interpretation is true to the purpose of the Act because it ensures that before forfeiture occurs, the subject property has been tainted by unlawful activity.

(ii) The scheme of the *Civil Remedies Act*

[90] Not only is Ontario’s interpretation not in keeping with the object of the *Civil Remedies Act*, for related reasons it is also inconsistent with the scheme of the Act.

[91] In a disputed proceeding,[3] the scheme of the Act empowers a court to eradicate a citizen's lawful interest in the subject property through a forfeiture order, but only after making a finding that Ontario has established the requisite link between the property and unlawful activity. Yet Ontario's position is that s. 18.1 authorizes a court to permit a citizen's interest in the property to be extinguished without such a finding, and without Ontario having to meet any burden of proof relating to unlawful activity. Quite simply, this interpretation is not in keeping with the scheme of the Act.

[92] Further, I would reject the two overarching arguments Ontario offers in contending that its proposed interpretation is consistent with the scheme and purpose of the *Civil Remedies Act*.

[93] First, although I agree with Ontario's submission that settlements are generally to be encouraged, the settlements to be encouraged are those which are consistent with the scheme and object of the Act. As I have sought to demonstrate, the settlements that Ontario's interpretation would support, such as the one between Ontario and Rosa, are not consistent with the scheme and object of the Act.

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[3] "Administrative forfeiture" is possible without a finding of unlawful activity, but only where: (1) Ontario has "reason to believe that the property is the proceeds of unlawful activity or an instrument of unlawful activity"; (2) Ontario has provided proper notice of intention to forfeit; and (3) Ontario has not received any notice of dispute regarding the proposed forfeiture on or before the statutory deadline: *Civil Remedies Act, 2001*, S.O. 2001, c. 28, at ss. 1.2-1.3 and 1.8.

[94] Second, I would reject entirely Ontario's submission that its proposed interpretation pursues the object of the Act by promoting efficiency and flexibility in achieving the benefits of forfeiture, including compensation and support for victims. Absent a determination that the subject property is the proceeds or instruments of unlawful activity, there is a risk that a settlement eradicating the interest of others would deprive a legitimate owner of their property. In this regard, the words of Nordheimer J. in *$29,900 in Canadian Currency (in rem)*, at para. 36, are apt: "[I]t is necessary to ensure that the interests of the legitimate owner of property, that is seized under this statute, are not trampled over by a rush to conclude the proceeding."

(iii) The intention of the legislature in enacting the *Civil Remedies Act*

[95] Finally, Ontario's interpretation cannot find support in legislative intention. As Watt J.A. instructed in *Stipo*, at para. 175, "To discover what Parliament intended, we look at the words of the provision, informed by its history, context and purpose". As I have just described, the context and purpose of s. 18.1 are not in keeping with Ontario's proposed interpretation.

[96] Nor does the history of s. 18.1 support Ontario's interpretation. I do agree with Ontario's submission that s. 18.1 was enacted in response to Nordheimer J.'s decision in *$29,900 in Canadian Currency (in rem)* and that this history strongly suggests that the legislature intended s. 18.1 to redress the shortcoming exposed

in that decision, namely, the inability of judges, after making the requisite unlawful activity finding, to order anything other than full forfeiture unless one of the two statutory exceptions is satisfied. However, that shortcoming can be overcome without interpreting s. 18.1 as Ontario contends, which would confer judicial discretion to approve proposed settlements entered into by some parties to forfeiture proceedings even where those settlements purport to eradicate the *in rem* property interests of others.

[97] Indeed, the shortcoming exposed in *$29,900 in Canadian Currency (in rem)* can be resolved through the *in rem* settlement interpretation, which would empower judges, after making the requisite unlawful activity finding, to make orders other than full forfeiture. Simply put, Ontario's proposed interpretation of s. 18.1 goes further than required to satisfy the apparent historical objective of the provision, whereas the *in rem* settlement interpretation is better targeted to achieve that historical objective.

