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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	APPEARANCES:
THE DIRECTOR OF CRIMINAL PROPERTY AND FORFEITURE	)	Lisa Cupples and Denis Guénette
(Plaintiff)	)	Counsel for the Plaintiff
- and -	)	
DARREN SHAWN GURNIAK, JUSTIN SHAWN POITRAS, LEA DANIEL MURRELL, AND AGOSTINO RICHICHI	)	Michael Clark and Abram Silver Counsel for Defendants Justin Shawn Poitras and Lea Daniel Murrell
(Defendants)	)	
	)	Michael Zacharias Counsel for Defendant Agostino Richichi
	)	
	)	JUDGMENT DELIVERED:
	)	December 18, 2020

DEWAR J.

INTRODUCTION

[1] There are three motions before the court. There is a motion by Messrs. Murrell and Poitras for a declaration that their right to be free of unreasonable search and seizure pursuant to s. 8 of the *Canadian Charter of Rights and*

Freedoms ("the *Charter*") has been violated. They also argue that their s. 10 rights were violated. As a result, they seek an order excluding evidence from the trial of this action and in particular, the funds seized by the RCMP which form the subject matter of this forfeiture action.

[2] The second motion is brought by the defendant Richichi and seeks a declaration that his s. 8 right has been violated and an order for the exclusion of all evidence obtained in violation of the *Charter*, including a series of text messages between him and his co-defendants.

[3] The third motion (although brought first in time) is made by the plaintiff ("the Director") for a ruling on the propriety of questions that were put to the defendant Richichi on his examination for discovery. According to Richichi, those questions, which concern text messages between Mr. Richichi and Messrs. Poitras and Murrell, amount to an invasion of his privacy interest that is protected by s. 8 of the *Charter*.

[4] There are four general areas of controversy arising from these motions. The first area of controversy involves the question as to whether the Director is exposed at all to a *Charter* challenge of the nature made here. The second area of controversy involves a question concerning the procedure to be followed when an alleged *Charter* violation is raised in an action brought by the Director pursuant to *The Criminal Property Forfeiture Act*, C.C.S.M. c. C306 (hereinafter "the CPFA"). The third area of controversy examines whether any *Charter* breaches actually occurred. The fourth area of controversy arises only if a

Charter breach has been found to have occurred and involves a consideration as to the appropriate remedy, if any, to be granted.

THE FACTS

[5] The evidence before the court relied upon by the defendants consists of an affidavit of Poitras dated July 17, 2020. In that affidavit, Poitras says that on March 2, 2017, a vehicle rented by his girlfriend and loaned to him, at the material times, was being driven by his father, the defendant Gurniak. Poitras and Murrell were passengers, Poitras in the front passenger seat and Murrell in the back seat. The vehicle was pulled over by the police for speeding on the Trans-Canada Highway near the town of Carberry. Poitras attached copies of the police narratives and notes to his affidavit. Those notes indicate that an RCMP officer Gibb clocked the vehicle at approximately 150 km/h in a 100 km/h zone. When officer Gibb engaged with Mr. Gurniak at the side of the highway, she smelled marijuana emanating from the car. She asked whether there was marijuana in the vehicle. The police notes suggest that Mr. Gurniak distanced himself from the marijuana, but Poitras volunteered that he was in possession of a small amount of marijuana. He surrendered three joints to her.

[6] The police notes and Poitras' affidavit indicate that officer Gibb then arrested all three occupants for possession of marijuana. She went back to her car and called for backup. When backup arrived, the three men in the car were placed into separate police vehicles, and a search was made of the vehicle, ostensibly on the part of the police, as incident to arrest. Poitras' wallet was

found in the console of the front seat of the vehicle and contained $825 primarily in $20 bills. A jacket found in the backseat of the vehicle where Murrell had been riding yielded $5000 in cash. The sum of $260 was recovered from Murrell's person.

