COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Fercan Developments Inc., 2016 ONCA 269
DATE: 20160414
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Laskin, LaForme and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Fercan Developments Inc., GRVN Group Inc.
and FirstOntario Credit Union Limited

Respondents

Croft Michaelson, Q.C., and Kevin Wilson, for the appellant, Her Majesty the Queen

Brian Greenspan and Naomi Lutes, for the respondent, Fercan Developments Inc.

William Friedman and Patrick Bakos, for the respondent, GRVN Group Inc.

Robert Malen and Robert Drake, for the respondent, FirstOntario Credit Union Ltd.

Louis P. Strezos, for the intervener, the Criminal Lawyers' Association

Heard: November 30, 2015

On appeal from the cost awards of Justice Peter C. West of the Ontario Court of Justice, dated January 21, 2015, with reasons reported at 2014 ONCJ 779 and at 2015 ONCJ 695.

H.S. LaForme J.A.:

A. INTRODUCTION

[1] The Crown is no ordinary litigant. It has the power to enforce legislation like the forfeiture provisions of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*"), underlying this appeal. In addition, the Crown has discretion to decide whether or not to exercise these powers. This discretion is generally impervious to review and is derived from the Crown's independence. However, where the Crown fails to exercise its discretion in a fair and objective manner, corrective action may be necessary to protect the integrity of the criminal justice system: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at paras. 42-49.

[2] After 36 days of evidence, multiple motions, and comprehensive written and oral submissions, the application judge dismissed the Crown's application to forfeit two properties under s. 16 of the *CDSA*. The Crown abandoned its application against one of the respondents after 31 days of evidence. The application judge found that the evidence overwhelmingly led to the conclusion that the other two respondents were innocent of any complicity or collusion in relation to the designated-substance offences committed at the properties. After hearing an application for costs brought by all three respondents, the application judge ordered costs of almost $1 million against the Crown.

[3] The Crown appeals the cost awards and argues that they should be quashed or, in the alternative, reduced. This appeal examines the jurisdiction of the Ontario Court of Justice to make these awards of costs against the Crown, the test to be applied when assessing the conduct of the Crown for purposes of awarding these costs, whether the Crown's conduct met the test, and how such costs should be quantified.

B. BACKGROUND

(1) The respondents and their properties

[4] There are three respondents on this appeal: Fercan Developments Inc. ("Fercan"), GRVN Group Inc. ("GRVN"), and FirstOntario Credit Union Limited ("FirstOntario"). Vincent DeRosa was the sole shareholder, director, and officer of Fercan. Nicola DeRosa was the sole shareholder, director, and officer of GRVN.

[5] Fercan owned the former Molson Brewery plant, which comprised approximately 450,000 square feet of space situated on 35 acres of land, in Barrie, Ontario (the "Fercan Property"). The Fercan Property was purchased on October 1, 2001, for $8 million, by another company owned by Vincent. Vincent was interested in selling the chattels acquired with the property (valued at between $3 million and $10 million) and in setting up a water bottling operation. Some parts of the Fercan Property were leased out to commercial tenants as well. Fercan obtained ownership of the property in 2003.

[6] FirstOntario is one of the largest credit unions in Ontario. FirstOntario regularly provided loans to companies owned by Vincent to finance real-estate acquisitions. In September 2003, FirstOntario loaned funds that Fercan used to pay off a mortgage held by the original vendors of the Fercan Property. FirstOntario obtained a first-ranking mortgage for $3 million on the Fercan Property.

[7] Before advancing funds to Fercan, FirstOntario conducted extensive due diligence. The due diligence included multiple visits to the Fercan Property, reviewing Fercan's loan application and supporting documents, reviewing Fercan's relevant leases, obtaining an appraisal of the Fercan Property, obtaining an environmental assessment, and reviewing the fire department's inspection of the Fercan Property. FirstOntario also obtained two collateral mortgages on other properties owned by Fercan and two guarantees as additional security.

[8] GRVN owned a residential property in Phelpston, Ontario (the "GRVN Property"). The GRVN Property was purchased by Vincent on July 29, 2002, and then sold to GRVN on January 30, 2009. Vincent purchased the GRVN Property as a home for his brother, Robert DeRosa, and Robert's family. GRVN also owned a number of other properties, including an auto mechanic shop in St. Catharines, Ontario, and a farm in the Niagara Region.

(2) *CDSA* offences and subsequent investigations

[9] In January 2004, two indoor grow operations were discovered by the police at the Fercan Property in parts of the property that had been leased. The application judge noted that the grow operations were massive and highly sophisticated. He also concluded that those in charge of the grow operations took extensive steps to hide them and prevent anyone from inadvertently finding them.

[10] The police conducted three investigations (Project Plants, Project 3D, and Project Birmingham) over the following years. In October 2010, the police found 10 pounds of marijuana and evidence of a dismantled grow operation at the GRVN Property. A number of people were charged and convicted in relation to the grow operations, including Robert, who was Vincent and Nicola's brother.

[11] Robert was connected to both the grow operations found at the Fercan Proerty and the drugs found at the GRVN Property. Robert was hired as a property manager for the Fercan Property. His responsibilities included leasing space, collecting rents, and ensuring that tenants' needs were met. He used his position to ensure that the grow operations remained hidden. Furthermore, Robert lived at the GRVN Property when drugs were discovered there.

[12] Vincent, Nicola, Fercan, and GRVN were never charged in relation to the grow operations at the Fercan Property or the drugs found at the GRVN Property.

C. THE *CDSA* FORFEITURE PROVISIONS

[13] Sections 16-22 of the *CDSA* create a regime for the forfeiture of "offence-related properties" and provide safeguards for innocent third-parties not implicated in the underlying offences.

[14] Section 14 permits the Crown to obtain a restraint order for any offence-related property, on an *ex parte* basis if necessary. Under s. 16(1), subject to certain provisions discussed below, a court shall order forfeiture of a property if satisfied that a person has been convicted of a "designated substance offence", that the property at issue is offence-related property, and that the offence was committed in relation to that property.

[15] This ability to forfeit offence-related properties advances three objectives. First, it punishes offenders by taking away property used in the commission of designated-substance offences. Second, it deters future offences by imposing costs on anyone who either uses or permits their property to be used in the commission of designated-substance offences. Third, it ensures that the forfeited property is no longer available for the commission of offences: *R. v. Gisby*, 2000

ABCA 261, 271 A.R. 303, at paras. 19-23; and *R. v. Craig*, 2009 SCC 23, [2009] 1 S.C.R. 762, at paras. 16-17.

[16] This forfeiture regime may apply to property owned by individuals who have never been convicted of or even charged with a designated-substance offence: *Craig*, at para. 41. However, s. 16 is subject to ss. 18-19.1. These provisions give effect to the common sense proposition that property owners who acted reasonably, were unaware of and not involved in any criminal activity, and did not profit from any illegal acts should not be subject to punishment or loss: *Ontario (Attorney General) v. 8477 Darlington Crescent,* 2011 ONCA 363, 333 D.L.R. (4th) 326, at para. 100.

[17] Section 19(3), which was the focus of the underlying forfeiture application, permits a judge to return offence-related property to any person who is lawfully entitled to it and who appears innocent of any complicity or collusion in respect of the underlying designated-substance offence.

