Date: 2017 05 11
Docket: S-1-CR-2017 000 009

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

ATTORNEY GENERAL OF CANADA

Applicant

- and –

LINDSEY ROCHER

Respondent

MEMORANDUM OF JUDGMENT
(FORFEITURE APPLICATION)

I) INTRODUCTION AND BACKGROUND

[1] This is an Application for Forfeiture in relation to a Recognizance entered into by Lindsay Rocher on April 26, 2016 (the Recognizance). The Recognizance required a cash deposit of $50,000.00. Les Rocher, Lindsay's father, agreed to be a surety and pledged an additional amount of $50,000.00, without deposit. On May 2nd, 2016, Mr. Rocher signed an Assignment with respect to the cash deposit in favor of his father. No one disputes that Les Rocher was the one who provided the cash deposit monies.

[2] On November 8, 2016, the Recognizance was amended and the cash deposit amount was reduced to $10,000.00. This is the amount that the Crown now seeks to have forfeited.

[3] The Recognizance contemplated that Mr. Rocher would, immediately upon release, attend a drug treatment program outside the Northwest Territories. Upon

his return, he was required to abide by a number of conditions. Two of these conditions were that he report in person to the R.C.M.P. Detachment in Yellowknife every Wednesday, and that he not consume or possess any controlled substances or prohibited substances.

[4] Mr. Rocher attended the drug treatment program and returned to Yellowknife at the end of August 2016. Between September 12 and December 28, 2016, there were eleven occasions when he breached the reporting condition. On three occasions, he did report, but not on the Wednesday. The other eight times, he did not report at all. On November 24, 2016 Mr. Rocher overdosed on Fentanyl. The consumption of that drug, obviously, also constituted a breach of the Recognizance.

[5] Mr. Rocher pleaded guilty to two charges of breach of Recognizance arising from those events. He was sentenced on these and other charges on January 12, 2017. *R v Lindsay Rocher*, 2017 NWTTC 01. He received a global term of imprisonment of 160 days, minus credit for remand time. For the breach charges, he was sentenced to 1 day in jail on each count, to be served concurrently with the other sentences.

II) POSITION OF THE PARTIES

[6] The Crown seeks forfeiture of the $10,000.00 cash deposit. It does not seek any forfeiture order against Les Rocher for the $50,000.00 that was pledged without deposit.

[7] In addition to the Certificate of Default and Certified Copies of the Informations charging the offenses that were dealt with in the Territorial Court, the Crown relies on the following materials on this Application: the Agreed Statement of Facts adduced at Mr. Rocher's January 12, 2017 sentencing hearing; the Pre-Sentence Report prepared for that hearing; and the Reasons for Sentence referred to above at Paragraph 5.

[8] The Crown argues that because no forfeiture is sought against Les Rocher, he has no standing on the Application, his diligence as a surety is irrelevant, and the fact that he provided the money for the cash deposit should have no bearing on the decision of the Court about whether that cash should be forfeited. Crown argues that in any event, there are indications that Les Rocher was not in fact diligent in monitoring his son's compliance with his release terms. The Crown

notes that Les Rocher did not contact the R.C.M.P. to report the breach when his son overdosed on Fentanyl, and moreover, that there is no evidence that he took any steps to monitor his son's compliance with the reporting conditions.

[9] Counsel for Lindsay and Les Rocher invites the Court to consider the overall circumstances and the nature of the breaches. He argues that there are, in this case, good reasons for the Court to exercise its discretion not to order forfeiture.

III) ANALYSIS

[10] In support of its position that Les Rocher, as an assignee of the cash bail monies, does not have any standing to oppose forfeiture in these circumstances, the Crown relies on *R v Webster*, 1994 CANLII 9166 (ABQB). That case stands for the basic proposition that a bail assignee "steps in the shoes" of the assignor, in this case an accused person, and cannot assert any right beyond the rights of that person. I do not disagree with this principle, but I do not think it is dispositive of this Application.

[11] The Court's power on a forfeiture application, as set out at section 771 of the *Criminal Code*, is very broad:

> 771. (…)
>
> (2) Where subsection (1) has been complied with, the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to forfeiture of the recognizance that he considers proper.
> (…)

Criminal Code, Section 771.

[12] As I noted in *R v Alookee*, 2011 NWTSC 11, irrespective of the issue of standing, all the circumstances of the case must be taken into account when exercising this discretionary power. In *Alookee*, the accused's mother had supplied the money for the cash deposit. She was not a surety, nor an assignee, and the overall circumstances were very different from those in this case. Mr. Alookee failed to appear at his trial and this led to forfeiture proceedings. At the forfeiture application, it was argued, and I agreed, that his mother's involvement and situation could properly be taken into account in deciding how to exercise the broad discretion conferred by section 771.

[13] *Alookee* was not decided on the basis that the mother had standing to oppose forfeiture in her own name. The decision was based on the conclusion that her situation, financial and otherwise, and the efforts she had made to supervise her son and try to get him before the Court in accordance with his release terms, could and should be taken into account at the forfeiture stage.