[7] When the money found in the jacket pocket was discovered, the three men were then advised that they were being arrested for possession of proceeds of crime. They were transported in separate police vehicles to the RCMP detachment in Brandon and their rental car was towed to that location. After the car arrived at the police detachment, the trunk was searched and an additional $208,585 was found in two suitcases contained therein, one allegedly owned by Murrell and one allegedly owned by Poitras.

[8] Messrs. Gurniak, Murrell, and Poitras were charged with possession of marijuana and possession of proceeds of crime. A trial was scheduled for October 2019, but the Crown stayed the charges shortly before that date.

[9] An action brought under the CPFA was issued by the Director of Criminal Property and Forfeiture ("the Director") on October 6, 2017. In it, the Director claims forfeiture of the seized monies, totaling $213,670. The defendant Richichi was named as a party defendant because shortly after the date of arrest, he surfaced to claim that $125,000 of the seized money belonged to him. He claims that $125,000 had been given to Mr. Poitras so that Mr. Poitras could buy some automotive equipment for Mr. Richichi.

[10] Although the criminal charges against the defendants Gurniak, Poitras and Murrell have been stayed, the Director continues to maintain in this action that the monies totaling $213,670 are proceeds of unlawful activity.

[11] Of particular relevance to the motion by Richichi, there are the following additional facts.

[12] As a result of the search of the vehicle in which the defendants Gurniak, Poitras and Murrell were riding, the police obtained possession not only of the sum of $213,670 as detailed above, but also five cell phones to which they ascribed numbers PE018 through PE022 inclusive.

[13] In April 2017, the police applied to the Provincial Court for a warrant to search the cellular telephones that had been seized. According to the affidavit sworn to obtain the warrant ("the ITO"), PEO18 was located in the area where Murrell was seated, PEO19 was found on Murrell, PEO20 was claimed by Gurniak as his, PEO21 and PEO22 were located in Poitras' pockets. The warrant was issued as requested.

[14] The search of the contents of the cell phones yielded only the cell phone number, the cell phone identification, and the service provider information.

[15] Armed with the fruits of the search of the cell phones, in October 2017, the police applied to the Provincial Court for Production Orders under ss. 487.014(3), 487.016(3), and 487.017(3) of the ***Criminal Code*** and sought to obtain from Rogers Communications Inc. ("Rogers"), amongst other things,

call/text detail reports, including all incoming and outgoing calls and text messages between October 25, 2013 and September 25, 2017.

[16] The Production Orders were granted on October 4, 2017. When executed, data from the phones for a period of 13 months preceding March 2, 2017 was provided by Rogers. Included within the data are records of text communications between Richichi and Poitras and between Richichi and Murrell.

[17] The Director was furnished with copies of the text communications ("the Rogers Data") by the RCMP.

[18] At the discovery stage of this litigation, the Director disclosed the Rogers Data to the defendants. In an examination for discovery of Richichi, counsel for the Director asked Richichi for his explanation about a number of text messages that were included in the Rogers Data and that were between Richichi and Poitras, and Richichi and Murrell. The questions were met with objections by counsel for Richichi and Richichi refused to answer the questions on the basis that the Rogers Data was unlawfully obtained in violation of Richichi's rights under s. 8 of the *Charter*.

DOES THE *CHARTER* APPLY IN A CPFA PROCEEDING?

[19] Counsel for the Director questioned whether a *Charter* breach committed by a police officer could impact upon an action by the Director who is at arm's length from the police. To that, I simply say that both the Director and the police are instruments of the State, whether provincial or federal. The *Charter* is

directed against abuses by the State. It is open to a court to impose a consequence for a *Charter* breach by one arm of the State upon another arm of the State where the second arm is seeking to make use of information or evidence obtained as a result of the *Charter* breach. Whether or not a court will impose a consequence upon the second arm of the State is a decision to be made under s. 24 of the *Charter*, but the court is free to consider whether the arm of the State that committed the alleged breach (in this case the police) has committed a *Charter* breach before determining whether there is any impact upon the second arm of the State under s. 24.

