CITATION: Attorney General of Ontario v. $163,015.29 in Canadian Currency (in rem), 2019 ONSC 3973
COURT FILE NO.: CV-17-5566-00
DATE: 2019 06 26
CORRECTED: July 5, 2019

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Attorney General of Ontario, Applicant

AND:

$163,015.29 in Canadian Currency *(in rem)*, Respondent

BEFORE: TRIMBLE J.

COUNSEL: For the Applicant,
Sandra Di Ciano Sandra.diciano@ontario.ca
and Paul Kim paul.kim@ontario.ca

For the Respondent,
Kamal Sehgal
Harry Mann hsm@mannlaw.ca

HEARD: 27 March 2019

ENDORSEMENT

Nature of the Application

[1] The Attorney General seeks an order for forfeiture of $163,015.29 held in a TD bank account numbered 6165728–1176, pursuant to sections 3 and 8 of the *Civil Remedies Act*, 2001, S.O. 2001, c. 28.

[2] The Attorney General says that the account was used as the repository for funds obtained by fraud. Accordingly, the account itself is an instrument of fraud

or unlawful activity, and the money in the account is the proceeds of unlawful activity.

[3] Kamal Sehgal is the owner of the account and opposes the Attorney General's motion. Mr. Sehgal's position is that the money was deposited legitimately into the account pursuant to a Hawala, an arrangement used in many places in the world, including in India, to transfer money between people in different parts of the world, without the money actually crossing borders.

Result:

[4] The Attorney General's Application is allowed in part. It is entitled to forfeiture of $141,965.29. Mr. Sehgal shall receive the balance of $21,050.29 of which he has established that he is the rightful owner.

The *Civil Remedies Act*:

[5] The relevant portions of the *CRA* to this Application are as follows:

> DEFINITIONS
>
> 2) In this part,
>
> …
>
> "legitimate owner" means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity committed by the person, and who,
>
> (a) was the rightful owner of the property before the unlawful activity occurred and was deprived of possession or control of the property by means of the unlawful activity,
>
> (b) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of

the acquisition that the property was proceeds of unlawful activity, or

(c) acquired the property from a person mentioned in clause (a) or (b); ("propriétaire légitime")

"proceeds of unlawful activity" means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity, whether the property was acquired before or after this Act came into force, but does not include proceeds of a contract for recounting crime within the meaning of the Prohibiting Profiting from Recounting Crimes Act, 2002.

property" means real or personal property, and includes any interest in property; ("bien")

"unlawful activity" means an act or omission that,

(a) is an offence under an Act of Canada, Ontario or another province or territory of Canada, or

(b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario,

whether the act or omission occurred before or after this Part came into force. ("activité illégale") 2001, c. 28, s. 2; 2002, c. 2, s. 19 (3); 2005, c. 33, s. 20.

FORFEITURE ORDER

3 (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is proceeds of unlawful activity. 2001, c. 28, s. 3 (1).

Action or application

(2) The proceeding may be by action or application. 2001, c. 28, s. 3 (2).

Legitimate owners

(3) If the court finds that property is proceeds of unlawful activity and a party to the proceeding proves that he, she or it is a legitimate owner of the property, the court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the legitimate owner's interest in the property. 2001, c. 28, s. 3 (3).

Same

(4) Without limiting the generality of subsection (3), an order made under subsection (3) may,

> (a) sever or partition any interest in the property or require any interest in the property to be sold or otherwise disposed of, to protect the legitimate owner's interest in the property; or
>
> (b) provide that the Crown in right of Ontario takes the property subject to the interest of the legitimate owner. 2001, c. 28, s. 3 (4).

…

DEFINITIONS

7(1) In This Part, ...

"instrument of unlawful activity" means property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person, and includes any property that is realized from the sale or other disposition of such property;

"property" means real or personal property, and includes any interest in property;

"responsible owner" means, with respect to property that is an instrument of unlawful activity, a person with an interest in the property who has done all that can reasonably be done to prevent the property from being used to engage in unlawful activity, including,

> (a) promptly notifying appropriate law enforcement agencies whenever the person knows or ought to know that the property has been or is likely to be used to engage in unlawful activity, and
>
> (b) refusing or withdrawing any permission that the person has authority to give and that the person knows or ought to know has facilitated or is likely to facilitate the property being used to engage in unlawful activity.