[18] The *CDSA* provides concurrent jurisdiction to the Ontario Court of Justice and the Superior Court in respect of forfeiture applications. In some cases, the *CDSA* does make distinctions between superior and provincial courts. For instance, only a superior court judge may issue a restraint order under s. 14. However, s. 16 provides that a forfeiture application may be heard by a “court” and that term refers to both provincial and superior courts: *R. v. Nguyen*, 2011

BCCA 471, 285 C.C.C. (3d) 13, at para. 15. Therefore, the *CDSA* does not draw a distinction between the two courts for an application under s. 16.

D. PROCEEDINGS BELOW

(1) Proceedings to vary restraint orders

[19] The Crown obtained *ex parte* restraint orders on the Fercan Property on September 21, 2010, and on the GRVN Property on April 11, 2011. Fercan applied to vary the restraint order to permit it to sell the Fercan Property, pay off FirstOntario's mortgage and some other expenses, and to deposit the balance of the proceeds with the Seized Property Management Directorate[1] pending the disposition of the forfeiture application. This application was dismissed by Mulligan J. on March 23, 2012: *R. v. Fercan Developments Inc.,* 2012 ONSC 2365.

[20] FirstOntario subsequently applied, in June 2012, to vary the restraint order on the same terms. That application was also dismissed by Mulligan J. on August 22, 2012: *R. v. FirstOntario Credit Union Limited,* 2012 ONSC 4808.

[21] The Crown aggressively resisted both applications and stated that it had serious concerns about the relationship between Fercan and FirstOntario. In the Crown's opinion, the Fercan Property was over-encumbered and the timing of

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[1] A directorate of Public Works and Government Services Canada that manages assets seized or restrained under various legislation, including the forfeiture provisions of the *CDSA*.

FirstOntario's mortgage was suspicious. The Crown also argued that it was not for the Crown to "investigate, inquire and determine whether FirstOntario's interest was in good faith and whether they were an innocent third party." Justice Mulligan relied on the fact that the Crown was not willing to concede that FirstOntario was innocent of any complicity or collusion when dismissing both applications.

[22] It is worth nothing that, initially, the Crown did not contest the validity of FirstOntario's security interest. Though the Crown reserved the right to change its position, it stated that it would inform FirstOntario of any such change. However, the Crown never did that but began questioning FirstOntario's interest only when Fercan brought an application to vary the restraint order.

[23] After Fercan's application was dismissed, on March 30, 2012, counsel for FirstOntario wrote to the Crown and offered to "satisfy any concerns [the Crown] may have". The Crown never took FirstOntario up on that offer.

[24] During Fercan's first application, the Crown stated that it would seek production orders to understand the relationship between FirstOntario and Fercan. The Crown delayed and only obtained the production order on June 21, 2012. FirstOntario provided all of the evidence requested by August 2012.

[25] Moreover, FirstOntario included most of the information sought by the Crown in the record for its application before Mulligan J. The Crown admitted that it had not reviewed the materials provided by FirstOntario, even as it took the position that FirstOntario's complicity was a "live issue".

[26] On August 31, 2012, FirstOntario obtained a judgment for possession of the Fercan Property, with Fercan's consent, so that it could participate in the forfeiture application.

(2) The forfeiture application

[27] In May 2011, more than seven years after the discovery of the grow operations at the Fercan Property, the Crown brought an application in the Ontario Court of Justice to forfeit both the Fercan and GRVN Properties. The application was heard over 36 non-consecutive days between October 1, 2012, and June 18, 2013.

[28] The respondents sought a ruling as to which party bore the onus under s. 19(3) of the *CDSA*. The application judge determined that the onus remained with the Crown throughout the forfeiture proceedings. Therefore, it had the burden of showing that the respondents did not appear innocent of any complicity or collusion: *R. v. Fercan Developments Inc.*, [2013] O.J. No. 748 (the "Onus Decision"). This decision was not appealed.

[29] The Crown suddenly abandoned its application for forfeiture of FirstOntario's interest in the Fercan Property on the thirty-first day of the proceeding. The Crown never provided a satisfactory explanation for this decision. It suggested, without any supporting evidence, that Fercan had misled FirstOntario. The Crown also suggested that it abandoned its application because of the due diligence evidence produced by FirstOntario during the proceedings. However, the application judge concluded that the vast majority of that evidence had already been provided to the Crown during the application before Mulligan J.

[30] Ultimately the application judge dismissed the Crown's application: *R. v. Fercan Developments Inc*., 2013 ONCJ 826 (the "Forfeiture Decision"). The application judge concluded that, even though the properties were "offence-related properties" within the meaning of the *CDSA*, the Crown had not demonstrated complicity or collusion on the part of either respondent. Crucially, the application judge concluded that even if the onus under s. 19(3) lay with the respondents, "the evidence overwhelmingly leads to the conclusion that Fercan and GRVN, or the directing minds of those corporations, are innocent of any complicity or collusion" (emphasis added). The Crown did not appeal this decision either.

(3) The costs application

[31] After the application judge dismissed the forfeiture application, the respondents sought costs against the Crown. This was decided in two separate stages by the application judge with separate reasons.

[32] First, the application judge decided the issue of the respondents' entitlement to costs against the Crown. He concluded that the Crown's decision to commence the forfeiture application, its treatment of FirstOntario, and its intransigent "hardball" attitude throughout the proceedings amounted to a "marked and unacceptable departure from the reasonable standards expected of the prosecution" or "Crown misconduct". Therefore, he concluded that the respondents were entitled to costs: *R. v. Fercan Developments Inc.*, 2014 ONCJ 779 (the "Entitlement Decision").

[33] Second, the application judge decided the amount of costs. He awarded costs to FirstOntario in the amount of $297,347, and to Fercan and GRVN in the amount of $570,000: *R. v. Fercan Developments Inc.*, 2015 ONCJ 695 (the "Quantum Decision"). The Crown appeals the costs awards.

[34] I will discuss the application judge's reasons in greater detail later on in these reasons.

E. LEAVE TO APPEAL

[35] Section 676.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that any party who is ordered to pay costs may appeal the order or the quantum with leave. The Crown raises significant issues that should be considered on their merits by this court. Therefore, I would grant leave to appeal.

F. THE ISSUES

[36] Before turning to the issues raised by the appellant, I note a few principles regarding costs in criminal proceedings to place the present appeal in context.

[37] Although they are rare, cost awards have a long and established history as a criminal law remedy: *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 80 ("*Dunedin*"). In *Canada (Attorney General) v. Foster* (2006), 215 C.C.C. (3d) 59, at paras. 62-69, this court outlined three circumstances where costs may be awarded against the Crown: (i) where there has been a *Charter* violation; (ii) where there has been Crown misconduct; and (iii) where there are exceptional circumstances.

[38] In this case, the application judge awarded costs on the basis of Crown misconduct. Therefore, these reasons address only that basis for awarding costs.

[39] The Crown submits that the application judge committed four errors. Specifically, the Crown argues that the application judge: (i) did not have the

jurisdiction to award costs in this case; (ii) erred in his conclusion about the applicable test; (iii) erred in finding that the conduct of the Crown met the applicable test; and (iv) awarded an amount that was excessive.

[40] I will examine each of the alleged errors in order. As I will explain, I conclude that the application judge had the jurisdiction to award costs, identified the correct test, and did not commit any reviewable error. I would, therefore, dismiss the appeal.

