PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Reeve*, 2018 NSPC 30

Date: 20180831
Docket: 2793700 & 2793703
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Sherri Reeve

DECISION RE: JURISDICTION OF PROVINCIAL COURT

Judge:	The Honourable Judge Theodore Tax,
Heard:	June 29, 2018, in Dartmouth, Nova Scotia
Decision	August 31, 2018
Charge:	5(2) and 5(1) of the Controlled Drugs and Substances Act
Counsel:	Jack Lloyd, for Sherri Reeve Jan Jensen, for the Attorney General

By the Court:

Introduction:

[1] The issue on this application by the Attorney General of Canada is whether the Provincial Court has jurisdiction to order the return of or compensation for Seized Substances under the **Controlled Drugs and Substances Act**.

[2] On September 5, 2014, police officers executed a search warrant in relation to the possession of cannabis (marijuana) by Ms. Sherri Reeve and her husband, Mr. Christopher Enns for the purpose of trafficking. Police officers executed searches at three different locations, which included their residence located at 764 East Chezzetcook Road and at a warehouse located at Unit 2-30 Colford Drive, Head of Chezzetcook, Nova Scotia. Marijuana plants were only seized from the warehouse location at 30 Colford Drive.

[3] Shortly after the execution of that search warrant, an Information was sworn which alleged **Controlled Drugs and Substances Act (CDSA)** charges against Ms. Reeve, Mr. Enns and a third individual for the possession of cannabis (marijuana) not in excess of three kilograms for the purpose of trafficking contrary to section 5(2) of the **CDSA** as well as the trafficking of cannabis (marijuana), not in excess of three kilograms, contrary to section 5(1) of the **CDSA.**

[4] In early November 2014, both Ms. Reeve and Mr. Enns filed and served a notice of application for the return of the controlled substances that had been seized by the police officers. They each filed separate applications pursuant to section 24 of the **CDSA** within sixty days after the date of that seizure as required by section 24(1) of the **CDSA**. Since there were outstanding charges against Ms. Reeve and Mr. Enns at that time, the determination of their section 24 **CDSA** applications for the return of the controlled substances was deferred or adjourned until the final conclusion of the charges before the Court.

[5] On or about November 9, 2016, the two **CDSA** charges against Ms. Sherri Reeve and the third individual were stayed by the Crown Attorney. However, the charges of possession for the purpose of trafficking and the trafficking in cannabis (marijuana) as against Mr. Enns remained before the Court. As a result of the stay of proceedings of the **CDSA** charges against Ms. Reeve, counsel for the Attorney

General (Atty. Gen.) of Canada and Ms. Reeve returned to the Court to proceed with Ms. Reeve's section 24 **CDSA** application, which had been filed in November 2014. The Court scheduled time for the hearing of her application and the applicant [Ms. Reeve] and the respondent, the Atty. Gen. of Canada agreed to present affidavit and *viva voce* evidence in relation to the issues raised by Ms. Reeve's application.

[6] Prior to proceeding with the hearing of Ms. Reeve's application pursuant to section 24 of the **CDSA**, counsel for the Atty. Gen. of Canada, filed a preliminary motion to contest the jurisdiction of the Provincial Court of Nova Scotia to adjudicate Ms. Reeve's section 24 **CDSA** application.

[7] Based upon the facts in relation to this application, the issue is whether the Provincial Court has jurisdiction to order compensation for destroyed controlled substances in the absence of an order made by a justice pursuant to section 26(2) of the **CDSA**, that there are reasonable grounds to believe that the controlled substances constitute a potential security, public health or safety hazard. Furthermore, the Atty. Gen. of Canada has also raised the issue of whether the Provincial Court has the jurisdiction to order compensation for grow equipment that was allegedly damaged by police officers when they executed the search warrant at various locations on or about September 5, 2014.

[8] On June 29, 2018, the Court heard the submissions of counsel for the Atty. Gen. of Canada, Ms. Reeve and on behalf of an intervenor, the Halifax Regional Municipality. The Court reserved its decision and advised the parties that the decision would be delivered on August 31, 2018.

Positions of the Parties:

[9] It is the position of the Atty. Gen. of Canada that the Provincial Court does not have jurisdiction to order compensation for a destroyed controlled substance in the absence of an order made pursuant to section 26(2) of the **CDSA**. The Atty. Gen. submits that the jurisdiction of the Provincial Court is established by a statute and it is not a court of inherent jurisdiction like the Nova Scotia Supreme Court. Counsel submits that as a statutory body, the **Criminal Code** and the **CDSA** provide detailed procedural directions that circumscribe the jurisdiction of the Provincial Court and that the powers of the magistrate or Justice acting under the **Criminal Code** are entirely statutory. In those circumstances, it is submitted that the jurisdiction as defined in Part III of the **CDSA** does not extend jurisdiction to

this Court to order compensation for seized controlled substances in the circumstances of this case.

[10] The Atty. Gen. of Canada submits that there is only one circumstance outlined in Part III of the **CDSA** by which this Court could make an order for compensation instead of an order for the return of the controlled substance and that circumstance is precisely defined in subsection 24(5) **CDSA**. It is the position of the Atty. Gen. that the subsection 24(5) **CDSA** requires, as a precondition to an order for compensation, that the Minister of Health has made an *ex parte* application and an order has been made under subsection 26(2) of the **CDSA** in respect of the substances. In this case, the Minister of Health did not make an *ex parte* application for the forfeiture or disposal of the controlled substances for constituting a potential security, public health or safety hazard. Since no order was made by the Provincial Court pursuant to subsection 26(2) **CDSA,** the Atty. Gen. of Canada submits that the Court has no jurisdiction to provide compensation in the circumstances of this case.