"unlawful activity" means an act or omission that,

> (a) is an offence under an Act of Canada, Ontario or another province or territory of Canada, or
>
> (b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario,

whether the act or omission occurred before or after this Part came into force. ("activité illégale") 2001, c. 28, s. 7 (1); 2005, c. 33, s. 23; 2007, c. 13, s. 28 (1).

7(2) For the purpose of the definition of "instrument of unlawful activity" in subsection (1), proof that property was used to engage in unlawful activity that, in turn, resulted in the acquisition of other property or in serious bodily harm to any person is proof, in the absence of evidence to the contrary, that the property is likely to be used to engage in unlawful activity that, in turn, would be likely to result in the acquisition of other property or in serious bodily harm to any person.

FORFEITURE ORDER

8 (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is an instrument of unlawful activity.

…

8(3) If the court finds that property is an instrument of unlawful activity and a party to the proceeding proves that he, she or it is a responsible owner of the property, the court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the responsible owner's interest in the property.

…

Protecting responsible owner's interest

(4) Without limiting the generality of subsection (3), an order made under subsection (3) may,

> (a) sever or partition any interest in the property or require any interest in the property to be sold or otherwise disposed of, to protect the responsible owner's interest in the property; or
>
> (b) provide that the Crown in right of Ontario takes the property subject to the interest of the responsible owner. 2001, c. 28, s. 8 (4).

…

16 Except as otherwise provided in this Act, findings of fact in proceedings under this Act shall be made on the balance of probabilities.

Jurisprudence:

[6] The CRA is a curious piece of legislation. It runs contrary to our views of the sanctity of ownership of property. It allows the Government of Ontario to seize property that is the proceeds of, or was an instrument of illegal activity. The CRA focuses on the characteristics of the property, not the actions of the property owner. It focuses on the acts by people perhaps not the owner. The property does not have to be linked to a specific person or group of persons. Indeed, the CRA is not concerned about the criminal culpability of anyone associated with the property. The seizure may occur regardless of the fact that the owner was not charged, or if charged, the charge was dropped, stayed, withdrawn, or the owner was acquitted. Because the CRA is not concerned with the actions of any particular person or group of people, proof is on the civil standard.

[7] While the effect of the statute may seem punitive, the remedies imposed are not. If the property was obtained illegally or was the instrument of illegal activity, the owner cannot have genuine title to the unlawfully obtained property.

[8] The court is given broad powers to declare property forfeited, but also equally broad discretion to protect the interests of a responsible or legitimate owner of the property.

[9] The following are the legal principals derived from the jurisprudence:

1. In order to obtain an order forfeiting property under the *CRA*, the Crown must prove, on a balance of probabilities, that the property at issue is either “proceeds of unlawful activity” or an “instrument of unlawful activity” (see: *CRA* s. 16, and *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, para. 23).

2. “Proceeds of unlawful activity” is defined property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity (see: *CRA* s. 2 and 7(1)).

3. An “instrument of unlawful activity” is defined as property that is likely to be used to engage in unlawful activity which, in turn, would be likely to or is intended to result in the acquisition of other property (see: *CRA* s. 7).

4. Property may be both the “proceeds of” and an “instrument of” unlawful activity at the same time (see: *CRA* s. 7, *Ontario v. Chow*, [2003 O.J. No. 5387 (S.C.J.), paras. 21 to 24).

5. “Unlawful activity” is defined as act or omission that is an offence under an Act of Canada, Ontario or another province or territory of Canada, or is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario (see: *CRA* s. 2).

6. Proceedings under the statute are in *rem*. They do not establish fault against anyone. They only seek to establish that the property is proceeds or an instrument of unlawful activity. Further, the court may find that an offence was committed even if no person was charged with the offence or charges were withdrawn are stayed. The property need not be linked to a specific offense (see: *Chatterjee*, paras. 21, 46 to 47; *Ontario (Attorney General) v. $43,120 in Canadian currency (in rem)*, 2011 ONSC 3067, at para. 7 (S.C.).

7. Forfeiture is not a punishment since the wrongdoer does not have, nor has ever had genuine title to the unlawful proceeds (see: *Murphy v. CM PB PC Ltd.*, [1999] IEHC (H.C. Ireland), para. 111).