G. ANALYSIS

(1) Did the application judge have the power to award costs against the Crown?

[41] Jurisdiction refers to a collection of attributes that enable a court to issue an enforceable order or judgment. A court will have jurisdiction if it has authority over the persons in and the subject matter of a proceeding, and has the authority to make the order sought: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 44.

[42] Before the application judge, the Crown conceded that a provincial court hearing a *CDSA* forfeiture application has the jurisdiction to award costs in appropriate circumstances. The Crown resiles from that position before this court and argues that the application judge could not award costs in this case. Though the Crown challenges the jurisdiction of the application judge generally, its

submissions raise only one question: did the application judge have an implied power to award costs in this case?

[43] I conclude that the application judge had an implied power to award costs in the circumstances of this case. In explaining my conclusion, I will first discuss the principles governing implied powers, then discuss their application here, and finally address some of the arguments raised by the Crown.

(a) Principles governing implied jurisdiction

[44] As a statutory court, the Ontario Court of Justice does not have any inherent jurisdiction and derives its jurisdiction from statute. It is well established that a statutory court or tribunal enjoys both the powers that are expressly conferred upon it and, by implication, any powers that are reasonably necessary to accomplish its mandate: *Dunedin*, at para. 70. The jurisprudence has recognized that statutory courts possess certain implied powers as courts of law: *R. v. Romanowicz* (1999), 45 O.R. (3d) 506 (C.A.), at paras. 59-60. In addition, powers may be implied in the context of particular statutory schemes as well.

[45] This court recently considered the “doctrine of jurisdiction by necessary implication” in *Pierre v. McRae*, 2011 ONCA 187, 104 O.R. (3d) 321. Justice Laskin, at para. 34, noted that a power or authority may be implied: (i) when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling its mandate; (ii) when the

enabling act fails to explicitly grant the power to accomplish the legislative objective; (iii) when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction; (iv) when the jurisdiction sought is not one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; or (v) when the legislature did not address its mind to the issue and decide against conferring the power to the statutory body.

[46] Whether a statutory court is vested with the power to grant a particular remedy depends on an interpretation of its enabling legislation: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 36. When ascertaining legislative intent, a court is to keep in mind that such intention is not frozen in time. Rather, a court must approach the task so as to promote the purpose of the legislation and render it capable of responding to changing circumstances: *Dunedin*, at para. 38.

[47] Furthermore, as in any other statutory interpretation exercise, courts need to consider the legislative context when interpreting the legislation at issue: *ATCO Gas & Pipelines Ltd.,* at para. 49.

[48] Finally, I note that the power being conferred does not have to be absolutely necessary. It only needs to be practically necessary for the statutory

court or tribunal to effectively and efficiently carry out its purpose: *Dunedin*, at para. 71.

(b) Application judge had an implied power to award costs

[49] I conclude that a provincial court hearing a *CDSA* forfeiture application has an implied power to award costs in appropriate circumstances. I come to that conclusion for three reasons.

[50] First, that power is derived from the authority, possessed by every court of law, to control its own process. The Crown accepts, correctly in my view, that a superior court has the ability to award costs pursuant to its power to control its own process. That power is part of a superior court's inherent jurisdiction: *Canada (Attorney General) v. Pacific International Securities Inc.*, 2006 BCCA 303, 209 C.C.C. (3d) 390, at para. 28. This court in *R. v. Chapman* (2006), 78 O.R. (3d) 778, at para. 16, recognized that, pursuant to the power to control its own process, a superior court can order parties to pay costs for frivolous or abusive proceedings or in cases involving misconduct.

[51] A statutory court also has the power to control its own process. That power is necessarily implied in a legislative grant of power to function as a court of law: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19.

[52] The Supreme Court of Canada has discussed the power of statutory courts to control their process in *Cunningham* and in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3. Other than noting that this power cannot contravene explicit statutory provisions or constitutional principles like the separation of power, the court did not discuss the outer limits of a statutory court's ability to control its own process in either decision. However, in both cases, the court treated a statutory court's ability to control its own process as largely parallel to a superior court's ability to control its own process.[2]

[53] Therefore, even though a provincial court does not have any inherent jurisdiction, it does have the authority to control its own process. Though that power comes through an implied grant of power rather than inherent jurisdiction, I see no reason why a provincial court's authority to control its own process should not provide the same power to award costs.

[54] Second, the breadth of a provincial court's mandate under the *CDSA* suggests that it has an implied power to award costs. Under the *CDSA*, a forfeiture application may be heard in either the Superior Court or the Court of Justice. As noted, in certain specific circumstances the *CDSA* draws distinctions between provincial and superior courts. However, it draws no distinction of any

[2] For the sake of clarity, I am not saying that a statutory court's power to control its own process is the same as a superior court's inherent jurisdiction. A superior court's inherent jurisdiction is a reserve or fund of authority that provides a number of different powers, including the power to control the court's process: *Parsons v. Ontario*, 2015 ONCA 158, 125 O.R. (3d) 168, at paras. 63-70.

kind in respect of their role when hearing a forfeiture application under s. 16. The two courts' function is equal in all ways. Therefore, it follows that Parliament intended that the power of the two courts should also be equal.

[55] Third, given the statutory context in which a provincial court hears forfeiture applications, this implied power is reasonably necessary for it to discharge its mandate in a fair and efficient manner. I agree with the respondents that, in light of the Superior Court's power to award costs, depriving the Ontario Court of Justice of that power is undesirable. Without this power a contest would likely arise as to which court the application for forfeiture should be brought in, depending on whether the costs issue was deemed relevant by the Crown. A contest like this would frustrate the scheme of the forfeiture provisions and could not have been intended by Parliament.

[56] Denying jurisdiction to provincial courts in this case would result in unfairness to a respondent. By commencing an application in the provincial court, the Crown would deprive respondents of the ability to obtain costs where they would otherwise be entitled to them. Furthermore, when proceeding in a provincial court, the Crown would never have to worry about potential cost consequences even if it engages in severe misconduct. This would undermine the efficacy of forfeiture applications heard in provincial courts.

[57] The Crown submits that a respondent could bring an application in the superior courts for costs of a proceeding heard in the provincial court. Assuming that such an option is available, it is insufficient to permit the *CDSA* forfeiture regime to operate efficiently. An applicant would be forced to bring a new application before a new judge and to re-litigate at least part of their case. Bifurcating proceedings in this manner is undesirable and should be avoided in all but exceptional cases: *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 52; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 79. Bifurcation negatively impacts the effective and efficient functioning of the courts; it is undesirable and inefficient for both the legal system and for litigants.

[58] In *Dunedin*, at para. 82, McLachlin C.J.C. noted that bifurcation may render remedies “illusory in practice”. She noted that courts should be reluctant to interpret legislation in a way that would require such bifurcation. While *Dunedin* was addressing the availability of costs under s. 24(1) of the *Charter*, these concerns are relevant in the present case and support the conclusion that a statutory court should be able to award remedies when its process has been misused.

(c) The Crown's submissions

[59] The Crown has presented a number of submissions in support of its position that the application judge did not have an implied power to award costs. I address those arguments in this section.