[20] Counsel for the Director also questioned the use by the defendants of the *Charter* in a CPFA proceeding on the grounds that the *Charter* is intended to protect people whilst a proceeding under the CPFA is an action "*in rem*" only. She cites ***Schreiber v. Canada (Attorney General)***, [1998] 1 S.C.R. 841 wherein the majority of the Supreme Court ruled that a search conducted by Swiss authorities in Switzerland but at the request of Canadian authorities was not subject to *Charter* requirements. Counsel cites in particular para. 32 thereof:

> 32 On the applicability of s. 8 to the facts of this case, I must respectfully disagree with the approach taken by Iacobucci J. He states that "the focus of the right to privacy, therefore, is the *impact of an unreasonable search or seizure on the individual*; it matters not where the search and seizure took place" (emphasis in original). Although I agree that s. 8 protects" people, not places or things", it only protects people against actions by the government of Canada that interfere with a person's privacy interests through the unreasonable use of a search or seizure. Therefore, it *does* matter where the search or seizure took place, if it took place outside Canada by persons not under the authority of the government of Canada. Clearly, the government of Canada did not undertake any search or seizure. Canadian officials merely requested that a search and seizure be undertaken. Because those actions that are

> properly subjected to *Charter* review under s. 8 were undertaken by foreign officials, the respondent instead has sought to implicate those actions undertaken in Canada which requested the search and seizure in Switzerland. But as Stone J.A. stated at p. 207:
>
> > To conclude that section 8 is engaged because the Canadian authorities sent the request to Switzerland even though they could not and did not conduct any search and seizure there would be to contort the language of this important protection and to give it application where no governmental action of the kind envisaged by the section is involved.
>
> (Underlining added)

[21] I am not convinced that the commonly expressed notion referenced by counsel for the Director that s. 8 protects "people, not places or things" is of any consequence in this case. The purpose of s. 8 of the *Charter* is to protect individuals from being searched at the whim of the State. The purpose of s. 10 is, in part, to ensure that people do not incriminate themselves without first having the opportunity to speak to a lawyer before so doing. It is the intrusion of the State into their personal rights and private space which are the focus of the *Charter* rights raised here.

[22] The right to seek a remedy for the alleged *Charter* breaches in this case arises not from the fact that the Director is pursuing a civil action to take property from the defendants, but rather from the fact that in pursuing the action, the Director is in part relying upon the police who are alleged to have violated the defendants' *Charter* rights. The only question is whether, if there was a violation, the court may grant a remedy that interferes with the normal prosecution of a CPFA action instituted by the Director.

[23] If there is a *Charter* breach, s. 24 of the *Charter* provides a remedy. There is no limitation in s. 24 which would foreclose the kinds of relief being sought by both defendants. The fact that there is no court rule which discusses how a *Charter* remedy might be advanced during a civil action does not mean that a *Charter* remedy cannot be superimposed into a CPFA proceeding. In my opinion, if there is a reasonable connection between the alleged breach and a proceeding against a party in a court proceeding instituted by the State, I see no reason why the complaining party might not seek a remedy in that proceeding.

[24] Indeed, this issue has already been decided in the case of ***Alberta (Justice and Attorney General) v. Petros***, 2011 ABQB 541 (CanLII). There, a defendant in a civil forfeiture action sought to raise the legality of a search by the police the fruits of which formed major part of the government's case. Counsel for the Minister argued that the *Charter* did not apply to a civil forfeiture action. At para. 23, Sullivan J. wrote:

> In this case the impugned police conduct was an exercise of government authority delegated to peace officers through the *Police Act*, R.S.A. 2000,c. P-17, s. 38. In my opinion, where the full force of the state operates against the interests of an individual, with the potential to impart significant legal consequences, it is a matter of fairness to afford a remedy to a person whose constitutionally protected rights have been infringed by government actors.

[25] Similarly, courts in British Columbia have recognized that defendants in forfeiture proceedings may advance *Charter* arguments which if successful might result in the dismissal of the action against them. In British Columbia, ***Director of Civil Forfeiture v. Huynh***, 2012 BCSC 740 (CanLII), Schultes J. ordered that the *Charter* issues relating to the search of the defendant's residence to be heard

first, and separately, from the remaining issues in the statement of claim and that examinations for discovery would be deferred until after those issues were decided. Such an order would have not been made if *Charter* arguments could not be advanced in a forfeiture proceeding.