[11] In addition, the Atty. Gen. acknowledges that the seized cannabis plants were destroyed by the police shortly after the search warrants were executed. Police officers had prepared a section 29 **CDSA** application for the "emergency destruction of plants" which they believed to have been produced otherwise than under the authority of and in accordance with a license issued under the regulations. The Atty. Gen. also acknowledges that police officers proceeded to destroy the cannabis plants without first having obtained the authorization of the Minister of Health. However, the Atty. Gen. submits that, even if the Court was to regard the destruction of the cannabis plants as not having been authorized by the Minister of Health, the failure to first obtain the Minister's section 29 **CDSA** authorization would not provide jurisdiction to a statutory court in the absence of a section 26(2) **CDSA** order.

[12] Finally, with respect to Ms. Reeve's claim for compensation for "cannabis gardening equipment" which she has alleged was damaged by the police officers when they executed the search warrant, the Atty. Gen. submits that even if the Court was to conclude that there was jurisdiction to make a compensation order for destroyed controlled substances, subsection 24(5) **CDSA** cannot be read to include compensation for damaged gardening equipment. The Atty. Gen. submits that "controlled substances" is a defined term in section 2 of the **CDSA**, which clearly does not include "gardening equipment".

[13] It is the position of Ms. Sherri Reeve that the Provincial Court has the jurisdiction to order compensation for destroyed controlled substances, regardless of whether or not an order was made pursuant to subsection 26(2) of the **CDSA**. Counsel for Ms. Reeve submits that Part III of the **CDSA,** which is comprised of sections 24-29, establishes a framework for the return, disposal of and/or compensation for controlled substances seized by the police. Counsel for Ms. Reeve notes that she has fully complied with the requirements of subsection 24(1) of the **CDSA** for proceeding with an application for the return of or compensation for, controlled substances seized by the police. Counsel points out that Ms. Reeve has (1) filed an application, in writing, in the jurisdiction in which the substance was being detained, (2) the application was made within 60 days of the date of the seizure and (3) the application was served on the Atty. Gen.

[14] Since the cannabis plants were destroyed shortly after they were seized by the police on an "emergency" basis, apparently pursuant to section 29 of the **CDSA**, based upon the information contained on a Drug Offence and Disposition Report [Health Canada form 3515] dated September 5, 2014, it is evident that the cannabis plants themselves could not be returned to Ms. Reeve. However, Counsel for Ms. Reeve submits that whether the police relied on one rationale or the other to destroy the cannabis plants, the police decision as to which way they would proceed should not act as a bar to her pursuing a claim for compensation for those plants in the Provincial Court pursuant to Part III of the **CDSA**.

[15] Counsel for Ms. Reeve submits that the Provincial Court of Nova Scotia would certainly have had the jurisdiction to order the return of the controlled substances seized by the police if those cannabis plants still existed. However, since those plants have been destroyed by the police, Counsel submits that common sense and logic would then dictate that this court would also have the jurisdiction to order compensation in lieu of the return of the cannabis plants.

[16] Furthermore, Counsel for Ms. Reeve acknowledges that, before any order for the return of seized cannabis plants or compensation in lieu of those plants could be made, the onus is on her as the Applicant to satisfy the presiding "justice" that she was the lawful owner or was lawfully entitled to possession of those controlled substances. In support of Ms. Reeve's position with respect to jurisdiction, Counsel points out that the reference to "justice" in the **CDSA** is a defined term and the **CDSA** definition states that "justice" has the same meaning as section 2 of the **Criminal Code**, which includes a provincial court judge.

[17] Finally, Counsel for Ms. Reeve acknowledges that her application related to the return of the cannabis plants, however, once she was informed that they had been destroyed, it is only logical that she would then seek compensation for them pursuant to subsection 24(5) of the **CDSA**. Counsel submits that the jurisdiction of the Provincial Court to order compensation in lieu of the return of the controlled substances ought not to be ousted simply because the cannabis plants were apparently destroyed on an "emergency" basis pursuant to section 29 of the **CDSA.**

[18] It is the position of Ms. Reeve that it is illogical that the Provincial Court would not have the jurisdiction to entertain this application if the plants were destroyed on an "emergency" basis, but would have the jurisdiction if they were destroyed pursuant to a court order based upon an application made by the Minister of Health pursuant to section 26 **CDSA.** Regardless of whether the Minister of Health had reasonable grounds to believe that the cannabis plants constituted a potential security, public health or safety hazard, Ms. Reeve's claim for the return of the plants or compensation in lieu is based on the issue of whether she was the lawful owner or was lawfully entitled to possession of the controlled substances that were seized and ultimately destroyed by police officers.

Facts:

[19] On September 5, 2014, police officers executed search warrants in relation to the possession of cannabis (marijuana) by Ms. Sherri Reeve and her husband, Mr. Christopher Enns for the purpose of trafficking. Pursuant to the search warrants, police officers executed searches at three different locations, which included their residence located at 764 East Chezzetcook Road and at a warehouse located at Unit 2-30 Colford Drive, Head of Chezzetcook, Nova Scotia. Marijuana plants were only seized from the warehouse location at 30 Colford Drive.

[20] At the time that the warrants were executed, Ms. Reeve had a Personal Use Production Licence (PUPL) which had been issued by Health Canada for personal production of marijuana plants and to produce medical marijuana for specific individuals. The PUPL licences set out specific numbers of plants and amounts of dried cannabis that Ms. Reeve was allowed to grow or have in her possession. Ms. Reeve's PUPL allowed her to grow a hundred and ninety-five marijuana (195) plants and to produce dried marijuana for her own medical purposes. She also had permission from Health Canada to store 8775g of dried cannabis at her home at 764 East Chezzetcook Road.

