

Date: 1999 05 19
Docket: CR 03729

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

CANADA) IN THE MATTER OF AN APPLICATION
THE NORTHWEST TERRITORIES) BY THE ATTORNEY GENERAL OF
CITY OF YELLOWKNIFE) CANADA PURSUANT TO SECTION
492.33(1) OF THE CRIMINAL CODE
) FOR AN ORDER RESTRAINING
) CERTAIN PROPERTY

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

**CLAUDE YVON CAZA (Born: November 2, 1943).
CAZA AND SON ENTERPRISES LIMITED,
and CAZA INVESTMENTS LIMITED**

Respondents

MEMORANDUM OF JUDGMENT

[1] In March 1998 an *ex parte* restraint order was made herein pursuant to Part XII.2 of the *Criminal Code* (Proceeds of Crime) with respect to certain properties in Iqaluit, Northwest Territories. The respondents named in the order are Claude Caza,

Caza and Son Enterprises Limited and Caza Investments Limited. It is common ground on the present application that on the *ex parte* application leading to the March 1998 restraint order it was alleged that the subject Iqaluit properties were proceeds of crime relating to enterprise crime offences allegedly committed by Claude Caza, properties subject to possible forfeiture to the Crown pursuant to provisions of the *Criminal Code*.

[2] On the present application the applicant is one Roch Lessard Inc. It says that it is the legal owner of property in Iqaluit that is intermingled with the properties being restrained under the March 1998 Court order. It seeks relief with respect to its interest in that property. It makes the present application on notice to the Attorney General of Canada (representing the Minister of Public Works and Government Services who, pursuant to the restraint order, is charged with the control and management of the properties subject to the restraint order) and on notice to Caza.

[3] Prior to April 1997 Lessard owned a leasehold property at the Iqaluit airport on which it had built a commercial building. Lessard obtained its leasehold interest from the federal Crown which granted Lessard a 20-year lease. The administration of this federal lease was subsequently transferred from the federal government to the Government of the Northwest Territories.

[4] In April 1997 Lessard agreed to sell the property (i.e., the building and the leasehold interest in land) to Caza. They entered into a written agreement. The purchase price was \$425,000. There was a down payment of \$100,000.00, with the balance to be paid over time at \$6,589.86 per month. Other relevant terms of the agreement included:

- a) the sale was conditional upon Lessard obtaining the written consent of the federal Minister of Transport to the assignment of the land lease -- which was a condition in Lessard's head lease;
- b) Caza was to make the monthly payments to Lessard on the sale price while the parties awaited the consent of the Minister of Transport;
- c) Caza was to be responsible for any costs incurred in obtaining the consent of the Minister of Transport;

- d) Caza was to maintain insurance coverage on the premises to protect Lessard's interest as unpaid vendor;
- e) Caza was to pay the lease payments to the federal Crown pursuant to the head lease;
- f) Caza was to pay all municipal property taxes as these became due;
- g) in the event of Caza's default in payment of the monthly installments under the sale agreement, insurance premiums, taxes, or federal lease payments, Lessard was entitled to terminate the sale agreement and retake possession of the property.

[5] Caza made the \$100,000.00 down payment and took possession of the property. Caza rented portions of the premises to tenants and collected monthly rental payments. Caza commenced paying the monthly installments to Lessard, and the municipal taxes, et cetera. Caza's solicitors undertook to obtain the written consent of the Minister of Transport. This latter task became cumbersome or difficult, and for unspecified reasons the Minister's consent had not been obtained by March 1998.

[6] In March 1998 the office of the Attorney General of Canada, in conjunction with its investigation of Caza of the commission of enterprise crime offences, made an *ex parte* application in this Court for a restraint order under s.462.33 of the *Criminal Code*. On that application the Crown alleged such crime, that certain Iqaluit properties were the proceeds of such crime and were therefore subject to forfeiture. The purpose in seeking a s.462.33 order was to ensure that the properties remained intact pending a later application for forfeiture.

[7] There are five distinct Caza properties named in the March 1998 restraint order, the property acquired from Lessard being one of these.

[8] Pertinent excerpts from the March 1998 restraint order are as follows:

“This Court orders that:

1. No person, including Claude Yvon CAZA, Caza and Son Enterprises Limited, and Caza Investments Limited (hereinafter the Respondents) their heirs, agents, solicitors or any other person on their behalf, shall dispose of or otherwise deal in any manner with any interest in the Properties described above except as hereinafter provided for in this Order.