[26] In British Columbia, ***Director of Civil Forfeiture v. Lloydsmith***, 2014 BCCA 72 (CanLII), the Court of Appeal upheld a procedure which had been prescribed by the case management judge in determining *Charter* issues at an early stage in a civil forfeiture case

[27] In ***British Columbia (Director of Civil Forfeiture) v. Crowley***, 2013 BCCA 89 (CanLII), Chiasson J.A. wrote at para. 31 after considering the purposes of the provincial civil forfeiture legislation:

> 31 These salutary objectives must be placed into the context of civil proceedings that are somewhat unusual: the exercise of state power to confiscate the property of a citizen in a civil action based on unlawful activity that is an offence under legislation. Protection from the arbitrary exercise of state power is rooted in our legal tradition. Its exercise, albeit for good policy reasons, must recognize the procedural rights of the citizen. …

[28] In ***British Columbia (Director of Civil Forfeiture) v. Thandi,*** 2018 BCSC 215 (CanLII), in directing a procedure to be followed which permitted *Charter* issues to be determined in advance of other issues, Smith J. wrote at para. 17:

> 17 Although forfeiture actions are civil proceedings governed by the civil rules of procedure, unique considerations arise from the fact that they are frequently based on evidence gathered in criminal investigations by police, using powers only the police have. That brings the *Charter*, which is not a usual feature of civil cases, into play. In *British Columbia (Director of Civil Forfeiture) v. Huynh*, 2013 BCSC 980 (B.C. S.C.), Justice Verhoeven said at para. 33:

> [33] . . . the Director seeks to rely upon evidence gathered pursuant to the machinery of the criminal law and the powers of the state to prove the Director's case. Therefore, exactly the same *Charter* principles apply to the manner in which that evidence is obtained as would be applicable in a criminal case.

[29] Finally, in the case of ***British Columbia (Director of Civil Forfeiture) v. Judd***, 2020 BCSC 1508 (CanLII), Lyster J. wrote:

> 39 The foregoing review of the case law establishes that bifurcation of issues relating to allegations of breaches of *Charter* rights from the Director's underlying claim may be appropriate in some cases. In considering such an application, the court must consider factors including trial fairness, convenience, efficiency, and the presence or absence of prejudice. The preeminent consideration is the interests of justice, which involves a recognition of the power imbalance inherent in such proceedings. If the resolution of the *Charter* issues may resolve the case completely, then severance is likely appropriate, in the interests of both efficiency and justice.

[30] Given these authorities, there is in my respectful opinion no reason to prohibit the use of *Charter* remedies in every CPFA proceeding. When the Director purports to take advantage of an alleged *Charter* breach committed by the police, it is open for a defendant to bring that breach before the court and seek a remedy which is appropriate in the circumstances. That of course is different from determining whether a particular remedy in a particular CPFA proceeding is appropriate. The defendant in a civil forfeiture case is at least entitled to ask for a remedy within the CFPA action.

HOW AND WHEN SHOULD *CHARTER* MOTIONS BE HEARD IN A CPFA ACTION?

[31] The aim of the defendants by bringing these motions is to secure an order excluding evidence both at discovery and trial based upon a breach of the

Charter. Messrs. Murrell and Poitras generally complain that their treatment by the police, including their arrest and the searches of the vehicle in which they were riding and of their clothes and luggage were unlawful, committed in violation of ss. 8 and of 10 of the *Charter*. They submit that the fruits of the search, namely the cell phones and cash in the amount of $213,670 should be excluded from evidence at trial. The defendant Richichi complains that a series of text messages between himself and the defendant Poitras also should be excluded because the police, having found the telephones of Messrs. Gurniak, Murrell and Poitras, gained access to the messages without appropriate authorization thus breaching s. 24 of the *Charter*.