[21] Shortly after the execution of the search warrant, an Information was sworn which alleged certain **CDSA** charges against Ms. Reeve, Mr. Enns and a third individual. The first Information was withdrawn and a replacement information was filed approximately a week later which contained seven **CDSA** charges. However, that second Information was also withdrawn. On or about October 24, 2014, a second replacement Information was sworn in which Mr. Enns, Ms. Reeve and the third individual were charged with possession of cannabis (marijuana) **not** in excess of three kilograms for the purpose of trafficking contrary to section 5(2) of the **CDSA** as well as the trafficking of cannabis (marijuana), **not** in excess of three kilograms, contrary to section 5(1) of the **CDSA.**

[22] All subsequent appearances in the Provincial Court by Ms. Reeve, Mr. Enns and the third individual were in relation to that second replacement Information. The charges of trafficking cannabis marijuana contrary to section 5(1) **CDSA** and of possession for the purpose of trafficking cannabis marijuana contrary to section 5(2) **CDSA, not in excess of three kilograms,** are indictable offences, but Parliament has deemed them to be offences within the absolute jurisdiction of the provincial Court, pursuant to subsection 553(c)(xi) of the **Criminal Code**.

[23] Notwithstanding the fact that Ms. Reeve had been charged with those **CDSA** offences, she maintained that she was the lawful owner or lawfully entitled to the possession of those controlled substances. Ms. Reeve filed an application in writing with the Provincial Court on or about November 3, 2014 and served a copy of her application on a representative of the Attorney General of Canada. The application included, *inter alia*, a request for the "Return of controlled substances pursuant to section 24(2)" of the **CDSA**. Ms. Reeve's application was filed in the Provincial Court within the sixty-day time-period contemplated by section 24(1) of the **CDSA**. In the application, Ms. Reeve refers to the "cannabis" which was seized by the police officers, but did not provide any further information relating to the kind, form or quantity of the "cannabis" for which she was applying to have returned. In the alternative, she sought compensation in lieu of the return of the controlled substances pursuant to section 24(5) of the **CDSA.**

[24] On the initial hearing of her application and a similar application brought by Mr. Enns on November 17, 2014, the Crown Attorney advised the Court that the marijuana plants had been destroyed. Since there were charges of possession for the purpose of trafficking contrary to section 5(2) and for trafficking contrary to section 5(1) **CDSA** before the Court, the Court advised the Crown Attorney, Mr. Enns on his behalf and on behalf of Ms. Reeve who was not present in court at that

time, that the issue of whether she was the lawful owner or was lawfully entitled to the possession of the controlled substances, would have to be adjourned or deferred until a trial of the substantive charge was concluded.

[25] In her application for return of the marijuana plants and other cannabis or compensation in lieu of those controlled substances, Ms. Reeve also sought the return or compensation for growing equipment which had been seized by the police officers when they executed the search warrant at Unit 2-30 Colford Drive, Head of Chezzetcook, Nova Scotia. On November 17, 2014, when the court was discussing the application made by Ms. Reeve under section 24(2) of the **CDSA**, the Crown Attorney advised the court that he believed that the "grow equipment" which was claimed in the application, had been returned to Mr. Enns.

[26] Furthermore, during the court appearance on November 17, 2014, the Crown Attorney advised the court that he had been informed that the marijuana plants seized from Colford Drive location had been destroyed pursuant to the provisions of the **CDSA**. The Crown Attorney indicated that a "Disposition Report" had been prepared which had authorized the destruction of the marijuana/cannabis plants.

[27] On or about November 9, 2016, the charges against Ms. Reeve for possession of cannabis marijuana for the purpose of trafficking and the trafficking of cannabis marijuana **not** in excess of three kilograms, were stayed by the Crown. In those circumstances, it was clear that there would not be a final trial conclusion on the **CDSA** charges which might impact the issue of whether Ms. Reeve was the lawful owner of or legally entitled to the possession of the controlled substances. Since the court had postponed or deferred her application until there was a final conclusion of a trial, after the charges against Ms. Reeve were stayed by the Crown, there was no longer a legal impediment to proceeding with her application under section 24 of the **CDSA**.

[28] Once the two **CDSA** charges which Ms. Reeve had been facing were no longer before the court, the Court established a schedule for the parties to provide affidavit evidence and legal briefs in support of their positions. The Attorney General's materials were filed in mid-August 2017 and Ms. Reeve's materials in October 2017.

[29] The affidavit evidence which was filed by the Atty. Gen. and by the Applicant included a transcript of proceedings in the Provincial Court on November 17, 2014. During that court hearing, the Crown Attorney advised the Court that some items, referring to grow equipment and other supplies used at the

Colford Drive location were available for return or had been returned to Mr. Enns since the earlier charges of production contrary to section 7(1) **CDSA** had been withdrawn. However, the Crown Attorney also advised the Court that the drugs seized from that location had been destroyed pursuant to the provisions of the **CDSA**.

[30] In addition, during the court appearance of November 17, 2014, the Crown Attorney stated that they were opposing the return of any drugs to Ms. Reeve or Mr. Enns, which were seized from the Colford Drive location or any other location involved in the investigation. The Crown Attorney also noted that the charges before the Court and applications for the return of the seized controlled substances presented an "unusual set of circumstances" since there were production licences issued pursuant to the regulations under the **CDSA** which authorized production and distribution to certain named individuals.