[14] To be clear, I completely agree with the Crown in this respect: the simple fact that someone other than the accused has supplied the money for a cash deposit is not in itself a reason not to order forfeiture following a breach. If it were, the whole point of having cash deposits would be circumvented and this type of bail condition would have no teeth. At the same time, it is not a given that full forfeiture will necessarily be ordered every time a Recognizance has been breached. Each situation is different and this is why the Court has broad discretion in these matters.

[15] I remain of the view that in considering a forfeiture application, it is sometimes appropriate to take into account the interests and situations of persons who do not technically have standing to oppose forfeiture. Standing is one issue. Deciding what factors should be taken into account in exercising a discretionary power is quite another.

[16] In *R v Horvarth*, 2009 ONCA 732, the Ontario Court of Appeal outlined a number of factors that can be considered when deciding whether to make a forfeiture order against a surety. To be sure, not all of those considerations apply when forfeiture is sought against the principal, as is the case here. But others do, because they are linked to the overarching objective of the forfeiture proceedings generally. These objectives are relevant whether forfeiture is sought against the principal or a surety.

[17] The purpose of forfeiture is to uphold the integrity of the bail system. Whether it is to bolster the incentive of accused persons to comply with their bail terms or to bolster the incentive for sureties to take their monitoring responsibilities seriously, in all cases, the goal is to ensure that bail terms are complied with and conditions imposed as part of a release plan are respected and meaningfully enforced. This is with a view of promoting and preserving respect for the administration of justice, and also of ensuring that the bail terms are effective: the goal is that the accused does ultimately attend court to be dealt with in accordance with the law and that in the meantime, the safety of the public is protected and the integrity of the proceedings is maintained.

[18] As I noted in *Alookee* at Paragraph 31, some of the factors evoked in *Horvath*, even though they were made in the context of forfeiture applications against sureties, can be applied, by analogy, to a situation where there is no surety.

[19] In this case, the factors I find most relevant are the nature of the breaches and the amount of money at issue.

[20] The breaches of the reporting condition were numerous and flagrant. The requirement was for reporting every Wednesday. During the time frame of the breach charge (September 12, 2016 to December 28, 2016), Mr. Rocher should have reported sixteen times. He missed half of those completely, and reported on the wrong day on three other occasions. In short, he complied with his reporting terms a third of the time during that period.

[21] The other breach also went to the heart of the release plan, which was to have Mr. Rocher attend treatment and maintain his sobriety once he returned to Yellowknife. It is, of course, not unusual for persons suffering from addictions to struggle with achieving sobriety, even after treatment. Still, the November 24th 2016 events reflect a flagrant breach of Mr. Rocher's release terms.

[22] At the same time, this is not a situation where the breaches had any immediate impact on the administration of justice (unlike what happens when an accused fails to report and absconds, or misses a trial date), or resulted in someone being victimized or harmed (such as the situation where an accused breaches a no-contact order, or breaches a no-alcohol order and commits a crime of violence while under the influence):

> If the breach has serious consequences, it is all the more reason for the Court to be concerned about the bail system being undermined. For example, if a person who is bound by a recognizance fails to appear at their trial, such that resources are wasted and witnesses are inconvenienced, the concern about upholding the bail process through forfeiture is highlighted. The same is true if the breach is associated with further criminal activity.

Attorney General of Canada v Nayally et al., 2012 NWTSC 56, para 29.

[23] Here, the second breach constituted criminal activity. But the person harmed by that breach was Mr. Rocher himself. He overdosed on a very dangerous drug and had to be hospitalized. There were immediate consequences to him for his conduct, quite apart from the reach of the criminal justice system.

[24] The Crown points out that the sentences imposed for the two breaches were nominal and that there is no concern here about "double punishment". That is a consideration, but it must be weighed against the balance of the circumstances.

[25] As I already noted, the exercise of the discretionary power set out at subsection 771(2) required balancing the objectives of the bail system, the breaches committed, their consequences, and the overall circumstances disclosed by the evidence.

[26] Having done so, I am satisfied that some forfeiture is required in this case to uphold the integrity of the bail system and reflect the flagrant nature of the breaches that were committed. However, given the amount of money that was deposited, I am not persuaded that full forfeiture is required to achieve this purpose.

[27] Accordingly, I order the forfeiture of $6,000.00 of the cash monies. The remaining $4,000.00 shall be returned to Les Rocher, in accordance with the Assignment of Bail signed on May 2, 2016.

L.A. Charbonneau
J.S.C.

Dated this 11th day of May 2017.

Counsel for the Applicant: Duane Praught
Counsel for the Respondent: Robbie Davidson

S-1-CR-2017 000 009

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

ATTORNEY GENERAL OF CANADA

Applicant

- and –

LINDSEY ROCHER

Respondent

MEMORANDUM OF JUDGMENT
(FORFEITURE APPLICATION) OF
THE HONOURABLE JUSTICE L.A. CHARBONNEAU