[32] The right of the defendants to seek relief for *Charter* violations is found at s. 24(1) of the *Charter*. That section reads:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[33] The very specific remedy wherein a court excludes evidence is then addressed in s. 24(2) of the *Charter*. It reads:

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[34] This appears to be the first time that an alleged *Charter* violation has been the subject of a hearing in an action in Manitoba brought under the CPFA. There is a stated purpose for the CPFA which is found at s. 2 which reads:

> 2 The purpose of this Act is to provide civil remedies that will prevent
>
> (a) people who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities; and
>
> (b) property from being used to engage in certain unlawful activities.

[35] The allegation in the statement of claim alleging that the sum of $213,670 found within the vehicle which was the subject of a traffic stop were "proceeds of unlawful activity", clearly falls within the purpose described in s. 2(a) of the CPFA.

[36] Counsel for the Director has put into question the adjudication of the defendants' motions at this time. She argues that once in the realm of civil litigation, the process which should be followed is as set forth in the Court *Rules*. That process starts with the pleadings, moves through document discovery, then examinations for discovery and then to trial. She argues that the resolution of the *Charter* issues should therefore be achieved at the trial stage and in the meantime, the Director should be entitled to press on with the discovery portion of the civil litigation process. She argues that the motions of the defendants essentially amount to requests for an order staying or dismissing the action but are dressed up as an "evidentiary remedy". She argues that, from the way that the motions are styled, it is difficult to understand whether they are stay motions, motions to dismiss the action, or summary judgment motions.

[37] The defendants argue that their motions are appropriate vehicles to bring their *Charter* concerns before the court. Indeed, they argue that they present the most expeditious and least expensive way to do so.

[38] The timing of a *Charter* challenge in a CPFA proceeding is novel in this province.

[39] Counsel for the Director argues that if *Charter* remedies are available in a CPFA action, then I should put the *Charter* issues off until the trial of this matter. In the normal course, it makes sense for *Charter* issues to be raised early in the proceeding by referring them to the pre-trial judge so that an early decision can be made as to when and how they should be dealt with. I am of the opinion that issues such as raised here are best dealt with by the trial judge.

[40] In British Columbia, where *Charter* issues have been raised, the courts have adopted a bifurcated process described in the cases of ***Director of Civil Forfeiture v. Huynh***, 2012 BCSC 740 (CanLII), ***Director of Civil Forfeiture v. LloydSmith***, 2014 BCCA 72 (CanLII), and ***British Columbia (Director of Civil Forfeiture) v. Judd***, 2020 BCSC 1508 (CanLII), at least in situations where the resolution of the *Charter* issue will save time and expense to the parties. In Manitoba, this being the first opportunity for the court to consider the issue, no such process has yet been universally adopted.

[41] Evidentiary *Charter* Motions are common in the work of this Court in a criminal case. A process has arisen there whereby an accused person who raises an evidentiary *Charter* issue is required to file a notice of motion that sets out the request for exclusion of evidence and lists the grounds for the request that evidence be excluded. At a time convenient to the parties, and often before the trial formally starts, the trial judge will preside at a *voir dire* during which, the

Crown presents the evidence which is of concern to the accused. The accused has the opportunity to cross examine witnesses called by the Crown. After the evidence is presented by the Crown, the accused is given the opportunity to adduce his/her own evidence relevant to the *Charter* issue. Following that, absent any reply evidence (which is rare), the parties argue. The accused, who has the onus on the *Charter* motion, argues first, after which the Crown responds. Following argument, the judge makes the decision on the admissibility of the evidence.

[42] If the decision declares the evidence inadmissible, the trial then proceeds without that evidence being adduced. Often, the ruling will result in the inability of the Crown to prove its case, at which time, a stay is entered by the Crown or in the absence of any other admissible evidence adduced by the Crown, the charges are dismissed.

[43] If the decision declares the evidence admissible, the evidence which was presented by the Crown in the *voir dire* is considered to be evidence presented by the Crown at trial in order to avoid the need to call it once again.