[31] The Crown Attorney informed the Court that the essence of the Crown's case was that the accused had sold marijuana to people for whom they were not authorized to distribute that substance. It was the Crown's position that the contravention of the **CDSA** licences was illegal and if they established that marijuana had been sold to a number of individuals for whom there was no legal authorization to do so, that would be the "crux of the Crown's case" with respect to the section 5(1) and section 5(2) **CDSA** trafficking charges before the Court.

[32] In addition, the Crown Attorney confirmed that since Mr. Enns had indicated that he would be challenging the constitutionality of the restrictions contained in the **CDSA** licences, it would not be possible to determine whether he was "legally entitled to possession of those things" until the conclusion of the trial. For those reasons, pursuant to section 24(3) and section 27 of the **CDSA**, the Crown Attorney asked that the issues raised by the section 24(1) **CDSA** applications be deferred until the conclusion of the trial. The Crown Attorney also noted that there was no issue of immediate return of the items seized since they had been destroyed and there would essentially have to be a trial to determine the legal entitlement to the substances which had been seized,

[33] Furthermore, during the court appearance on November 17, 2014, the Crown Attorney advised Mr. Enns and the Court that he believed that the cannabis (marijuana) had been destroyed under section 29 of the **CDSA**.

[34] In the affidavit evidence which has been filed by the Atty. Gen. and by the Applicant, there is a copy of a Health Canada Drug Offence and Disposition

Report Form HC/SC 3515, which was prepared and signed by Const. Gordon Giffin of the Royal Canadian Mounted Police on September 5, 2014. The stated purpose for that Disposition Report being sent to Health Canada was for the authorization for the emergency destruction of plants under section 29 of the **CDSA**. The form noted that three-hundred and thirty-six (336) cannabis marijuana plants had been seized on September 5, 2014 and that charges were proceeding. However, there was no authorization signed on behalf of the Minister of Health at the bottom of that form.

[35] Section 29 of the **CDSA** authorizes the Minister of Health, on prior notice being given to the Atty. Gen., to destroy any plant from which Schedule I- IV substances may be extracted if they were being produced otherwise than under the authority of and in accordance with a license issued under the regulations.

[36] In further affidavit evidence the Manager of Compliance and Monitoring Division in the Office of Controlled Substances, stated that he had done a careful examination and search of their records, but could not locate the Health Canada Form 3515 which was signed by Const. Giffin on September 5, 2014.

[37] In anticipation of the affidavits and other documents being placed before the court for the application for potential compensation, the Court scheduled several days for the hearing of *viva voce* evidence, cross-examination on the affidavits and the submissions of counsel on Ms. Reeve's application.

[38] Prior to the scheduled hearing on the merits of Ms. Reeve's application for compensation under section 24 of the **CDSA**, the Crown Attorney advised the court that an application would be brought forward to contest the jurisdiction of the Provincial Court to determine whether Ms. Reeve was the lawful owner or legally entitled to the controlled substances seized in early September 2014 and whether she should receive compensation in lieu of the destroyed plants and other controlled substances pursuant to section 24 of the **CDSA.**

[39] As a result of that preliminary motion which contested the jurisdiction of the Provincial Court to proceed with the application brought by Ms. Reeve pursuant to section 24 of the **CDSA,** the Court established a further schedule for the filing of any supplementary evidence relating to the jurisdictional issue as well as briefs in support of the parties' respective positions. The written submissions and supporting materials on behalf of Her Majesty-The Queen as represented by the Atty. Gen. of Canada were filed on April 25, 2018. Ms. Reeve's written

submissions in response to the jurisdictional issue raised by the Atty. Gen. of Canada were filed with the Court on May 28, 2018,

[40] On June 29, 2018, Counsel for the Atty. Gen. of Canada and Ms. Reeve made their oral submissions with respect to the jurisdictional issue raised by the Atty. Gen. In addition, counsel appeared on behalf of the Halifax Regional Municipality, who wished to intervene on this application and make representations to the Court, based upon the fact that the materials filed by the Atty. Gen. of Canada had relied, in part, on affidavit evidence provided by two police officers who are employed by the Halifax Regional Municipality.

[41] The Court questioned whether there should be a formal notice and application by counsel for standing to intervene on behalf of the Halifax Regional Municipality. However, Counsel for the Atty. Gen. of Canada and Ms. Reeve advised the Court that there was no need to contest that issue and they had no objection to Counsel for the Halifax Regional Municipality being present and being able to make some representations to the Court as the representative of the two witnesses who had provided affidavit evidence.

Analysis:

[42] Part III of the **Controlled Drugs and Substances Act (CDSA)** which is comprised of sections 24 to 29 of the **CDSA**, establishes a disposition and forfeiture scheme for all controlled substances by the "Minister" [defined as the Minister of Health in section 2 **CDSA**] which have been seized, found or otherwise acquired by a peace officer.

[43] In *The Practical Guide to the Controlled Drugs and Substances Act*, 4th Edition, by Theresa M. Brucker, Carswell, 2008, the author notes that Part III entitled "Disposal of Controlled Substances" contains the special disposition scheme for all controlled substances which was enacted in the **CDSA** when it was proclaimed in May, 1997. The author comments at page 109 of her text:

> "This special procedure was enacted at the request of Health Canada. Personnel in that department expressed concern about drugs that were lost, misplaced, stolen or improperly disposed of after seizure, thus creating a danger to the health and safety of the Canadian public.
>
> The procedure is intended to strengthen the controls applicable to seized substances and ensure that they were disposed of in a consistent manner. It addressed the problems faced by law enforcement officers and court officials who

> were responsible for the security of drug exhibits. In the past, large drug seizures presented a major security problem to the police and the courts. In many cases, neither group had the resources necessary to address the storage risks."