8. In cases of fraud, once the Crown has met the civil standard and proven that the property is tainted by crime, the proceeds shall be disgorged by the party benefiting from the unlawful activity (see: *Chatterjee*, para. 23).

9. Once the Crown has discharged its obligation, the alleged owner must provide a credible explanation for the suspicious circumstances, or establishment a legitimate source for the property (see: *Ontario (Attorney General) v. 170 Glenville Road, King* (*in rem*), 2011 ONCA 444, para. 5 to 9; *Ontario (Attorney General) v. $1650 in Canadian currency (in rem)*, [2008] O.J. No.: 2076 (S.C.), para. 3; *Ontario (Attorney General) v. $13,900 in Canadian currency (in rem)*, 2015 ONSC 2267, para. 47 and 48).

10. Where the alleged owner provides only a vague explanation for the suspicious circumstances or to establish a legitimate source for the property, he must provide corroborating evidence (see: *Ontario (Attorney General) v. $150,000 (in rem)*, [2014] O.J. No. 2204 (S.C.), paras. 1 to 3, and 170 *Glenville Road*, para. 5 to 6).

11. Dollar for dollar tracing of the property or money acquired directly or indirectly, in whole or in part, as a result of unlawful activity, is not necessary. The statute reverses the common law presumption of co-mingling. The Crown need only prove that the property was acquired in part as a result of unlawful activity. Whether the alleged owner has any interest in the property that is tainted by unlawful activity is an consideration to be weighed when determining whether forfeiture is not in the interests of justice (see: *CRA*, section 2; *Attorney General of Ontario v. 855 Darby Road*, *and all contents (in rem)* 2019 ONCA 31, paras. 43 to 45).

12. Once property is found to be acquired by, or an instrument of unlawful activity, the *CRA* provides that property of a “responsible owner” is exempt from forfeiture. A “responsible owner” is defined as someone who has done all that can be reasonably done to prevent the property from being used to engage in unlawful activity. A “legitimate owner” is also protected. The legitimate owner must show that he is the rightful owner of the property, was deprived of possession of controlled property by unlawful activity, or acquired the property for fair market value after the

unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was the proceeds of unlawful activity (see: *CRA*, section 2, 3(3) and 8(3)).

13. The burden of proving that the claimant is a legitimate or responsible owner is on the claimant, on a balance of probabilities. The claimant must lead evidence. Bald assertions are inadequate (see: *Ontario (Attorney General) v. 51 Taylor Avenue*, 2014 ONCA 396, paras. 19 and 20; *Ontario (Attorney General) v. Chow*, [2003] O.J. No.: 5387 (S.C.), paras. 32 and 33).

14. In order to avoid forfeiture, it is open to the alleged owner to show that it is 'clearly not in the interest of justice' to make forfeiture. This is a narrow exception, not to be routinely exercised in order to allow a party to a void prescribed statutory consequences. This exemption is "very much the exception." It should only be granted where it has been established that forfeiture would be "manifestly harsh" or "draconian." The relief from forfeiture provisions cannot be allowed to subvert the purposes of the CRA (see: *Ontario (Attorney General) v. 1140 Aubin* Road and 3142 Halpin Road, Windsor (in rem), 2011 ONCA 363, paras. 84 to 85, and 93 to 95).

15. The claimant's conduct is the most important factor in the analysis of relief from forfeiture (See: *Aubin Road*, paras. 90, 98 to 101).

The Issues:

[10] This Application gives rise to the following issues:

1. Has the Crown proven on a balance of probabilities that the funds in the account are proceeds of unlawful activity and/or the account itself was the instrument of unlawful activity?

2. Has Mr. Sehgal provided a credible explanation for the suspicious circumstances, or establishment a legitimate source for the property?

3. Has Mr. Sehgal proven a balance of probabilities that he is a responsible owner or a legitimate owner of funds such that the funds are his rightful property and exempt from forfeiture?

4. Has Mr. Sehgal shown that it is clearly not in the interest of justice to make forfeiture?

The Result:

[11] Mr. Sehgal has satisfied me that he is the legitimate and rightful owner of $22,350, comprising $2,350 which he transferred into the account in order to open it, and of $20,000 deposited on April 26, 2017 by way of a cheque from 218-9788 Ontario Inc. payable to Mr. Sehgal.