[44] It may simply be another means to arrive at the same destination, but I am not convinced that the bifurcation model suggested in the British Columbia cases need be followed here. Rather, an alleged *Charter* breach for which the remedy of excluding evidence is sought could just as easily be achieved through the use of a *voir dire* similar to that employed in a criminal case. There are three advantages to this approach. Firstly, it complies with the general proposition

that the trial judge is the judicial official who should make evidentiary rulings in a trial. After all, it is the trial judge who has ultimate responsibility for the trial. Secondly, the actual evidence that is to be excluded is tendered by the Crown and therefore, the motion is not presented in a speculative manner, and everyone can see the evidence which is being proposed and about which there is a challenge. Thirdly, evidentiary rulings are not generally the subject of appeals during the course of the trial, so that the trial might proceed promptly after the ruling is made. This avoids a situation where appeals from interlocutory motions impede the progress of the action.

[45] However, even the *voir dire* approach is not appropriate in all cases. This case is a good example of that. The motion of Poitras and Murrell seeks an order excluding evidence as to the very subject matter of the action, namely the sum of $213,670 seized by the police following the traffic stop about which Poitras and Murrell complain. The motion of Richichi also requests exclusion of evidence, but only in respect of a series of text messages that were exchanged between Richichi on the one hand and Poitras or Murrell on the other. Whilst the evidence sought by Poitras and Murrell to be excluded concerns the very subject matter of the *in rem* proceeding, the evidence sought by Richichi to be excluded does not.

[46] As to the motion by Poitras and Murrell, the request for an order excluding evidence is not a logical consequence of the alleged breach in a case of this nature. Presumably, it has been chosen because that is the remedy which is

most frequently sought and considered where *Charter* breaches are raised in a criminal trial. However, a CPFA proceeding is not a criminal proceeding. During her oral submission, counsel for the Director argued that applying criminal law procedures in a CPFA proceeding is akin to trying to put a square peg into a round hole. I agree. The reason that the *voir dire* approach works in a criminal trial stems from the fact that a criminal proceeding is "*in personam*", not "*in rem*", and the accused person has a right to remain silent. The theory behind *Charter* objections in a criminal case is based upon the notion that without the evidence of possession from the police who found the contraband, the Crown will be unable to prove beyond a reasonable doubt that the accused was ever in possession of the contraband.

[47] There is a significant difference in a CPFA proceeding. It starts with a statement of claim. The defendants are required to file a statement of defence in which they are obliged to admit, deny, or allege no knowledge of the allegations contained in the statement of claim. The next step is discovery. The defendants are required to produce documents and to answer questions put to them on an examination for discovery. If a defendant refuses to do either, he/she is exposed to an order striking out their defence.

[48] That is why I have concluded that although the defendants may raise a *Charter* issue in this case, the process which allows their concerns to be aired should be adapted to the kind of proceeding which the Director has commenced. Furthermore, the process in respect of the motion by Poitras and Murrell need

not necessarily be the same as the process that would be suitable for the motion filed by Richichi.

THE MOTION OF POITRAS AND MURRELL

[49] As indicated, Poitras and Murrell seek an order which excludes evidence that they were found in possession of $213,670. The only way that such a remedy would be effective arises from the fact that no admission or other evidence exists to tie the cash to Poitras and Murrell. In my respectful view, the remedy sought by Poitras and Murrell lacks logical application in this case.

[50] Firstly, Poitras and Murrell have admitted in their statement of defence that the cash claimed by the Director was found in their possession. Although they have also pleaded that the detention, the search, and their arrest was "unlawful", they also plead that they were in lawful possession of the items seized by the police. Therefore, right on the face of the court record, there is an acknowledgement that the sum of $213,670 was in their possession when the money was seized by the police. Technically, the Director need not spend a great deal of time proving that the police seized the cash and phones because according to the defendants' own pleading, they admit that they were in possession of same. Furthermore, under the *Civil Rules* of this Court, the defendants Poitras and Murrell are obliged to answer questions put to them by the Director. One can only anticipate that if they answer in a manner consistent with their own pleading, they will admit that they were in possession of these

items. In my view, it stretches a legal fiction too far to make an order excluding evidence when the very facts which the evidence will prove have been admitted.