[44] Part III of the **CDSA** also provides a specific procedural framework for a person to apply for the return of controlled substances which were seized, found or otherwise acquired by a peace officer. Subsection 24(1) of the **CDSA** provides as follows:

> **24(1)** Where a controlled substance has been seized, found or otherwise acquired by a peace officer or an inspector, any person may, within 60 days after the date of the seizure, finding or acquisition, on prior notification being given to the Attorney General in the prescribed manner, apply, by notice in writing to a justice in the jurisdiction in which the substance is being detained, for an order to return that substance to the person.

[45] As a result, subsection 24(1) of the **CDSA** provides for a process by which anyone claiming an interest can, within sixty days of the date of the seizure or other acquisition by a peace officer, bring an application for the return of the drugs. The Attorney General must be given notice of the application. Subsection 24(2) **CDSA** establishes the requirement that, on the hearing of an application made under subsection 24(1) **CDSA**, the applicant would have to satisfy a "justice" that he or she was the lawful owner of or was lawfully entitled to possession of the controlled substance.

[46] Subsection 24(2) of the **CDSA** provides as follows:

> "**(2)** Where, on the hearing of an application made under subsection (1), a justice is satisfied that an applicant is the lawful owner or is lawfully entitled to possession of the controlled substance and the Attorney General does not indicate that the substance or a portion of it may be required for the purposes of a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament, the justice shall, subject to subsection (5), order that the substance or the portion not required for the purposes of the preceding be returned forthwith to the applicant."

[47] For the purposes of the **CDSA** and in particular for the purposes of this application, it is important to note that section 2 of the **CDSA** defines "**justice**" as having the same meaning as in section 2 of the **Criminal Code.**

[48] Section 2 of the **Criminal Code** defines **"justice"** as meaning "a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction."

[49] In her text *The Practical Guide to the Controlled Drugs and Substances Act* at page 110, the author points to the practical reality of an application of this nature in stating that "(B)ecause of the necessity for the applicant to prove lawful possession, it is unlikely that applications will be brought in respect of illicit substances." However, the author also notes the following at page 110:

> "Since such substances have an intrinsic market value, the legislation provides for a method by which the person lawfully entitled to the possession of the substance can apply to either recover it *in specie* or to be compensated for loss where the substance cannot be returned.
>
> Where the applicant can establish lawful ownership or legal entitlement to possession, and where the Attorney General does not need the substance for the purpose of statutory proceedings, or needs only a portion of the substance for such proceedings, the justice *must* order all or that portion of the substance which is not required, to be returned to the applicant. This mandatory provision is subject to subsection 24(5)." (Emphasis in original text)

[50] Under the provisions of subsection 24(3) **CDSA**, where lawful ownership or possession is established by the applicant, but the drugs are needed by the Attorney General, the justice *must*, subject to subsection 24(5), order that the drugs, or portion of them, be returned to the applicant either pursuant to para. 24(3)(a) **CDSA** after a hundred and eighty days (180), where no proceedings have been a commenced, or pursuant to para. 24(3)(b) **CDSA** once the proceedings were finally concluded and the applicant was found not guilty in those proceedings of any offence in relation to the substance(s).

[51] It is important to note that, on November 17, 2014, the Crown Attorney advised the Court that, in relation to the section 24(1) **CDSA** applications which had been served on the Attorney General by Ms. Reeve and Mr. Enns, it would not be possible to determine whether they were "legally entitled to possession" of the cannabis that was seized by the police officers until the final conclusion of the criminal proceedings which had already been commenced.

[52] Since Ms. Reeve and Mr. Enns were facing **CDSA** trafficking charges at that point in time and the Crown Attorney was opposed to returning any of the seized controlled substances given those pending charges, the only alternative available for holding a hearing and possibly returning the controlled substance, subject to

subsection 24(5) was pursuant to para. 24(3)(b) of the **CDSA.** In other words**,** the issue Ms. Reeve's lawful ownership or her being lawfully entitled to possession of the controlled substances would have to be adjourned until the final conclusion of the proceedings in relation to the substances where the applicant was found not guilty in those proceedings.

[53] Moreover, the Crown Attorney noted, in his remarks to the Court on November 17, 2014, that the applications for return of the seized controlled substances by Ms. Reeve and Mr. Enns presented an "unusual set of circumstances" because the crux of the Crown's case was their view that Ms. Reeve and Mr. Enns had contravened their **CDSA** authorizations. Therefore, for all intents and practical purposes, it did not make sense to conduct a hearing for the return of the seized controlled substances which were the subject of the allegations of trafficking and possession for the purpose of trafficking when the issue of lawful ownership or lawfully entitled to the possession of those controlled substances was or would also be the critical issue in the prosecution.

[54] As Ms. Brucker points out in her text, at page 111, pursuant to the provisions of subsection 24(4) where an applicant does not satisfy the justice that he or she was the lawful owner or legally entitled to possession of the controlled substances, the justice *must* order that the substance in question, or that portion of it that is not required for any federal proceedings, be forfeited to the Crown for the discretionary disposition by the Minister of Health.

[55] Subsection 24(5) **CDSA** which is entitled "Payment of compensation in lieu" and reads as follows:

> "**(5)** Where, on the hearing of an application made under subsection (1), a justice is satisfied that an applicant is the lawful owner or is lawfully entitled to possession of a controlled substance, but an order has been made under subsection 26(2) in respect of the substance, the justice shall make an order that an amount equal to the value of the substance be paid to the applicant."