[12] The parties agreed that $15,000 that was once in the account was the proceeds of fraudulent activity. That $15,000 has already been reimbursed to the rightful owners. I have not considered that sum in these reasons.

[13] The balance of the funds in the account, namely $149,665.29, is forfeited under the CRA.

Analysis:

1. *Has the Crown proven a balance of probabilities that the funds in the account are proceeds of unlawful activity and/or the account itself was the instrument of unlawful activity?*

[14] The Crown has met its burden. I say this for two reasons.

[15] First, the account was used as an instrument of unlawful activity. Mr. Sehgal admits that his account was used by Mr. Gagan Khatri after May 11, 2017 (who replaced “Mahesh” as Mr. Gupta’s contact for the transfer of funds from India to Canada). Mr. Sehgal admitted that he, through his friend, Mr. Gupta, gave Mr. Khatri access to the account. Mr. Sehgal admits that the three deposits

that Mr. Khatri made or arranged, which totaled $15,000, were obtained through fraud.

[16] Those admissions, alone, are sufficient to support forfeiture of the $141,965.00 remaining in the account since the account, by inference from Mr. Sehgal's admission, was used as an instrument of unlawful activity.

[17] Second, I am satisfied that, on a balance of probabilities, the $141,965.00 the account were, themselves, the proceeds of unlawful activity.

[18] In support of its submission that the money in the account was the proceeds of unlawful activity, and that the account itself was an instrument of unlawful activity, the Crown has put forward evidence from the Canadian antifraud agency, from Mr. McConnell (a fraud expert with the TD Bank financial crimes and fraud management group), from Detective Catherine Davidson (an expert in Mass Marketing Frauds), and from Constable Jackson (with the Peel Regional Police).

[19] All of these witnesses were put forward as experts. Mr. Sehgal did not attack the credibility of any of these experts, or their opinions. Rather, he attacked the experts' factual underpinning as not reliable since all experts relied upon the factual determinations made by Mr. McConnell, who works TD. Since Mr. McConnell's evidence is not reliable, says Mr. Sehgal, I should therefore

disregard the evidence of all of the other experts since they relied on the results of Mr. McConnell's investigation.

[20] Mr. Sehgal argued that McConnell's evidence should not be accepted (and the remaining experts' evidence must also fail) because:

a) His investigation was shoddy;
b) He ignored exculpatory evidence such as proof of the $20,000 deposit, proof of the initial transfers by Mr. Sehgal, and evidence received from certain depositors that they had not been defrauded;
c) He hid evidence from Mr. Sehgal that was exculpatory, including advice received from certain depositors that they had not been defrauded;
d) He predetermined what evidence he would release, and only released that evidence which fit Mr. McConnell's theory that the account was used for fraudulent purposes;
e) He only approached six individuals of approximately 33 victims, only two of whom complained;
f) He did not preserve evidence. For example, he did not preserve the photographs taken by the ATM security cameras for those deposits done at ATM machines;
g) He did not attempt to contact those making the wire transfers; and
h) He did not bother to make any inquiries until after McConnell was asked to determine if any of the transactions were fraudulent.

[21] There is no doubt that Mr. McConnell could have done a more thorough investigation. Most of Mr. Sehgal's complaints, however, are unfounded. Mr. Sehgal's objections to Mr. McConnell reflect Mr. Sehgal's view that Mr. McConnell ought to have investigated like a police officer, following every lead

and investigating every transaction. Mr. McConnell, however, was not a policeman. He owed no duty to Mr. Sehgal to conduct the type of investigation Mr. Sehgal wanted. He was not obliged to investigate every transaction.

[22] Further, the alleged problems with Mr. McConnell's investigation do not detract from the overall independent investigation done by the others, or their expert evidence with respect to any earmarks of fraud that attached to this account.

[23] Brett Cunningham, an RCMP officer, investigated the complaints made by Anne Pasochnik, who complained that she was telephoned by someone at the CRA and told that she had to make a payment of $5,000 into the account because of back taxes. Officer Cunningham determined that she was subject to a scam.