...

3. The Minister of Public Works and Government Services (the Minister), or his designate, is appointed to take control of and to manage the Properties, described above, as hereinafter provided for in this order.

...

5. No mortgage, hypothec, charge, conveyance of any interest or any other form of encumbrance or transfer of ownership may be registered or placed against the Properties as of the date of this Order except as permitted by Order of this Court. Any mortgage, hypothec, charge, conveyance of any interest or any other form of encumbrance filed without permission of this Court shall be deemed to be void.

6. No action, application or other proceedings shall be taken or continued against any of the properties listed above, other than in accordance with the procedures set out below, without leave of this Court first being obtained and upon three clear days notice to the Attorney General of Canada.

...

8. If all or a portion of the properties listed above in paragraphs A through E under the heading “the Properties” are the subject of a written lease agreement as of the date of this Order, then the Respondents may continue to rent or lease that property in which an interest is held subject to the terms and conditions of the existing lease or rental agreement in accordance with the laws of the Northwest Territories, subject to the following conditions:

...

8.04 All payments due to the Landlord under the lease or rental agreement shall be paid to the Minister of Public Works and Government Services as directed in writing by the Minister, provided that a copy of this Order shall first be served on the tenant. The Minister of Public Works and Government Services may use any rental payments received to discharge the obligations of the Landlord under the lease or rental agreement, including the payment of any outstanding

mortgage amounts due owing, and shall maintain an accounting of monies received.

...

9. The registered mortgagee may exercise their power of sale on three clear days notice to the Attorney General of Canada prior to proceeding to sell the Properties so as to realize upon the registered mortgage pursuant to the law of Northwest Territories and in accordance with the following procedure..."

[9] In an affidavit filed in support of the present application Roch Lessard says that Caza has defaulted under the sale agreement, as follows:

- a) Caza has not paid to Lessard the monthly installments due since April 1998;
- b) Caza has not paid land lease payments which are due under the head lease;
- c) Caza has not paid municipal taxes which are due;
- d) Caza has allowed the insurance coverage to lapse.

[10] Evidence adduced on the present application indicates that the Seized Property Management Directorate of the federal Department of Public Works and Government Services has, since the March 1998 restraint order, been managing the properties under restraint and has been collecting rental payments from tenants using the properties (as authorized by the March 1998 restraint order of this Court). It retained these rental payments and only in March 1999 did it take steps to pay the outstanding municipal taxes and ground lease payments. The Directorate has not made any monthly installment payments to Lessard pursuant to the April 1997 sale agreement between Lessard and Caza. Hence the need for Lessard to seek some sort of relief.

[11] Absent the March 1998 restraint order, Lessard would no doubt be taking proceedings against Caza to rectify Caza's defaults under the sale agreement. The March 1998 restraint order, in particular paragraphs 1 and 6 thereof, prohibit Lessard from taking such proceedings without leave of this Court. In all of the circumstances I see no reason to deny such leave.

[12] If the Lessard/Caza sale agreement was current; i.e., all monthly installments were paid to Lessard when due, Lessard would no doubt be continuing in its efforts to obtain the written consent of the Minister of Transport (or that Minister's assignee in the Government of the Northwest Territories or Government of Nunavut) in order to facilitate the formal assignment of the ground lease to Caza pursuant to the terms of the sale agreement. Again, however, paragraphs 1 and 6 of the March 1998 restraint order restrict Lessard in such dealings, without leave of this Court. As stated, I see no reason to deny such leave, in the circumstances.

[13] I turn now to the failure of the Seized Property Management Directorate to pay the monthly installments to Lessard as unpaid vendor, from the rental payments it has been collecting from tenants.

[14] The Directorate, and counsel for the Directorate on this application, by way of explanation for this refusal, point to the unfulfilled condition of the Lessard/Caza agreement requiring the written consent of the Minister of Transport, and the corresponding condition in the head lease.