[60] First, the Crown notes that Parliament has enacted provisions in the *Criminal Code* that expressly provide the ability to award costs in certain limited circumstances. According to the Crown, that precludes a finding that the application judge had an implied power to award costs in this case. In effect, this is an argument based on the maxim *expressio unius est exclusio alterius* ("to express one thing is to exclude another"). Because Parliament has expressly provided for costs in certain cases, the Crown submits that the power to award costs is explicitly excluded in all other cases.

[61] I would reject that argument. As noted by Laskin C.J.C. in *Jones v. A.G. of New Brunswick,* [1975] 2 S.C.R. 182, at pp. 195-196, that maxim provides "at the most merely a guide to interpretation" and does not pre-ordain conclusions. And, as Rothstein J. observed in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217, at para. 15, reliance on implied exclusion can be misleading and should be treated with caution. It is not enough to show that the enacting legislature has expressly or specifically addressed a particular matter. A court must be convinced that the

express provisions are meant to be an exhaustive statement of the law concerning a particular matter: *A.Y.S.A.*, at para. 15.

[62] I find the maxim to be of limited assistance in this case. To begin with, the maxim does nothing to address the provincial court's power to control its own process. Furthermore, as noted, when the *CDSA* forfeiture regime is viewed as a whole, an implied power to award costs is necessary for the fair and efficient functioning of the regime established by Parliament. Finally, I am not convinced that the provisions the Crown relies on are meant to be an exhaustive statement on the law concerning costs in criminal proceedings. The provisions at issue are piecemeal and disparate, and it is well established that costs can be awarded on other bases such as inherent jurisdiction or s. 24(1) of the *Charter*. I would, therefore, decline to apply any presumption based on implied exclusion.

[63] Second, and related to the first argument, the Crown points out that Parliament and the courts have expressly limited the availability of costs in the criminal context. The underlying premise seems to be that because costs in criminal proceedings are an extraordinary remedy we should infer that Parliament intended to deny statutory courts any implied power to award them.

[64] While I accept that costs are rare in criminal proceedings, that fact justifies establishing an appropriately high threshold for awarding costs, an issue I will address later on. It does not justify artificially limiting the ability of statutory courts

to control their own process and ensure that they are able to discharge their mandates in a fair and efficient manner.

[65] The fact that costs are an extraordinary remedy is not a basis for inferring that Parliament intended to deny provincial courts the ability to award them. In *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at paras. 40-44, Rosenberg J.A. emphasized the need to construe provincial courts' ability to control their process in a generous manner and with regard to their role as a court of first instance. And, as noted in *Dunedin*, at para. 80, cost awards may be "integrally connected" to a provincial court's role as a trial court. As such, it is far from surprising that provincial courts may have the power to award costs when it is reasonably necessary for them to discharge their mandate.

[66] Third, the Crown submits that a power to award costs is not necessary for statutory courts hearing forfeiture applications. Therefore, the Crown argues, it cannot be an implied power granted to the court here. In support of its position, the Crown refers to decisions rendered by superior courts which have concluded that provincial courts do not have the power to award costs: *R. v. Gunn*, 2003 ABQB 314, 15 Alta. L.R. (4th) 109; and *R. v. Xanthopoulos* (2000), 14 C.C.C. (3d) 562 (Ont. S.C.). The Crown also argues that because statutory courts have other powers to control their own process (for instance, the power to hold

persons before them in contempt or the power to enter a stay of proceedings) they do not need the power to award costs.

[67] With respect, the decisions cited by the Crown apply an inappropriately high threshold for finding that an implied power exists. Statutory courts have a number of powers (such as the authority to appoint *amicus*, to enter a stay of proceedings, to prohibit publication of information identifying a witness or party, or to deny audience to an agent) that are not strictly speaking necessary for the criminal justice system to function or exist. These are powers they exercise as guardians of the rule of law, to protect the integrity of their process, and to ensure that they function as courts of law: *Romanowicz*, at para. 60; *Cunningham*, at para. 19.

[68] In my opinion, the power to award costs falls into the same category. While it is not strictly necessary for provincial courts to simply exist or function, it is necessary to permit them to respond appropriately when their process has been offended. The ability to award costs is “integrally connected” to a court’s control of its own process and denying statutory courts a power to award costs may deprive them of the only effective remedy to control their process and recognize the harm incurred when that process has been abused: *Dunedein*, at para. 81.

[69] This case exemplifies that necessity. Here, the application judge could award costs or take no action whatsoever. The power to hold someone in

contempt or to enter a stay of proceedings, alternatives suggested by the Crown, were not possible here as the need for a response was not apparent before the end of the forfeiture application. Having found that the Crown had demonstrated a marked and unacceptable departure from the standards expected of the prosecution, the application judge could award costs or simply fail to respond to an offence against the court's process. In these circumstances, the power to award costs was reasonably necessary for the court to protect the integrity of its process, to denounce the abuse that had occurred, and to deter future misconduct.

(2) Did the application judge apply the wrong test for determining when costs should be awarded against the Crown?

[70] The application judge held that costs are appropriate where there has been a "marked and unacceptable departure from the reasonable standards expected of the prosecution." The Crown argues that this test applies when awarding costs against the Crown under s. 24(1) of the *Charter* only. The correct standard to apply, it says, is narrower and is conduct that is reprehensible, a serious affront to the authority of the court, or serious interference with the administration of justice.

[71] I disagree. In my opinion, the application judge identified the correct standard: in the context of a forfeiture application under the *CDSA*, a court can award costs when there has been a marked and unacceptable departure from

the reasonable standards expected of the prosecution. I come to this conclusion for three reasons. First, contrary to the Crown's position before us, that standard accurately captures the degree of misconduct required outside the *Charter* context. Second, given the interests at play in a *CDSA* forfeiture application, the marked and unacceptable departure standard is an appropriate threshold. Third, the standard gives effect to both the objectives behind restricting costs in criminal proceedings and the rationale employed when awarding them.

(a) The standard of misconduct for cost awards generally

[72] I acknowledge that courts, when making brief references to the requisite Crown misconduct outside the *Charter* context, have characterized the threshold in a few different ways. For example, in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 97, the court described the necessary Crown misconduct as "oppressive or improper" and the circumstances required as "remarkable". In *Quebec (Attorney General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.) at pp. 449 and 451, the court described the necessary misconduct as "reprehensible".

[73] However, contrary to the Crown's submissions, the courts rendering these decisions were not providing an exhaustive or definitive explanation of the requisite degree of misconduct. In my opinion, the jurisprudence, viewed as a whole, does not support the Crown's position that a standard higher than marked and unacceptable departure applies outside the *Charter* context.

[74] For instance, in *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), Sharpe J.A. defined the traditional Crown misconduct rule (that applies outside the *Charter* context) as follows: “It is only where the accused can show ‘a marked and unacceptable departure from the reasonable standards expected of the prosecution’ that a costs order will be made”. In *R. v. Ontario (Review Board)*, 2009 ONCA 16, 240 C.C.C. (3d) 181, at para. 62, Simmons J.A. held that a trial judge erred in awarding costs because the appellant in that case had not demonstrated a “marked and unacceptable departure from the reasonable standards” expected of it. Justice Simmons explicitly stated that she was applying this test when considering the inherent jurisdiction of a superior court to award costs in criminal cases: para. 64.