[24] Lori Blaskavitch, a Law Clerk with the Civil Remedies for Illicit Activities office of the Ministry the Attorney General, in Toronto, searched the phone numbers from which calls were made to Ms. Pasochnik, and found that website which indicated 25 posts which described attempted scams by people claiming to be CRA employees, 17 of which identified the same officer or officers as described by Ms. Pasochnik.

[25] Catherine Davidson, a detective with the Calgary Police, provided an opinion dated May 17, 2018, along with her Acknowledgment of Expert's Duty

and her C.V. Her expertise was not challenged. She indicated that the earmarks of a fraud in respect of the use of a bank account are as follows:

a) The victim receives a call from a phone number and area code often from Ontario or out of province;
b) The caller makes misrepresentations to the victims in order to obtain money;
c) Cash deposits begin to the account soon after the account is opened with frequent deposits;
d) The deposits are usually in round numbers;
e) The deposits are made from across the country by unrelated depositors;
f) The owner of the account often pleads lack of knowledge of the identity of the actual depositors or those who arranged the deposits;
g) The account owner pleads that he has no knowledge of what the depositors were told to induce them to make the deposit to the account;
h) The account is owned by a foreign national and monitored from offshore;
i) The fraudsters often claim to be borrowing money or are being paid back money for a debt owed to them from somebody outside of the country;
j) The account holder's stories are impossible to corroborate;
k) The account is often located in the city and/or province different to that of the victim's location, and
l) Some victims report the fraud and others do not.

[26] Jeffrey Thompson, is a civilian member of the National Intelligence Analyst with the RCMP. He investigated the phone numbers from which calls were made

to the two people who acknowledged that they were defrauded into making payments into the account. Mr. Thompson indicated that there were 41 complaint reports receipt between May 15 and June 27, 2017 with respect to one phone number, all related to the CRA extortion scam. Another phone number reported by the two people acknowledged to have been defrauded, returned 10 complaint reports received between June 2 and 12, 2017 with respect to a CRA extortion.

[27] Even if I exclude from my consideration the “investigation” done by Mr. McConnell, I accept the evidence of the other Crown witnesses with respect to the earmarks of fraud with respect to using a bank account and find that, on a balance of probabilities, the remaining monies in the account of $141,965.00 are the proceeds of illegal activity.

[28] Why do I make this finding?

[29] The account has the earmarks of fraud as identified by Ms. Davidson.

a. Mr. Sehgal is a foreign national.

b. He told the Bank when he opened the account that he was unemployed.

c. In three months, there were approximately 44 deposits into the account.

d. All of the deposit were in round numbers, divisible by 10.

e. All were cash deposits at ATM machines or account-to-account transfers (except for the $20,000 cheque).

f. The deposits were made at locations all over Canada. Each deposit was by a different individual.

g. Only two deposits were by the same individual - one of whom is one of the two people Mr. Sehgal admits was defrauded.

h. The account was reviewed frequently but only from locations in India and the United Arab Emirates.

i. Mr. Sehgal admitted that except with respect to the $20,000 cheque and his initial transfers made to open the account, he did not know any of the individual depositors into the account, or why any of them had made the deposits into the account.

2. Has Mr. Sehgal provided a credible explanation for the suspicious circumstances, or establishment a legitimate source for the property?

[30] He has not.

[31] Mr. Sehgal says, and I accept, that because of the financial requirements he had to meet in order to immigrate to Canada under Québec's immigration legislation, he needed to have an account in Canada, containing a balance of $180,000, CDN.

[32] I do not accept Mr. Sehgal's explanation for how and why the money was deposited to the account. His explanation is vague and unsubstantiated.

[33] Mr. Sehgal says that because of the devaluation of the 500 and 1000 rupee notes by the Indian Government, and because of government imposed restrictions on money transfers out of India for immigration purposes, he could not transfer money from his accounts in India to the account in Canada.

Therefore, he entered into a Hawala. In the Hawala, Mr. Sehgal enlisted the assistance of a longtime business associate, Mr. Gupta, to help with amassing the $180,000 CDN. Mr. Gupta made contact with a man named “Mahesh.” The arrangement was that Mahesh would arrange for money to be deposited in Mr. Sehgal’s account in Canada. Once money was deposited in the account in Canada, Mr. Gupta would reimburse the amounts to Mahesh in Indian currency. This arrangement continued until May 11, 2017 when Mahesh disappeared, without explanation. Mr. Gupta then entered into an arrangement with Mr. Khatri to complete the last few transactions.