The legislature did not intend for s. 18.1 to produce absurd consequences

[98] I would offer one additional point related to the legislature's intention in enacting s. 18.1 of the *Civil Remedies Act*. The "absurdity principle" (often called the "golden rule" of statutory interpretation), holds that if an interpretation would lead to an absurdity, a court may reject it in favour of a plausible alternative which avoids the absurdity: *Ontario v. Canadian Pacific Ltd.* [1995] 2 S.C.R. 1031, at

para. 65; *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, 140 O.R. (3d) 241, at para. 72, leave to appeal refused, [2018] S.C.C.A. No. 187; Sullivan, at §10.5.

[99] In *Stipo*, at para. 177, Watt J.A. affirmed the "well-established principle of statutory interpretation" holding that the legislature "does not intend to produce absurd consequences". Watt J.A. reminded us that absurdity occurs if a proposed interpretation:

> i. leads to ridiculous or frivolous consequences;
>
> ii. is extremely unreasonable or inequitable;
>
> iii. is illogical or incoherent;
>
> iv. is incompatible with other provisions or with the object of the enactment; or
>
> v. defeats the purpose of the statute or renders some aspect of it pointless or futile.

[100] Where a potential absurdity is identified, Gonthier J. explained the relevant interpretive exercise as follows, at para. 65 of *Canadian Pacific*:

> One method of avoiding absurdity is through the strict interpretation of general words … Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature.

[101] The absurdity principle, as articulated above, reinforces my view to reject Ontario's proposed interpretation in favour of the *in rem* settlement interpretation.

I have already explored the incompatibility between Ontario's interpretation and the object of the Act; I need say no more on this point. However, at least two additional forms of absurdity recounted by Watt J.A. in *Stipo* could apply.

[102] First, Ontario's interpretation is illogical and incoherent. It will be recalled that the motion judge approved a settlement in which Rosa was to be paid some, not all, of the sale proceeds of the Cassone Court property. If the order under appeal were to stand, in order to resolve what is to happen to the balance of those proceeds, an adjudicated hearing would be required to determine whether forfeiture is appropriate. What if, at that hearing, the court found that Ontario had not met its burden of establishing that the sale proceeds of the Cassone Court property are the proceeds and/or instruments of crime? Would Rosa be entitled to keep the $120,000, or would she have to return it?

[103] Ontario could not answer these questions. As I see it, neither alternative is logical or coherent. If Rosa were permitted to keep the money, under a proceeds of crime statute she would have received property that is not the proceeds or instruments of crime. If she were required to return the money, even leaving aside the logistical problems this would present, the law would, illogically and incoherently, be treating the settlement as having been lawful pursuant to s. 18.1, yet invalid.

[104] Second, Ontario's interpretation would produce extremely unreasonable or inequitable outcomes. I am certain I have already betrayed my conviction that it would be unreasonable and inequitable in the extreme to permit courts to approve settlements between Ontario and others that deprive third parties of their rights in private property, without any inquiry into whether the subject property was tainted by unlawful activity. This outcome, which violates due process, is not merely hypothetical. It is the very position Ontario seeks to uphold in this appeal.

[105] Indeed, Ontario argues before us that s. 18.1 enables it to seek court approval for settlements it enters into with anyone authorized to receive payments from a special purpose account, pursuant to ss. 6 and 11 of the Act, without the need for prior judicial determination that the property was tainted by unlawful activity. If Ontario is correct, it would be permitted to seek approval for "settlements" it arrives at with alleged victims of entirely unproven crimes to compensate them using money that legally belongs to a suspect from whom it has been seized. In my view, if this court were to accept Ontario's proposed interpretation, the potential for well-intentioned but abusive settlements is palpable.