[15] It is submitted that Lessard's failure to obtain the Minister's written consent, as required by the head lease and the Lessard/Caza sale agreement, renders the latter agreement unenforceable and that Lessard cannot compel payment of the ongoing monthly installments. With respect, I disagree. Lessard and Caza made their bargain. They agreed that the monthly installments on the unpaid balance of the purchase price were to continue while awaiting the Minister's written consent. The Directorate, in seeking to restrain Caza's property under the proceeds of crime legislation, must take that property as they find it; in this case an interest in property that is subject to an ongoing obligation to pay the purchase price to an innocent, unpaid vendor. The requirement for the Minister of Transport to consent to any assignment of the ground lease by Lessard is a matter between that Minister and Lessard and should not concern the Directorate. I see no reason why the Directorate should not be making monthly installments to Lessard from any available rental revenues it is collecting from this property.

[16] I note that the wording of the March 1998 restraint order obtained by the Attorney General contemplates that restrained property may be subject to a mortgage, and, in that case, in the period of 'restraint' prior to the forfeiture hearing, mortgage payments are to be continued and the rights of the mortgagee are to be respected.

There is no valid reason why the rights of an unpaid vendor should not be afforded the same deference.

[17] The delayed Minister's consent is, in the context of the Attorney General's pursuit of Caza's alleged proceeds of crime, a red herring.

[18] I understand, of course, that the office of the Attorney General of Canada in taking these criminal proceedings specifically against the Lessard/Caza property is, in reality, tracing and targeting Caza's apparent \$100,000.00 investment in this property. However, any relief granted by the Court to Lessard on the present application does not preclude the Attorney General asserting its "proceeds of crime" claim at the eventual forfeiture hearing, nor the forfeiture of the \$100,000.00 interest itself, if warranted.

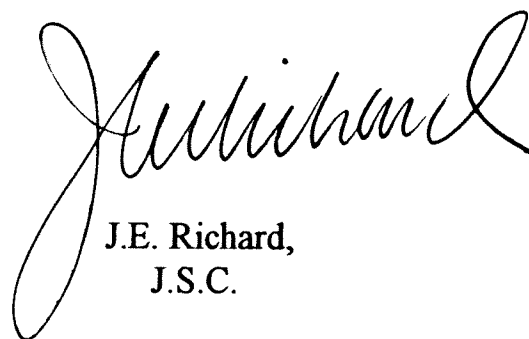
[19] What is certain is that Lessard is the legal owner of the subject property; what is uncertain is what interest of Caza in the subject property, if any, is subject to forfeiture proceedings by the Crown.

[20] The extraordinary remedies of seizure, restraint and forfeiture of property afforded the Crown in Part XII.2 (Proceeds of Crime) of the *Criminal Code* ought to be exercised with caution, particularly with regard to the property of innocent third parties.

[21] Accordingly, I hereby grant leave to Lessard to commence and prosecute such realization and foreclosure or cancellation proceedings against Caza Investments Limited with respect to the subject property as may be permitted by law, on notice to the Attorney General of Canada. In addition, if same is required, I hereby grant leave to Lessard to deal with the subject property by communicating with the Minister of Transport or his assignee to obtain the Minister's consent to facilitate the Lessard/Caza sale agreement, again on notice to the Attorney General. I decline to make any order compelling any specific distribution of the monthly rental revenues during the "restraint" period. I shall leave it to the parties to do what is appropriate in that regard, in the context of what I have said above.

[22] In my view, Lessard should receive its costs of the present application from the Attorney General of Canada, as requested. With respect, there should have been no need for a contested hearing of this application. The position taken by the Attorney General, on behalf of the Directorate, was contradictory and untenable. On the one

hand, it submits the Lessard/Caza transaction is unenforceable, yet if that is so, then the property is Lessard's and is not subject to attachment/forfeiture by the Attorney General *via* Caza's alleged criminal conduct. The Attorney General of Canada has knowingly intercepted the proper flow of funds from Caza's tenants through to Lessard (the lawful owner and unpaid vendor) for a period in excess of one year. In these circumstances I order the Attorney General of Canada to pay Lessard's party and party costs of this application.



J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
19th day of May 1999

Counsel for the Applicant Roch Lessard Inc.:
Counsel for the Attorney General of Canada:
Counsel for the Respondents Caza,
Caza & Son Enterprises Ltd. and
Caza Investments Ltd.

A.H. Lefever
Robert A. Sigurdson
Gerard K. Phillips

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MEMORANDUM OF JUDGMENT OF
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