[34] For the reasons that follow, I do not accept Mr. Sehgal’s explanation for the very suspicious circumstances surrounding the deposits into the account.

[35] First, there was no admissible evidence before me of what constituted a Hawala or how it operated.

[36] In argument, Mr. Sehgal relied on two sources of information with respect to what constituted a Hawala and how it operated: an article from the Toronto Star dated June 20, 2014 (7th Supp. Appl. Record, tab 23 – 14) which reported that $24 billion Canadian left Canada in 2012 through Hawalas or similar methods of financing, and a report prepared by the Financial Crimes Enforcement Network in cooperation with Interpol entitled “*The Hawala Alternative Remittance System and its Role in Money Laundering*” (7th Supp.

App. Record, tab 23 – 15) which described the Hawala system and how it operates.

[37] Both of these documents are classic hearsay. Neither author brought before the court to give viva voce evidence; neither submitted an affidavit. The articles were introduced as exhibits at the cross-examination of Catherine Davidson on May 17, 2018. She did not adopt either as truthful or accurate.

[38] Second, the first mention to a Hawala arose during the cross-examination of Ms. Davidson, at question 263, page 72 of the transcript (7th Supp. App. Record Tab 22). Ms. Davidson was asked about a Hawala. She said that she had not researched the issue but understood, generally, that Hawala was a method for exchanging funds from one location into another without the funds actually leaving the respective areas. She said:

> From what I understand, and again, I haven't researched this myself, is that it's a form of exchanging of funds from one location to another, without the funds actually leaving the area. If someone owes someone in one area potentially the world, and is paid back in another portion of the world by someone who owes someone else, unlike when if I send a wire transfer from here to someone across to another country, that's an identifiable transfer.
>
> So, again, it's limited… I'm not sure of the specific details on how it works, but that is what I believe Hawala is somewhat like.

[39] Third, even if I accept the description of a Hawala contained in the Interpol document, the arrangement described by Mr. Sehgal is not a Hawala.

[40] The Interpol document describes a Hawala as a non-traditional banking or financial arrangement or remittance system developed in India before the introduction of Western business practices. Hawalas often operate legitimately. The hallmark of a Hawala remittance system is that it based on trust and extensive use of connections such as family relationships or regional affiliations, without any sort of negotiable instruments. In a Hawala, transfers of money take place based on communications between a team of members of a network known as Hawaladars or Hawala dealers.

[41] By way of an example from the Interpol document, A, in North America, wishes to transfer money to his brother B, in India. In order to do so, A contacts a Hawaladar. The Hawaladar charges a commission to assist with the transaction. The Hawaladar tells A to call X, a member of the same ethnic community, living in Canada. A gives to X the money he wishes to give to his brother B, plus the commission for the Hawaladar. X calls Y in India and tells Y to pay the money to B (A's brother).

[42] A key component of this arrangement is trust. A trusts X. X does not give A a receipt. X keeps records in order to keep track of how much money s/he owes Y in Pakistan. X trusts Y to make the payment in Pakistan to B. The A - X transaction always takes place before the Y - B transaction.

[43] Another key component of the arrangement is connections. X is connected to Y Pakistan. They are part of the same network. Y could be repaying a debt he owes to X, or, could be handling money that X entrusted to him.

[44] Even if I were to accept the description of a Hawala as set out in the Interpol paper, the arrangement that Mr. Sehgal described does not qualify as a Hawala, as essential elements are missing. For instance:

a) There are not the necessary trust relationships. Aside from Mr. Sehgal knowing Mr. Gupta, neither Mr. Sehgal nor Mr. Gupta knew, or heard of Mahesh or Mr. Khatri, before each became involved with Mr. Sehgal and Mr. Gupta.

   Mr. Sehgal heard of Mahesh only through Mr. Gupta. Mr. Sehgal spoke to Mahesh only once, over the phone. He had no phone number email or address for Mahesh, nor did he know his full name. Mr. Sehgal admitted that he had no knowledge of what Mahesh's arrangement was with the depositors or what Mahesh was going to do to get the money into the account.