[51] Secondly, there is a unique circumstance in this case. Richichi has been made a party defendant because he claims a portion of the monies which were seized. It makes no sense to exclude evidence concerning the cash if the existence of the cash is necessary for Richichi to prove his case. A ruling excluding the existence of the cash would interfere with Richichi's ability to prove his case. That reason alone is sufficient for ruling out the kind of remedy which Poitras and Murrell suggest would be appropriate in a case of this nature.

[52] I recognize that at first blush, this conclusion appears to deprive Poitras and Murrell of a remedy in this action for a *Charter* breach. However, if one considers the matter in the context of the scheme proposed by the CPFA, it is clear that Murrell and Poitras still have a remedy (assuming they can prove a breach), although not a remedy in the form of an order excluding evidence. Under the CPFA, the onus is on the Director to prove the facts which, either with or without various presumptions outlined in the CPFA, demonstrate that the property claimed is proceeds of unlawful activity or an instrument of unlawful activity. Once those facts are proven, the court is obliged to declare that the property is proceeds of unlawful activity or an instrument of unlawful activity, but there is some flexibility in the remedy to be granted. Section 14(1) of the CPFA reads:

> 14(1) Subject to section 15, and unless it would clearly not be in the interests of justice, the court must make an order forfeiting property to

> the government if it finds that the property is proceeds of unlawful activity or an instrument of unlawful activity.
>
> (Underlining added)

[53] The words "unless it would clearly not be in the interests of justice" provide to the presiding judge a discretion to temper the full effect of a finding that the property is proceeds of unlawful activity or an instrument of unlawful activity. It is this discretion which, in my respectful opinion, may be the source of relief that Poitras and Murrell may use to fashion a remedy for a *Charter* breach.

[54] It is to be remembered that the only reason why an accused person in a criminal case is given the right to ask that evidence be excluded because a *Charter* breach stems from the notion that such a remedy discourages the police from committing *Charter* infringing conduct. A person who is guilty of the charge is as free to request and receive such a remedy as a person who is innocent. That is because there must be a consequence, at least for serious *Charter* breaches. If there is a chance that a guilty person may be acquitted because of a *Charter* breach, the theory is that the police will be more inclined to respect an accused's *Charter* rights. Similarly, to dissuade the police from committing *Charter* infringing conduct where the fruits of the breach extend to the Director, there should be room for some consequence. In a case such as this, where an order for the exclusion of evidence is not of practical or logical assistance, the time for the exercise of the discretion provided to the presiding judge to consider

whether the order of forfeiture should be made regarding all, part, or none of the seized property is the time when the *Charter* remedy should be assessed.

[55] Having concluded that an order excluding evidence is not logical or practical in this case, I dismiss the motion filed by Poitras and Murrell, but without prejudice to their right to seek relief through the exercise of the discretion available to the trial judge when the judge considers whether an order of forfeiture would not be in the interests of justice.

RICHICHI'S MOTION

[56] Richichi is in a different situation. His statement of defence does not dispute that the money and phones were seized. His motion is simply directed to excluding evidence concerning the text messages which were located through the production orders that were granted during the police investigation surrounding the charges that had been laid against Poitras and Murrell. Richichi takes the position that he has a privacy interest in those cell phone records and that interest is being disregarded by the Director in using them in this litigation.

[57] The motion by the defendant Richichi has been compared to a motion concerning the propriety of questions put on an examination for discovery. This is a common type of motion seen in a piece of civil litigation. Here however, the relief sought is an order to exclude the text messages at trial as well as during discovery. In my view, the admissibility of evidence at trial is in the domain of the trial judge, and although the rules now give a pre-trial judge the power to make "provisional advance rulings on the admissibility of evidence at trial", that

power should be sparingly used where one party favours a decision to be made by the trial judge. At any rate, I have not as yet been assigned the role of pre-trial judge for this case. Even if I were, I would favour arranging for a *voir dire* to be heard by the trial judge in advance of the trial, but following any examinations for discovery.