[56] In The Practical Guide to the Controlled Drugs and Substances Act at page 112, the author observes:

> "Where the justice rules that the substance, or a portion thereof, can be returned to the applicant, but where an order has already been made under section 26(2), based on the fact that the controlled substance in question is a "potential security, public health or safety hazard", the justice *must* order payment to the applicant of an amount equal to the value of that substance. [Emphasis in original text]

[57] I find that the logical interpretation of subsection 24(5) which is in harmony with and consistent with the other sections in Part III of the **CDSA** is that subsection 24(5) simply means that a section 26 order after an *ex parte* application by the Minister of Health will take precedence over the procedure for the return controlled substances which is outlined in section 24 **CDSA**. This makes sense, since the Minister has made that decision to dispose of the controlled substance based upon the fact that he or she has reasonable grounds to believe that the controlled substance that was seized, found or otherwise acquired by a peace officer constitutes a "potential security, public health or safety hazard."

[58] I find that Parliament has also highlighted the urgency of this and primacy of this procedure to address any potential security, health or safety hazard posed by the controlled substance by allowing the Minister to make an application to a justice without any notice on an *ex parte* basis to the Applicant, but on prior notice to the Attorney General. In those circumstances, it is quite conceivable that there may be concurrent applications before a "justice" to forfeit the controlled substance to Her Majesty for disposal while, at the same time, the Applicant is seeking the return of those controlled substances based on their belief that they were the lawful owner of or were lawfully entitled to possess them.

[59] In my opinion, the key phrase upon which the Attorney General submits that this court does not have jurisdiction to order compensation, that is, the wording of subsection 24(5) "but an order has been made under subsection 26(2) in respect of the substance" does <u>not</u> mean that Ms. Reeve may only seek compensation in lieu of the substance if the substance was either destroyed or forfeited to the Crown pursuant to an order pursuant to an order under subsection 26(2). I find that the Attorney General's submission with respect to this key provision is based on his belief that the word "but" in this subsection, should be interpreted as meaning "provided that" and operating essentially as a condition precedent to compensation.

[60] To state the obvious, if there is an application before the court for the return of a controlled substance seized, found or otherwise acquired by a peace officer and that controlled substance has already been destroyed or forfeited to the Crown, I find that subsection 24(5) means that the Applicant is not left without any remedy. If the controlled substance has been destroyed before a hearing of the application has been held, the controlled substance itself cannot be returned to the Applicant. However, once a section 24 hearing has been held, if the justice is satisfied that the Applicant was the lawful owner or was lawfully entitled to the

possession of the controlled substance, the justice can that order compensation be paid to the Applicant.

Jurisdiction of the Provincial Court to Hear a Section 24 CDSA Application:

[61] The jurisdiction of the court refers to a collection of attributes that enable a court to issue an enforceable order or judgement. 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 (CanLII) at para. 44.

[62] A statutory court, like the Provincial Court of Nova Scotia does not have an inherent jurisdiction and as such, it 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: **R. v. 974649 Ontario Inc., carrying on business as Dunedin Construction**, 2001 SCC 81 at para. 70.

[63] In addition, there is also jurisprudence that has recognized that statutory courts possess certain implied powers as courts of law. In addition, powers may be implied in the context of the particular statutory schemes as well. In **R. v. Fercan Developments Inc.,** 2016 ONCA 260, which dealt with the issue of whether the Ontario Court of Justice had the power to order costs against the Crown, Laforme JA noted at para. 45 that they had recently considered the "doctrine of jurisdiction by necessarily implication" and that a power or authority may be implied.

[64] Whether a statutory court is vested with the power to grant a particular remedy depends on the interpretation of its enabling legislation: see **Atco Gas and Pipelines Ltd v. Alberta (Energy and Utilities Board)**, 2000 SCC 4, 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: see **Dunedin Construction** at para. 38. Furthermore, as in any other statutory interpretation exercise, courts need to consider the legislative context when interpreting the legislation at issue: see **Atco Gas and Pipelines Ltd**. at para. 49.

[65] In **R. v Fercan Developments,** supra, at para. 49-51, the Ontario Court of Appeal ruled that a provincial court hearing a **CDSA** forfeiture application has an implied power to award costs in appropriate circumstances. The Court of Appeal

concluded that the power to do so is derived from the authority, possessed by every court of law, to control its own process. While there is no doubt that a superior court has the ability to award costs as part of its inherent jurisdiction and pursuant to its power to control its own process, the Ontario Court of Appeal concluded that a statutory court also has the power to control its own process which is necessarily implied in a legislative grant of power to function as a court of law.

[66] Justice Laforme stated In **Fercan Developments** at para. 54 that the breadth of a provincial court's mandate under the **CDSA** suggests that it has the implied power to award costs. Laforme JA added that under the **CDSA**, a forfeiture application may be heard in either the Superior Court or in the Court of Justice, which is a provincial court.

[67] In **Fercan Developments,** supra, at para. 54, Laforme JA added that, in certain specific circumstances, the **CDSA** draws distinctions between provincial and superior courts. However, the Court of Appeal noted that, with respect to forfeiture applications under section 16, there was no distinction of any kind in respect of their role and the two courts' function is equal in all ways. He concluded: "[T]herefore, it follows that Parliament intended that the power of the two courts should also be equal."