   Mr. Gupta testified that he never met Mahesh, does not know his last name, where he lives, or what line of work he was in. He does not know his phone number and there are no phone records that he can check. Mr. Gupta said that he was put in touch with Mahesh through a friend but does not recall who that friend was or that friend gave him any information about Mahesh. Mr. Gupta did not ask Mahesh any questions before Mr. Gupta put Mahesh in charge of arranging the

deposits in the account, and by giving this Mahesh access to the accounts.

b) The transactions that Mr. Sehgal engaged in were the reverse of those described in the Interpol paper. The Interpol paper said that the A - X transaction occurred before the Y – B transaction. In this case, Mr. Sehgal only authorized the transfer through Mr. Gupta to somebody in India, after the Canadian funds were deposited into the account.

c) There was no commission paid. Mr. Sehgal confirmed that Mahesh was not paid a commission. He had no idea why Mahesh was prepared to help with depositing $180,000 CDN into the account. It defies common sense that Mahesh would act for free or would accept risk in the transactions without being paid a fee.

d) There was no community or network. Mr. Sehgal was not involved in giving Mahesh instructions about what to tell depositors to get them to make the deposits. Mr. Gupta also had no knowledge of what the depositors were told to adduce them in the making payment to the account.

e) There was no information provided with respect to any of the individuals involved in a Hawala in India.

[45] Third, Mr. Sehgal himself does not use the word Hawala nor does he consistently describe the arrangements that he described as a Hawala. At first, he described his arrangement to the police as an arrangement he had with three friends in India which agreed to give him Canadian dollars in exchange for

rupees. Two of these friends were Mr. Gupta and Mr. Khatri. Later in that same interview, he gave a number of other explanations such as he sent the money himself, that he brought the money and put it into the account, that friends sent the money, that relatives sent the money, that his cousin or his friends sent the money, or that people sent the money because he told them to.

[46] Fourth, I do not accept Mr. Sehgal's explanation for why he could not transfer the money to Canada from his resources in India. Mr. Sehgal described himself as a wealthy entrepreneur owning many businesses in the hospitality and construction fields. He admitted that at the material time he had a USD account in India containing $250,000. By any account, Mr. Sehgal is a sophisticated, affluent business person. His explanation for not being able to transfer the money makes no sense.

[47] Mr. Sehgal says that he could not transfer money because the Indian government had devalued the 500 and 1,000 rupee notes because they were used by criminals. Certainly, this devaluation would have made it difficult for Mr. Sehgal to transfer $180,000 CDN, in specie, to Canada. There is no evidence that he tried to transfer the money by physically shipping or carrying it to Canada, or that he considered doing so. Physically transporting that sum of money would have been dangerous. In modern commerce and banking, there is no need to

move cash in order to fund the $180,000 Canadian in the Canadian bank account.

[48] Mr. Sehgal also explained that he did not transfer the $180,000 CDN from his bank in India to his bank in Canada (notwithstanding that he had money available to be transferred) because “a friend” told him that he could not transfer that amount of money for immigration purposes. The Indian government forbade it.

[49] Mr. Sehgal’s evidence in this regard is not credible and is based on hearsay. He does not identify this friend or the source of the information the friend gave him. He did not, for example, contact his bank in India. He cites no Indian government authority or record to support this assertion.

[50] Fifth, it turns out that the transfer of $180,000 from India to Canada was entirely possible. Immediately after Mr. Sehgal discovered that the Canadian TD account was locked down because of fraud concerns, his sister transferred $180,000, USD, to the immigration consultant.

3. Has Mr. Sehgal proven, on a balance of probabilities, that he is a responsible owner or a legitimate owner of funds such that the funds are his rightful property and exempt from forfeiture?

[51] He has not.

[52] Mr. Sehgal, referring to Mr. McConnell's investigation, submitted that TD could only prove that $15,000 entered the account as a result of fraud. TD's attempts to call and speak to depositors who transferred money into the account was unable to unearth any who had been defrauded of money. Therefore, Mr. Sehgal invited me to conclude that none of the money remaining in the account after the $15,000 was paid out to the two acknowledged victims of fraud, was obtained illegally.

[53] Mr. Sehgal says that he did not know where the money in the account came from, or whether any of it was obtained unlawfully.