[58] Further, answers given under oath to questions put on an examination for discovery prior to trial are not, in my view, the type of "evidence" which is contemplated in s. 24(2) of the *Charter*. "Evidence" referenced in s. 24(2) concerns evidence which is proposed to be adduced at the trial. Answers to questions put in an examination for discovery do not become evidence until they are read in at trial. In many cases, very little, if any, of the transcript from the examination for discovery of a party is ever used at trial. An order under section 24(2) of the *Charter* is therefore not available to a litigant objecting to questions put on an examination for discovery. It only becomes available when the Director seeks to introduce the examination transcript in whole or in part at trial.

[59] I see little harm in permitting the examination for discovery to proceed in advance of the *Charter* motion. The implied undertaking rule would protect the privacy interest of the information if the information is ultimately kept out of the public record at trial.

[60] Another advantage of permitting the examination for discovery to proceed is that it permits the parties to focus on the specific questions and answers to

which the defendant takes issue. That focus enables the judge to know exactly what portion of the transcript he/she is being asked to exclude.

[61] In making my comments about examinations for discovery, I am also mindful of the general scope of the CPFA. A civil proceeding under the CPFA has a very significant advantage over a criminal proceeding. Under the CPFA, the Director has the opportunity to require a defendant to speak under oath to him. When the CPFA was drafted, no doubt that significant difference was very apparent to the Legislature. An examination for discovery is a very important feature of a CPFA proceeding and should not be easily deferred or dispensed with if there is no real prejudice to a defendant. Other than the time taken to submit to an examination for discovery, (which should not be unduly lengthy), I see no real prejudice to the defendant in requiring the examination to proceed. I might add that where there is evidence that the seized property are not proceeds of unlawful activity or an instrument of unlawful activity, then, the sooner that the Director can examine the defendant for discovery, the earlier the defendant might secure a decision from the Director to discontinue the proceedings.

[62] I add this. One of the arguments put forward by Richichi did not involve the *Charter*. He argued that many of the text messages disclosed by the Director were irrelevant since they extended for a period of 13 months before the traffic stop. It is trite that questions at an examination for discovery that inquire about irrelevant documents are objectionable questions. There is a line between questions that explore areas of some possible relevance and a fishing

expedition. My review of the discovery of Richichi suggests that some of the messages may very well be close to that line, but all may be justified as being at least tangentially relevant to the nature of the relationship between Richichi and Poitras and Murrell. Some may provide evidence of criminal activity. Rather than parse through each individual question, I therefore direct Mr. Richichi to answer all of the alleged objectionable questions at this time. The admissibility at trial of the answers to those questions can be subject to a future ruling by the trial judge.

CONCLUSION

[63] Given the foregoing, I decline to deal with the issue as to whether there were *Charter* breaches as alleged by the defendants. That decision in the case of Gurniak and Murrell should be made by the trial judge at the trial so that it may be factored into the decision of the trial judge as to whether an order of forfeiture should be made, in whole, in part, or at all. The *Charter* breach alleged by Richichi should also be heard by the trial judge if the Director intends to read in any questions and answers from his discovery examination of Richichi.

[64] So, having heard the arguments which admittedly were much more extensive than I have ultimately used in these reasons, the result of the motions is as follows:

a) The motion of Poitras and Murrell is dismissed without prejudice to their right to raise their *Charter* concerns about the detention,

arrest and search if and when the trial judge is considering whether a full order of forfeiture is in the interests of justice.

b) The motion of Richichi to exclude evidence regarding the alleged offending text messages is stayed, without prejudice to it being raised with the trial judge after his examination for discovery has been completed.

c) The motion of the Director is allowed.

[65] I am directing the Director to file a pre-trial brief and arrange a pre-trial conference before me at an early date. My status to make all encompassing orders should be regularized. At that pre-trial, I propose to set a trial date and will consider scheduling a *voir dire* in advance of the trial which would deal with any objections to the entry of all or portions of the transcript from the examination for discovery of Richichi.

[66] Costs may be spoken to if required, although my current leaning would be to defer that decision until the end of the trial.

_____J.