[75] Appellate courts in other provinces have also held that the same standard should apply in both the *Charter* and the non-*Charter* context. In *R. v. Sweeney*, 2003 MBCA 127, 179 C.C.C. (3d) 225, at para. 48, Philip J.A. stated that the marked and unacceptable departure standard “will apply whether costs are awarded against the Crown as a *Charter* remedy or under the court’s inherent jurisdiction.” This proposition was also adopted in *R. v. Taylor*, 2008 NSCA 5, 261 N.S.R. (2d) 247, at paras. 47-48 and 54.

[76] Finally, it bears noting that the marked and unacceptable departure standard represents a stringent threshold. It will generally require that the Crown

exhibit a flagrant or marked departure from the norm: *R. v. Singh*, 2016 ONCA 108, at para. 40.

[77] Based on a review of the jurisprudence noted above, I do not accept the Crown's submission that a test higher than the marked and unacceptable departure applies outside the *Charter* context.

(b) Cost awards in *CDSA* forfeiture applications

[78] The marked and unacceptable departure standard was an appropriate one for the application judge to apply given the interests at play in a *CDSA* forfeiture application.

[79] As noted in *R. v. Balemba*, 2009 CanLII 28396 (Ont. S.C.), a *CDSA* forfeiture proceeding is different from routine criminal cases. In particular, it is important to note that forfeiture applications can target innocent third parties who have never been charged with a criminal offence. The involvement of third parties is particularly important because there is some authority for the proposition that a lower threshold should apply when Crown misconduct is in respect of innocent bystanders.

[80] For instance, in *Ciarniello*, where the Crown infringed the *Charter*-protected rights of an innocent bystander, this court concluded that a threshold lower than the Crown misconduct rule should apply. Justice Sharpe gave several

reasons for that conclusion: (i) a third-party is less likely to incur the expenses of litigating than an accused; (ii) compensation is more important when the successful litigant is a bystander to a criminal prosecution; and (iii) a bystander has less procedural protections than an accused and, therefore, it is appropriate to apply greater controls over the Crown's conduct.

[81] Though Sharpe J.A. articulated those concerns in the *Charter* context, they have some resonance here as well. As noted, the *CDSA* forfeiture regime provides a number of protections for bystanders. These protections are meant to ensure fair treatment of innocent third parties: *R. v. Connolly,* 2007 NLCA 5, 262 Nfld. & P.E.I.R. 281, at para. 62; *8477 Darlington Crescent,* at para. 100. As noted in *1431633 Ontario Inc. v. Canada (Attorney General)*, 2010 ONSC 266, 250 C.C.C. (3d) 354, at para. 30, Parliament did not intend to achieve its objectives under the *CDSA* at the expense of innocent third parties. This fact was recognized in *Maple Trust Co. v. Canada (Attorney General)*, 2007 BCCA 304, 221 C.C.C. (3d) 505, at para. 26, where the court referred to the *CDSA*'s "objective of attaching the interests of those implicated in *CDSA* offences while protecting the rights and interests of innocent third parties."

[82] In *Connolly*, a case involving forfeiture provisions in the *Criminal Code*, the court applied the marked and unacceptable departure standard when awarding costs. The court concluded that the Crown exhibited a marked and unacceptable

departure when it ignored the impact of its actions on an innocent third party. Significantly, the court applied this standard without finding any *Charter* violations.

[83] I agree with the application judge that the third-party concerns identified in this context, absent an infringement of a *Charter*-protected right, do not justify applying a standard lower than marked and unacceptable departure. However, in my opinion, given those concerns, the standard should not be any higher in a *CDSA* forfeiture application involving uncharged third parties.

(c) Objectives underlying cost awards

[84] Finally, the marked and unacceptable departure standard aligns with both the objective behind restricting costs in most criminal cases and the rationale for awarding them in the rare cases where they are available.

[85] In respect of the objective for restricting the availability of cost awards, the following passage from *R. v. Robinson*, 1999 ABCA 367, 250 A.R. 201, at para. 29, is frequently cited for the applicable rationale:

> The reasons for limiting costs are that the Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions respecting prosecutions in the public interest. In the absence of proof of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties.

[86] That rationale – namely that the Crown makes decisions and acts in the public interest – justifies restricting the availability of costs against the Crown in ordinary circumstances. However, when the Crown displays a marked and unacceptable departure it is no longer acting with regard to the public interest and, consequently, should no longer be shielded from cost consequences.

[87] Furthermore, the marked and unacceptable departure standard gives effect to the purpose behind awarding costs in the limited circumstances where such awards are available. As noted in *R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 691, at para. 145, costs are awarded where an "accused should not suffer the grievous financial burden that arose from systemic problems that were beyond their control and to which they had in no way contributed."

[88] It is trite to note that a respondent in a forfeiture application will have little control over the Crown's conduct. In fact, courts will generally permit the Crown to operate with significant latitude. As noted in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 37-51, prosecutorial discretion – defined broadly as including a wide range of prosecutorial decision-making – is entitled to significant deference and can be reviewed only for abuse of process.

[89] In other words, if the Crown demonstrates a marked and unacceptable departure – either by commencing a forfeiture application or during such an application – a respondent will be exposed to costs for reasons beyond its

control. That is exactly the kind of situation where a respondent should not be forced to bear a grievous financial burden imposed on it.

(3) Did the application judge err in finding that the conduct of the Crown met the test for awarding costs?

[90] The Crown submits that, even if the application judge identified the correct test, he erred by concluding that the Crown's conduct demonstrated a marked and unacceptable departure. For the reasons that follow, I conclude that the application judge did not err in finding that the Crown's conduct justified a costs award.

[91] I pause to note that a decision to award costs and setting the quantum of costs is entitled to significant deference. As a discretionary order, an appellate court should interfere only if the judge below applied incorrect principles of law, made a palpable and overriding error in assessing the facts, or if patent injustice would otherwise result: *R. v. Cole*, 2000 NSCA 42, 183 N.S.R. (2d) 263, at para. 15; *R. v. Griffin*, 2011 ABCA 197, 510 A.R. 142, at para. 21.

[92] I will first summarize the application judge's reasons for concluding that the Crown's conduct demonstrated a marked and unacceptable departure. Then I will consider the Crown's arguments and explain why I reject them.

(a) Reasons of the application judge

[93] As noted, the application judge found that the Crown's conduct towards all three respondents demonstrated a marked and unacceptable departure. He criticized both the Crown's decision to initiate the forfeiture proceedings and the Crown's conduct during the proceedings.

[94] The application judge's reasons can be summarized as follows:

- **Meritless Application:** The Crown commenced an application that was meritless from the start. It had very little evidence connecting either Fercan or GRVN to the grow operations; any evidence it did have was extremely speculative. On the other hand, there was a lot of evidence that would rebut any inference advanced by the Crown. Choosing to commence an application against innocent, third-party bystanders and ignoring the weaknesses in the Crown's case demonstrated a marked and unacceptable departure.

- **Hardball Attitude:** The decision to commence the forfeiture application demonstrated an intransigent, "hardball" attitude, which continued throughout the hearing. For instace, the Crown took the position that it was not required to provide full disclosure of the evidence relating to the two grow operations to Fercan, GRVN, or FirstOntario, who had never been charged, even though such disclosure would have been provided to an accused person.