[54] I accept that Mr. Sehgal was the rightful owner of $2,350 that he transferred (by two separate transfers) into the account when he opened it. I also accept that Mr. Sehgal deposited into the account $20,000 comprising a cheque that was payable to him.

[55] From that, I must deduct $1,299.71. In his cross Examination, Mr. Sehgal said that he withdrew money from the account while he remained in Canada for expenses as hotels and meals. From the record, it appears Mr. Sehgal removed funds from the account on February 16, 17, 21, and March 31, 2017 (App. Record, ta 2F, pages 82 and 83). Therefore, Mr. Sehgal's legitimately deposited funds remaining were $21,050.29.

[56] As indicated above, with respect to the balance of $141,965.00 remaining after deducting the money legitimately in the account belonging to Mr. Sehgal, I have found that, on a balance of probabilities, those funds were the proceeds of unlawful activity. In doing so, I accepted the expert evidence with respect to the earmarks of fraud or unlawful activity set out by Ms. Davidson, as they apply to the account in this case. I have not accepted Mr. Sehgal's explanation for the money being deposited in the account.

4. Has Mr. Sehgal shown that it is clearly not in the interest of justice to make forfeiture?

[57] As indicated above, relief from forfeiture under section 3(1) of the *CRA* on the basis that it is not in the interests of justice to forfeit the money, is the exceptional remedy.

[58] In this case, Mr. Sehgal says that forfeiture is unfair. Mr. Sehgal is the rightful owner of the money. The Crown laid but then withdrew criminal charges against Mr. Sehgal. The forfeiture can only be seen as an attempt to obtain the funds by avoiding the more rigorous criminal standard of proof. Mr. Sehgal has not been shown to have been involved in any unlawful activity. Therefore, forfeiting the money to the Crown constitutes a punitive and excessive exercise of forfeiture. Mr. Sehgal had no involvement in, knowledge of, or responsibility for the relevant criminal activity.

[59] Applying the criteria from *Aubin Road* with respect to forfeiture, relief from forfeiture should not be granted in this case. The only evidence is that Mr. Sehgal was not involved, himself, in unlawful activity. However, all circumstantial evidence points to the fact that $141,965.00 of the money in the account was likely obtained through illegal activity. Mr. Sehgal has not given an acceptable explanation for the deposits that were made, aside from as a result of illegal activity. Even if I accept Mr. Sehgal's evidence about his innocence about the deposits in the account, he provided the details of and access to his accounts to Mahesh and Mr. Khatri, two people about which he knew nothing. In other words, he gave these absolute strangers the keys to the account which allowed them to use the account, according to Mr. Sehgal, as an instrument of illegal activity.

[60] There is no evidence for me that indicates that forfeiture is draconian or unusually harsh. Given my findings with respect to the probability that the account was used as an instrument of illegal activity and that the $141,965.00 in the account was obtained by illegal means, forfeiture meets the purposes of the act in terms of compensating persons who suffer losses as a result of unlawful activities, preventing people engaged in unlawful activities from profiting from their actions, preventing property from being used to engage in unlawful activities, and preventing injury to the public that may result from conspiracy to engage in unlawful activities.

[61] For the foregoing reasons, the Attorney General's application is allowed, in part. $21.050.29 shall be paid from the account to Mr. Sehgal as he is the legitimate owner of that amount. The balance of $141,965.00 will be forfeited under the *CRA*.

Costs:

[62] I will address the issue of costs in writing. The parties' submissions are limited to four double-spaced typewritten pages, excluding appendices and bills of costs. The Attorney General's submissions are to be served and filed by 4 p.m. July 19, 2019, and Mr. Sehgal's by 4 p.m. August 9, 2019.

TRIMBLE J.

Date: June 26, 2019 – Corrected July 5, 2019

CITATION: Attorney General of Ontario v. $163,015.29 in Canadian Currency (in rem), 2019 ONSC 3973
COURT FILE NO.: CV-17-5566-00
DATE: 2019 06 26
CORRECTED: July 5, 2019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

RE: Attorney General of Ontario, Applicant

AND:

$163,015.29 in Canadian Currency *(in rem)*, Respondent

BEFORE: TRIMBLE J.

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ENDORSEMENT

Trimble J.

Released: June 26, 2019 – Corrected July 5, 2019