[106] In contrast, there is nothing absurd about the *in rem* settlement interpretation of s. 18.1 I have described. I do not accept Ontario's objection that this interpretation would bar the release of seized property to a claimant without a judicial determination on unlawful activity. Ontario can accomplish the release of

seized property by simply abandoning its application. Where there is common ground that some of the seized property is not, in fact, tainted by unlawful activity, or that a claimant is, in fact, an “uninvolved interest holder” or “responsible owner” and therefore exclusively entitled to the property interest they claim, Ontario can accomplish the release of that property by withdrawing the forfeiture proceedings against it, pursuant to s. 1.7 of the *Civil Remedies Act*.

[107] Nor do I accept Ontario’s submission that the *in rem* settlement interpretation would require a “full hearing on the merits”, even where all interested parties consent or agree to the proposed settlement. In that scenario, where no one opposes the settlement, the requisite hearing is apt to be simple and efficient.

[108] In sum, applying the golden rule against absurd consequences, in my view Ontario’s interpretation must be rejected in favour of the *in rem* settlement interpretation.

Conclusion on the correct contextual and purposive interpretation of s. 18.1

[109] In light of the foregoing application of the modern approach to statutory interpretation, I would find that the *in rem* settlement interpretation of s. 18.1, rather than Ontario’s proposed interpretation, best accords with the words of the *Civil Remedies Act*, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature.

[110] Accordingly, I would accept the appellants' submission that the motion judge erred in approving the agreement between Ontario and Rosa as a "settlement" in the meaning of s. 18.1.

(4) Residual Principles: Resolving Ambiguity Through Strict Construction

[111] Assuming I am wrong, and Ontario's interpretation and the *in rem* settlement interpretation are equally in accord with the purpose of the *Civil Remedies Act* and the intentions of the legislature, I would still reject Ontario's interpretation.

[112] This alternative conclusion is based on the presumption that legislation designed to curtail the rights of citizens must be strictly construed: Sullivan, at §15.37. This presumption is available to assist in resolving a "real" ambiguity, meaning an ambiguity between two or more equally plausible interpretations that remains even after interpreting the provision at issue according to the modern purposive and contextual approach described above: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 28-30; Sullivan, at §15.38.

Strict construction and private property

[113] As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43, "[E]xplicit statutory language is required to divest persons of rights they otherwise enjoy at law".

[114] In explaining the link between this general presumption of strict construction and state confiscation of private property, Cory J. said as follows in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at para. 20:

> The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected.

[115] Similar statements of principle can be found in *Harrison v. Carswell*, [1976] 2 S.C.R. 200, at p. 219, and *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 27.

[116] In my view, the presumption of strict construction favours the *in rem* settlement interpretation over Ontario's interpretation of s. 18.1 of the *Civil Remedies Act*. As such, even if I were persuaded that the provision could support both interpretations on a proper application of the modern approach, I would arrive at the same conclusion.

CONCLUSION

[117] Properly interpreted, to constitute a "settlement in relation to a proceeding under this Act" in the meaning of s. 18.1(1) of the *Civil Remedies Act*, a proposed agreement must relate to the *in rem* property interests being litigated in the underlying forfeiture proceedings.

[118] Since Ontario did not establish that the proceeds of sale from the Cassone Court property were subject to forfeiture as the proceeds and/or instruments of unlawful activity, it never acquired a higher claim to the *in rem* rights in that property than all non-parties to its agreement with Rosa. It follows that Ontario's agreement with Rosa was not a "settlement in relation to a proceeding under this Act" within the meaning of s. 18.1(1). Therefore, in my view, the motion judge erred in law in approving that agreement.

[119] Accordingly, I would allow the appeal and set aside the order under appeal, dated June 4, 2020, which purported to approve the "settlement" between Ontario and Rosa.

[120] As agreed between the parties, I would award costs to the appellants in the amount of $15,000 inclusive of HST and disbursements.

Released: July 6, 2021 "J.H."

"J.A."

"I agree. Lauwers J.A."