- **Treatment of FirstOntario:** The Crown's position that it had "serious concerns" about FirstOntario was based on a fundamental misunderstanding about its relationship with Fercan. It maintained

> that position, without any supporting evidence and without reviewing the evidence available to it, during the two applications before Mulligan J. Forcing FirstOntario to go through the forfeiture proceedings, and to endure the associated costs, also demonstrated a marked and unacceptable departure from the reasonable standards expected of the prosecution.

[95] The Crown raises a number of arguments before us in support of its position that the application judge erred. I address those in turn.

(b) Arguments about onus

[96] In the Crown's submissions, the application judge's decision to award costs resulted from him misunderstanding the applicable onus. In essence the Crown is attacking the application judge's conclusion that the onus resided with the Crown at every stage of the forfeiture application. However, as noted, the Crown did not appeal the Onus Decision. It is not open to this court to consider the validity of that decision, and the Crown cannot collaterally attack the validity of that ruling: *R. v. Wilson*, [1983] 2 S.C.R. 594, at p. 599.

[97] However, to the extent that the Crown argues that their belief about the applicable onus made it reasonable for them to commence the forfeiture applications, I would reject that submission. The application judge's decision to award costs did not rest on his earlier ruling about onus. Rather, he concluded that when all of the evidence available to the Crown before the beginning of the proceedings is considered as a whole, it should have been obvious that the

application could not succeed. Specifically, as he noted at para. 322 of the Forfeiture Decision, “given my findings of fact in relation to the evidence…even if I had ruled in favour of the Crown that the onus under section 19(3) of the *CDSA* was on the lawful owner…it is my view that the evidence overwhelmingly leads to the conclusion that Fercan and GRVN, or the directing minds of those corporations, are innocent of any complicity or collusion in relation to the designated substance offences.”

[98] Furthermore, at para. 131 of his Entitlement Decision, the application judge emphasized that the Crown had an obligation to assess whether there was any evidence of complicity or collusion irrespective of the applicable onus.

[99] In this case, there simply was no credible or persuasive evidence supporting the Crown’s position that GRVN, Fercan, or their principals were involved in any *CDSA* offences. Therefore, contrary to the Crown’s submission, the application judge’s understanding about the onus did not play a significant role in his decision to award costs and the Crown’s belief about the onus did not make its conduct any less unreasonable.

(c) The application was meritless

[100] Central to the application judge’s decision was his conclusion that the Crown’s application was meritless from the start. The Crown argues that it

advanced evidence that could support a finding that Fercan and GRVN were complicit in the drug-related offences.

[101] The application judge did not ignore the potential evidence advanced by the Crown. However, as the application judge correctly noted, the Crown only ever pointed to a few pieces of evidence that, only when considered in complete isolation, might provide some support for the Crown's position. The Crown's case essentially hinged on the fact that Vincent and Nicola's brother, Robert, was implicated in the grow operations.

[102] The application judge recognized, and did not ignore, this fact. However, he concluded that any inferences advanced by the Crown were speculative at best and easily rebutted by evidence that the Crown had access to even before the application was commenced.

[103] For instance, the Crown argued that Vincent must have known about the grow operations at the Fercan Property given their size and sophistication. However, that position was simply untenable. There were a number of people who worked at the Fercan Property on a daily basis, and even some who lived there, who were completely unaware of the grow operations. There was evidence that fire inspections had been conducted at the Fercan Property, that the police had come to the property to arrest an employee of one of the tenants for smuggling drugs, and that the local police conducted training for their sniffer dogs

at the property. The grow operations were not discovered during any of these activities.

[104] Furthermore, the evidence revealed that Vincent visited the Fercan Property on Saturday mornings only. He would spend about an hour there, and only ever visited a few, limited parts of the Fercan Property.

[105] The Crown knew about this evidence before they commenced the application and, in fact, called a number of witnesses who presented this evidence. As correctly noted by the application judge, all of this evidence eliminated the Crown's theory of a "common sense inference of knowledge", which it continued to rely on.

[106] During the forfeiture proceedings, the Crown also argued that there was excessive hydro and water usage at the Fercan Property. However, that assertion was rebutted by evidence provided by the Crown's own witnesses and was, once again, information the Crown knew about.

[107] The Crown also argued that the only reason the Fercan Property was purchased was to house the grow operations. However, that position was also completely untenable based on the evidence.

[108] As noted, the Fercan Property was purchased for $8 million. The chattels that came with the property, which another of Vincent's company acquired and

was then able to sell at a profit, were valued at up to $10 million. Fercan also took on a number of commercial tenants and made considerable investments to establish a water bottling business at the Fercan Property. The evidence clearly established that there was a valid commercial objective behind the purchase of the Fercan Property. All of this was clearly established by the financial records obtained by the police in the course of their investigations.

[109] As noted by the application judge, the police carried out three separate investigations after discovering the grow operations in 2004. However, despite all of their investigations and despite a number of different individuals pleading guilty and providing further evidence about the grow operations; the police never had reasonable and probable grounds to charge Fercan, GRVN, or their principals.

[110] As the application judge noted, the reasonable and probable grounds standard is far less onerous than the balance of probabilities on which the Crown needed to prove its case in the forfeiture application. Despite that dearth of evidence, the Crown chose to commence its application to forfeit the Fercan and GRVN Properties.

[111] The Crown, while advancing an alternate theory in support of its application, argued that Vincent had delegated so much authority to Robert that the latter was a directing mind of Fercan. The Crown argued that this made Fercan complicit. The application judge noted that this theory arose after the

evidence had been completed. It was advanced without an evidentiary foundation, as the Crown did not lead any evidence about the nature of the corporation, its structure, its corporate policy, and its policies respecting delegation. In fact, the evidence called during the forfeiture hearing contradicted this theory.

[112] After reviewing all of the evidence at issue, the application judge summarized his conclusion as follows: “The Crown’s position was wholly and completely unsupported by the evidence in the possession of the Crown and was not based on any proper or thorough review of the witnesses’ statements.” That conclusion is supported by the record.

[113] This was not a weak but tenable case that was simply rejected at the end of the day. This was a case where any reasonable assessment of the evidence available to the Crown would have demonstrated the hopelessness of success. And, more to the point, it is a case where any reasonable assessment of the evidence should have caused the Crown to reconsider their conviction that Fercan, GRVN, or their principals were at all implicated in the grow operations. The only way to maintain that conviction would be to view certain facts in complete isolation and to completely ignore the wealth of evidence rebutting the Crown’s position. That, in my opinion, discloses a marked and unacceptable departure.

(d) Conduct towards FirstOntario

[114] The application judge concluded that the Crown's conduct towards FirstOntario was another instance of a marked and unacceptable departure. The Crown argues that it acted appropriately. I agree with the application judge's conclusion. The Crown's conduct towards FirstOntario may be the most troubling aspect of this case.

[115] The Crown's concerns about FirstOntario were misplaced from the very beginning and were based on a misunderstanding of its relationship with Fercan. For instance, the Crown thought that the Fercan Property was overleveraged because of collateral mortgages in favour of FirstOntario and the rate of interest on those mortgages. Those concerns were later shown to be completely misplaced. In fact, the Crown admitted that it had simply misunderstood the nature of a collateral mortgage. And they failed to understand that the actual rate of interest on the mortgages was only prime plus 1% and that the mortgages, in line with industry practice, simply listed a fluctuating interest rate on a collateral mortgage at 24%.