[68] It is significant to note that in **Fercan**, supra, at para. 54, the Ontario Court of Appeal observed that the superior court and the provincial court could hear forfeiture applications under the **CDSA.** Given that observation with respect to forfeiture applications, I find that it is equally applicable with respect to hearings or applications held before a justice of the provincial court under Part III "Disposal of Controlled Substances."

[69] In considering the jurisdiction of the Court to hear and determine applications under Part III of the **CDSA**, it is also important to remember that the two charges against Ms. Reeve, Mr. Enns and the third individual related to the possession of cannabis [marijuana] for the purpose of trafficking and the trafficking of cannabis [marijuana] **not in excess of three kilograms.** Those charges were within the absolute jurisdiction of the Provincial Court, when Ms. Reeve and Mr. Enns filed and served their section 24(1) **CDSA** applications for the return of controlled substances.

[70] The absolute jurisdiction of the Provincial Court with respect to the charges of possession for the purpose of trafficking cannabis marijuana contrary to section 5(2) **CDSA** and the trafficking of cannabis marijuana contrary to section 5(1)

CDSA is established by paragraph 5(3)(a.1) of the **CDSA** and subsection 553(c)(xi) of the **Criminal Code**. In this case, the two charges against Ms. Reeve and Mr. Enns were for possession for the purpose of trafficking and trafficking of cannabis marijuana, which is a Schedule II substance. Since the amount of that Schedule II substance, which is alleged to have been possessed for trafficking or having been trafficked was **not in excess of three kilograms**, the prosecution of those indictable offences was within the absolute jurisdiction of the Provincial Court and did not depend on the consent of the accused persons.

[71] Given the absolute jurisdiction of the Provincial Court with respect to the prosecution of the two charges that Ms. Reeve and Mr. Enns were facing, I find it is logical, especially when considering the definition of "justice" in Part III of the **CDSA**, that any forfeiture applications, disposal applications and applications for the return of the controlled substances at a specified time or compensation in lieu of the controlled substances would also logically come within the jurisdiction of the Provincial Court.

[72] Moreover, it was noted in **Fercan** by the Ontario Court of Appeal that a court should consider reasonable interpretations of the statutory context and, if necessary, consider the implied powers of a statutory court to control its own process in order to ensure that the statutory court is able to discharge its mandate in a fair and efficient manner. The Ontario Court of Appeal noted in **Fercan**, at para. 57 that, bifurcating proceedings which might force an applicant to make one application in the Provincial Court and then a separate application for a different part of the remedy in the Superior Court, negatively impacts the effective and efficient functioning of the courts. In those circumstances, it would be undesirable and inefficient for both the legal system and for litigants.

[73] For all of the foregoing reasons, I find that the Provincial Court has jurisdiction to order the return of controlled substances pursuant to an application, in writing, filed within 60 days after the date of the seizure, finding or acquisition of the substances, provided that prior notification of the application was given to the Attorney General.

[74] In addition, considering all of the circumstances of this application, I also find that the legal issues involved in the prosecution of the charges before the court meant that the applications made by Ms. Reeve and Mr. Enns could not be determined until the final conclusion of those charges pursuant to para. 24(3)(b) of the **CDSA**. For that reason, the Crown Attorney stated that the applications made

by Ms. Reeve and Mr. Enns pursuant to subsection 24(1) **CDSA** presented the "unusual set of circumstances" which were very much intertwined with the legal issues of the criminal prosecution. In those circumstances, it would also be logical for the Provincial Court to have the jurisdiction to deal with both matters in order to minimize the potential of inconsistent conclusions being found on the basis of what would have likely been the same factual foundation.

[75] Finally, I find that regardless of whether the controlled substances were destroyed by the Minister of Health as a security, health or safety hazard pursuant to section 26 or section 29 **CDSA** emergency destruction of plants, a person could apply for the return of the substances or compensation in lieu of those substances. If the person filed and served a written application for the return of the substances or compensation within the timelines stipulated by the **CDSA**, then a hearing would be scheduled to determine if a justice was satisfied that the person was the lawful owner of or was lawfully entitled to possession of the controlled substances.

[76] Obviously, if the controlled substances had already been destroyed or otherwise disposed of, and the applicant had satisfied the justice that he or she was lawful owner of or was lawfully entitled to possession of the controlled substances, they ought not to be deprived of a remedy or be forced to commence a bifurcated proceeding in another court if it was not possible to return the substances. In those circumstances, the justice would be required to make a subsection 24(5) **CDSA** order that an amount equal to the value of the substance be paid to the applicant.

[77] Therefore, with respect to Ms. Reeve's written application which was filed within sixty days of the date of the seizure, finding or acquisition of the controlled substances by a peace officer, regardless of the rationale for the almost immediate destruction of the cannabis plants, I find that the Provincial Court has the jurisdiction to proceed with a hearing of that application to determine if the Applicant is able to satisfy the court that she was the lawful owner or legally entitled to possession of the controlled substances. If so, since the cannabis plants themselves were destroyed shortly after the search warrant was executed, then she would be entitled to an order for an amount equal to the value of the substance, at that time pursuant to subsection 24(5) **CDSA**.

Jurisdiction Relating to the Return/Compensation of Equipment:

[78] The provisions of Part III of the **CDSA** entitled "Disposal of Controlled Substances" as they stood in September 2014 as well as at the time when Ms.

Reeve made her application pursuant to subsection 24(1) only dealt with the return of the controlled substance that had been seized, found or otherwise acquired by a peace officer. It should be noted that the interpretation of the term "controlled substance" for the purposes of the **CDSA** is defined in section 2 as a "substance included in Schedule I, II, III, IV, or V."