[116] These misunderstandings could have been removed if the Crown had gained a proper understanding of the documents they had been reviewing. Instead, the misunderstanding festered and the Crown's misplaced suspicions became even more entrenched.

[117] Despite an avowed desire to get to the truth, the Crown never accepted FirstOntario's offer to answer any questions and allay any concerns the Crown may have, delayed in getting a production order to obtain documents they said that they needed, and then delayed even further in reviewing the evidence provided. Despite that, and without fully reviewing FirstOntario's disclosure, the Crown expressed serious doubts to Mulligan J. about the validity of FirstOntario's security interests.

[118] Significantly, the Crown completely abandoned its opposition to FirstOntario's interest near the end of the forfeiture application. It implied that this concession came about due to new information. However, the Crown had not obtained any new information. The concession came after FirstOntario had called its evidence, all of which was contained in the materials provided to the Crown in July 2012 in response to the production order, and in FirstOntario's materials filed with its application before Mulligan J. It was clear that the Crown had not reviewed this material, despite advising Mulligan J., in two variation hearings, that the Crown had "serious concerns" regarding FirstOntario's complicity and collusion with the designated-substance offences.

[119] If the Crown had appropriately reviewed and understood the information available to it, FirstOntario would not have been forced to participate in the forfeiture proceedings. The Crown's conduct towards FirstOntario was in sharp

contrast to how it treated a mortgagee at the GRVN Property. The Crown permitted the GRVN Property to be sold and a mortgage on that property paid out, presumably after concluding that there was no evidence of collusion or complicity. There was similarly no real evidence of collusion or complicity on the part of FirstOntario. However, the Crown, without justification, questioned its security interest and motives, forced it to participate in a lengthy forfeiture application, and then, without explanation, simply dropped its opposition at the last possible minute.

[120] The application judge did not err in concluding that the Crown's conduct towards FirstOntario displayed a marked and unacceptable departure.

(e) Responsibility for costs incurred

[121] The Crown's position on appeal is founded on two overarching arguments. First, the Crown asserts that it did not misapprehend the evidence available to it and was merely advancing its position appropriately. As noted, I cannot agree with this submission.

[122] Second, the Crown argues that the consequences suffered by the respondents were not its responsibility. Rather, they were just the necessary consequences of the legislative scheme created by Parliament and, therefore, the Crown should not be held responsible.

[123] In my opinion, the Crown's position reflects an abdication of its responsibilities that cannot be condoned. Crown prosecutors play an undeniably important role in the administration of justice. It is well established that they play a quasi-judicial role as "ministers of justice": *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25. They must act in the interests of the community to see that justice is properly done: *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616.

[124] When discharging their role, Crown counsel have an obligation to ensure that the power of the state is used only in pursuit of impartial justice: *Oniel v. Marks* (2001), 141 O.A.C. 201 (C.A.), at para. 67. Crown counsel must discharge their role with the utmost integrity and sound judgment, remaining open to the possibility of the innocence of the accused and avoiding "tunnel vision": *R. v. Delchev*, 2015 ONCA 381, 126 O.R. (3d) 267, at paras. 64-65. Though these principles were articulated in the context of criminal prosecutions, they remain relevant in proceedings like this one.

[125] I cannot agree with the Crown's position that it should bear no responsibility for the costs incurred by the respondents who were all innocent, third-party bystanders in this case. When the Crown commenced the underlying forfeiture application, it exercised the coercive power of the state and forced the respondents to participate in a lengthy and onerous proceeding to defend their legitimate property interests. In my opinion, the Crown had some obligation to

ensure that it was using this power in the public interest and to advance the interests of justice. It failed to discharge that obligation.

[126] The consequences could have been avoided if the Crown had reviewed the evidence available to it in a reasonable fashion. Its failure to do so imposed considerable costs on the respondents who, on any reasonable view of the evidence, were innocent, third-party bystanders. The Crown cannot simply disclaim all responsibility for the consequences that flowed from its decisions.

[127] Before concluding on this issue, I note that nothing in these reasons suggests that mere errors on the part of Crown counsel should attract sanction from the courts. Crown counsel must often act in challenging circumstances and make difficult judgment calls. As noted in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, at para. 70, “[c]rown counsel will, from time to time, make good faith errors” and it will not advance the public interest to expose them to sanctions for any and every error.

[128] This, however, is not a case of inadvertent or good faith errors. The Crown fell short of the applicable standard by failing to properly consider the evidence available to it, by commencing a completely meritless application, and by taking an unjustifiably hardline attitude with all three respondents and refusing to consider the simple fact that there may be no collusion in this case. The Crown’s

failure to discharge its obligations was constant and continuing, and it imposed considerable costs on the respondents.

[129] Thus, overall, the application judge's conclusion that the Crown's conduct rose to the level of a marked and unacceptable departure is reasonable. I am not persuaded that there is any basis to interfere with his decision and I would dismiss this ground of appeal.

(4) Did the application judge order excessive costs and should there be a reduction?

[130] The Crown's final ground of appeal is that the application judge erred by awarding costs that were excessive. The Crown makes three submissions in support of this ground of appeal.

[131] First, by analogy to the civil costs regime, the Crown argues that costs should have been awarded on the partial indemnity scale. The application judge accepted that as the starting point, but then erred by awarding substantial indemnity costs.

[132] Second, the Crown submits that the application judge erred by using the beginning of the proceedings as the starting point for his costs calculation. The application against Fercan and GRVN was not always meritless; in particular, until the Onus Decision, the legal onus lay with the respondents. In relation to FirstOntario, the Crown did not receive relevant materials from it until June 2012;

therefore, no costs should be awarded for proceedings that occurred before that point in time.

[133] Finally, according to the Crown, the application judge never considered whether the hourly rates claimed by respondents' counsel were reasonable. He simply accepted them at face value.

[134] In varying degrees, I disagree with each of the Crown's submissions and would reject them all. In explaining my conclusion, I will first explain the governing principles. I will then summarize the application judge's reasons and, finally, will provide my reasons for dismissing the Crown's submissions.

(a) Governing Principles

[135] This court recently addressed the quantification of costs in a criminal proceeding in *Singh.* Although *Singh* involved the quantification of costs awarded under s. 24(1) of the *Charter*, the principles articulated by Pardu J.A. provide valuable guidance in this case.

[136] First, it is an error to rely on the civil costs regime in a criminal proceeding. At para. 48 in *Singh*, Pardu J.A. explains that costs awarded in criminal proceedings serve a very different purpose. In civil proceedings, costs partially indemnify a litigant, encourage settlement, deter frivolous proceedings, and discourage unnecessary steps. Costs against the Crown in criminal proceedings

are meant to discipline and deter misconduct. Indemnification, although it remains a valid consideration when quantifying costs, is much less significant: *Singh,* at para. 66.

[137] Second, when quantifying costs, a judge must keep in mind that the costs will be paid out of the public purse: *Singh,* at paras. 56-57. Therefore, the objective must be to provide a "reasonable" portion of the costs incurred by the respondents.

[138] Third, in *Singh,* at para. 57, Pardu J.A. notes that the precise calculation is a task for the judge to undertake while taking into account the following factors:

- the nature of the case and the legal complexity of the work done;
- the length of the proceedings;
- the nature and extent of the Crown's misconduct;
- the impact of the misconduct on the rights of the innocent third-parties; and
- the conduct (or lack thereof) of the innocent third-parties.

(b) Reasons of the application judge

[139] After a thorough review of the jurisprudence, the application judge concluded that costs awarded in criminal proceedings are quantified on a "reasonableness" basis, i.e. have the costs been reasonably incurred and do

they reflect what is proper and appropriate given the complexity and significance of the proceedings.

[140] The application judge identified a number of other considerations that must be kept in mind: (i) the quantum of costs will depend on the specific circumstances of the case; (ii) costs must be paid from the public fund and the Crown should not be viewed as a limitless “deep pocket”; and (iii) the court should set the quantum that will effectively denounce any Crown misconduct and deter future misconduct.

[141] Turning to the facts of this case, the application judge found that:

- The Crown misled Mulligan J. during the two applications to vary the restraint order by implying that the Crown had a *prima facie* case against FirstOntario when, in fact, the Crown had a fundamental misunderstanding of the mortgages and had not yet reviewed the documentation respecting FirstOntario’s due diligence.
- If the Crown had reviewed and assessed the due diligence information, they would have consented to the application to vary the restraint order and FirstOntario would not have been required to participate in the forfeiture proceedings.
- FirstOntario made attempts to alleviate and prevent costs.

- The Crown's "hardball" attitude and conduct resulted in a significant number of additional hours of preparation by the respondents' counsel (for instance only providing disclosure three weeks before the hearing and providing additional disclosure throughout the hearing).

[142] The application judge also excluded some of the costs claimed by the respondents because he concluded that: (i) Fercan and GRVN's conduct lengthened the proceedings and fees incurred, (ii) some of the costs relating to motions before the Superior Court should be sought through separate applications; (iii) some of the fees were not generated as a result of the Crown's misconduct; (iv) there was unnecessary duplication of work between counsel representing Fercan and GRVN; (v) the costs incurred by GRVN were excessive given that, at the end of the day, there was only $20,000 subject to forfeiture after its mortgagee had been paid out; and (vi) in some instances, the application judge was unable to discern what fees were generated based on the parties' bill of costs and therefore could not include them in the award.

[143] The application judge found that the reasonable costs of the respondents were as follows:

- Fercan and GRVN: $589,597.00 in fees and $26,954 in disbursements.
- FirstOntario: $245,000 in fees and $52,347.76 in disbursements.

[144] He then went on to determine what a reasonable quantum would be in the specific circumstances of the present case. He noted that the starting point of a criminal costs award appears to be partial indemnity, based on prior case law. The quantum increases depending on the actual conduct engaged in by the Crown. The more serious the Crown misconduct, the more likely the costs award will approach costs on a substantial indemnity basis.

[145] The application judge emphasized that, in this case, the Crown was not seeking to forfeit property owned by someone convicted of an offence. Fercan, GRVN, and their principals had never been charged with any offence related to the grow operations. Moreover, the application judge noted that the Crown stood to gain property worth more than $7 million if it had been successful.

[146] While acknowledging that the Crown had not infringed any *Charter* rights in this case, the application judge concluded that the Crown's conduct still deserved denunciation. He concluded that the Crown had a responsibility to pay "greater heed to a bystander's property rights" and to assess whether there is any evidence of complicity or collusion on the part of the third party who was not charged.

[147] Finally, the application judge accepted the Crown's argument that in criminal cases there must be a "causal connection" between the costs claimed and the impugned conduct of the Crown.

[148] In light of his findings, the application judge concluded that FirstOntario should receive costs on the substantial indemnity scale. He awarded FirstOntario costs in the amount of $297,347 plus HST. The application judge also awarded a total of $570,000 plus HST to Fercan and GRVN.

(c) The costs awarded were reasonable

[149] Admittedly, the application judge erred by relying on the civil costs regime. As noted, costs in criminal proceedings are distinct and should not be quantified by analogy to the civil costs regime.

[150] However, the application judge's overall approach when quantifying the costs awarded was correct. He explicitly noted that his task was to award costs that were reasonable in the circumstances before him. He correctly focused on a constellation of factors aimed at the objectives of some compensation, denunciation, and deterrence. These included:

- the conduct of the Crown and the respondents;
- the complexity of the proceedings;
- the matters put in issue;
- the concessions made, if any;
- disclosure by FirstOntario;
- the fact that a cost order would be paid out of public funds;
- the fact that there are no absolute rules in assessing reasonable costs;

- the fact that the respondents were innocent third-parties; and
- the outcome of the proceeding that he found was meritless.

[151] This constellation of factors was wholly appropriate in arriving at the cost awards. The factors are well rooted in principle, policy, and logic. They meet the aims of denunciation and deterrence and an element of compensation for the costs incurred by the respondents.

[152] The three arguments advanced by the Crown have failed to identify an error justifying appellate intervention. First, as noted, the civil costs regime is not a valid analogy. Therefore, the Crown's argument that the application judge should have restricted himself to partial indemnity costs must be rejected.

[153] Second, the application judge did not err by using the beginning of the forfeiture application as a benchmark when awarding costs. As noted, the Crown's concerns about FirstOntario were misplaced from the beginning and rooted in fundamental misunderstandings about its security interests. GRVN and Fercan were subject to an application that was meritless based on the evidence available to the Crown from the very beginning. Furthermore, the application judge was careful to award costs that were causally connected to the Crown's misconduct.

[154] Third, I am not convinced that the application judge failed to consider whether counsels' hourly rates were reasonable. He carefully scrutinized all costs claimed by the respondents. Where he found their bill of costs to be unreliable or that the costs claimed were either unreasonable or unconnected from the Crown's misconduct, he refused to award the costs at issue. The application judge was fully aware that the costs awarded had to be reasonable.

[155] Without a doubt, the quantum of costs awarded by the application judge was high. As noted in *Singh*, at paras. 53-57, the quantum of costs awarded in criminal proceedings is moderated by underlying policy considerations. Costs awarded in criminal proceedings are often moderate, and I do not endorse a departure from that practice in general.

[156] However, just as clear is the fact that costs awarded by a judge at first instance are afforded considerable deference on appeal. In this case, the application judge was intimately familiar with the proceedings and the relevant evidence. As noted, apart from one inconsequential error, he identified and applied the correct principles in quantifying costs.

[157] Furthermore, in the circumstances of this case, I cannot say that the costs awarded were excessive. The Crown forced three separate respondents to proceed through a lengthy forfeiture application and a number of related motions. As noted by the application judge, the forfeiture application was wholly and

obviously meritless from the beginning. The properties at issue, which the Crown would have obtained if successful, were valuable. As such, the objectives of both deterrence and denunciation justify a high award in this case and, therefore, I cannot conclude that the application judge's award was unnecessarily excessive.

H. DISPOSITION

[158] For these reasons, I would dismiss the appeal. The respondents have asked that this court award costs of the appeal. I would require the respondents to file brief submissions, addressing both entitlement to costs and the quantum of any costs if awarded, within 15 days from the release of these reasons. The Crown should file any responding submissions within 15 days after receipt of the respondents' submissions.

Released: ("HSL") April 14, 2016

"H.S. LaForme J.A."
"I agree John Laskin J.A."
"I agree G. Pardu J.A."