[79] Part III of the **CDSA** does not itself establish a process for the return of or compensation for equipment or other personal property that an applicant claims to have been seized, found or acquired by a peace officer or inspector under the authority of a search warrant. However, in section 13 **CDSA** which is found in Part III of the **CDSA,** Parliament has specifically stated that sections 489.1 and 490 of the **Criminal Code** apply to anything seized under the **CDSA**.

[80] A quick review of those sections appears allow for some concurrent jurisdiction of a superior court justice and a provincial court judge to order the return of "things seized" in certain circumstances if there is any dispute as to who is the lawful owner or lawfully entitled to possession of the things seized. However, those sections of the **Criminal Code** also state that in certain situations only a judge of a superior court of a criminal jurisdiction has the statutory authority to determine the legal issues.

[81] In this case, Ms. Reeve has not made any application to this court under sections 489.1 or 490 of the **Criminal Code** with respect to the return of "things seized" other than the controlled substance which was the subject matter of her application under section 24(1) **CDSA.** In those circumstances, I find that it is not necessary to make any further comment on those provisions of the **Criminal Code** and whether they would include the ability to make an order for compensation in lieu of the return of the "things seized."

[82] On June 21, 2018, the previously proposed amendments to the **CDSA** were proclaimed to be in effect as of that date. Section 24(1) of the **CDSA** which had been referred to previously as solely an "Application for return of substance" was amended to indicate that it was now an "Application for Return" and that a person could apply to have a "controlled substance, precursor or chemical offence related property that has been seized, found or otherwise acquired by a peace officer, inspector or prescribed person" returned to that person.

[83] The amendment to subsection 24(2) of the **CDSA** was entitled "Order to Return as soon as Practicable" instead of "forthwith" as the section previously read. The key threshold question remained the same. An order to return would

require a hearing of an application under subsection 24(1) and a justice to be satisfied that an applicant is the lawful owner or is lawfully entitled to possession of the substance, precursor or property.

[84] In section 24 **CDSA**, the subject matter of the application for return is now referred to as the "substance, precursor or property", however, I find that the reference to "property" in this section does not include physical property such as grow equipment which formed part of Ms. Reeve's application for its return or compensation in lieu. I find that reference to "property" in Section 24 and section 2 of the **CDSA** is only a reference to "chemical offence-related property" and that those sections do not include a **CDSA** application for the return of or compensation in lieu of returning a seized, found or otherwise acquired "thing" which is personal property, such as grow equipment, tables, lighting, soil, fertilizer, etc.

[85] However, as of June 21, 2018, Parliament has clearly indicated that an application for the return of a controlled substance may also now include an application for the return of "precursors or chemical offence related property." The precursors noted by the **CDSA,** which are substances from which another substance is formed by a metabolic reaction, are listed in Schedule VI.

[86] During the submissions of counsel on June 29, 2018, Counsel for Ms. Reeve referred to the proposed amendments as an indication that Parliament wished to amend Part III of the **CDSA** to clearly include the right to compensation. Counsel's submission was based upon the following revised wording, "*but if it was disposed of in any way or otherwise dealt with under section 26."* Therefore, it seems clear that Parliament wanted to clearly state that the right to compensation was not limited to only where there was a section 26 **CDSA** disposal.

[87] In the reasons outlined above, I have concluded that the Provincial Court does have the jurisdiction to order compensation in lieu of the return of the cannabis plants, given the fact that they were destroyed shortly after search warrants were executed. In my view, a reasonable interpretation of the Part III of the **CDSA** and its special disposition scheme and the procedural framework by which a person may apply for the return of the controlled substances, would include compensation in lieu of the controlled substances if they have already been destroyed or otherwise disposed of.

[88] In coming to those conclusions, I have not agreed with the Attorney General's interpretation of the special disposition scheme contained in Part III of the **CDSA**. In essence, although the previous wording of the special disposition

scheme or framework may not have been as clear as the recent amendments, I have concluded that Parliament wished to provide concurrent jurisdiction for the Provincial Court or a superior court to address issues relating to the return of or compensation for substances.

[89] While I find that the Provincial Court is a statutory court, I have also concluded that this Court has the power to control its own process and that power is necessarily implied in a legislative grant of power to function as a court of law. As I indicated, I find that a reasonable interpretation of Part III of the **CDSA** provides the Provincial Court with the jurisdiction and implied power reasonably necessary to discharge its mandate in a fair and efficient manner.

[90] Having said that, given the very specific nature of the subject matter of applications with respect to the disposal of controlled substances in Part III of the **CDSA** and Ms. Reeve's application for the return of personal property or compensation in lieu of personal property seized under section 24 of the **CDSA**, I find that those provisions do not clothe the Provincial Court with the statutory authority or the necessarily implied authority to conclude that there is jurisdiction to order the return of or compensation for personal property seized by a peace officer pursuant to that section. I have reluctantly come to that conclusion, while noting Chief Justice MacLachlan's comments in **Dunedin Construction**, supra at para. 82, that bifurcation of applications may render some remedies "illusory in practice" and that a court should be reluctant to interpret legislation in a way that would require such bifurcation.

[91] As a result, I conclude that if Ms. Reeve wishes to apply for the return of her personal property or compensation for personal property of the nature described above, which was either seized, found or acquired by a peace officer or in the alternative damaged by a peace officer during the execution of a search warrant, she would have to pursue that application in a court with inherent jurisdiction. A successful application in that a court would be able to award a wide range of civil remedies including damages, since that claim would appear to be more in the nature of civil litigation.

Theodore Tax, JPC