COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Travelers Insurance Company of Canada, 2024 ONCA 553
DATE: 20240712
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Benotto, Roberts and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent (Respondent)

and

Travelers Insurance Company of Canada

Applicant (Appellant)

David T. Ullmann, Alex Fernet Brochu and David Mackenzie, for the appellant

Melissa Adams, for the respondent

Heard: October 4, 2023[1]

On appeal from the order of Justice Judy A. Fowler Byrne of the Superior Court of Justice, dated November 23, 2022, with reasons reported at 2022 ONSC 5838.

Roberts J.A.:

A. OVERVIEW

[1] The appellant, Travelers Insurance Company of Canada ("Travelers"), challenges the application judge's dismissal of part of its subrogated claim for

[1] At the panel's request, the parties provided further written submissions in May 2024.

payment from proceeds of crime that were forfeited to the Crown under s. 462.37(2.01) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] This appeal turns on the question of whether, in the particular and narrow circumstances of this case, Travelers has an interest in property by way of a constructive trust that should have been paid as restitution to its insured that was a victim of a crime but was instead forfeited in error to the Crown.

[3] Sections 462.42(1) and 462.42(4) of the *Criminal Code* together provide that "[a]ny person who claims an interest in property that is forfeited" as proceeds of crime to the Crown may seek an order "declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest." Here, if Travelers has the requisite "interest in property that is forfeited", it would be entitled to payment of its subrogated claim from the funds forfeited to the Crown under s. 462.37(2.01).

[4] Travelers paid out two insureds under their respective insurance policies for losses suffered as a result of a large-scale cyber-fraud operation. Specifically, under the cyber-fraud insurance policies it had issued, Travelers paid out over $250,000 to its insured, Technologies Xpertdoc Inc. ("Xpertdoc"), and about $1 million to its insured, Robert Thibert Inc. ("Thibert").

[5] The person behind the operation, Mr. Sébastien Vachon-Desjardins, pleaded guilty to various counts related to the ransomware attacks by which he gained control over the victims' data, holding the data until he was paid a ransom

in Bitcoin. He cooperated with the police, identifying the victims of his frauds, including Travelers's two insureds. He consented to restitution of the claims of all his victims.

[6] Travelers participated in the process to obtain restitution of the amounts paid to its two insureds in the sentencing proceedings against Mr. Vachon-Desjardins. Certain of Mr. Vachon-Desjardins's property (including what was at the time several million dollars' worth of Bitcoin and several hundred thousand dollars in cash) was seized by the RCMP in January 2021. For the purpose of making a claim for restitution before the sentencing judge, Travelers provided information to support restitution for its two subrogated claims (the "Thibert claim" and the "Xpertdoc claim"). No issue was taken with Travelers's subrogated claims. Travelers understood that the Crown would put its subrogated claims before the sentencing judge.

[7] Along with the claims for six other Canadian victims, the Crown put the Thibert claim before the sentencing judge during the restitution hearing. Thibert received restitution in the amount of $706,921. However, the Crown inexplicably and erroneously failed to put the smaller, similar Xpertdoc claim before the sentencing judge. Nor did the Crown bring the Xpertdoc claim to the sentencing judge's attention so that notice of the Crown's forfeiture application could be given to Travelers under s. 462.41(1) of the *Criminal Code*: *Connolly v. R.*, 2007 NLCA 5, 262 Nfld. & P.E.I.R. 281, at paras. 12-14 ("*Connolly* NLCA"). The Xpertdoc claim

was not paid because, as the sentencing judge remarked, restitution was not claimed for that victim. Had its claim been before the sentencing judge, as the application judge found, Travelers would have benefitted from a "generous restitution order" for the amounts paid to Xpertdoc, similar to the restitution ordered for the Thibert claim and the other victims whose claims were put before the sentencing judge by the Crown. The seven victims before the sentencing judge all received restitution.

[8] After the release of the sentencing decision, Travelers wrote to the sentencing judge to inquire whether he would re-open the question of how to distribute the forfeited funds because, through inadvertence, Travelers had not received restitution for amounts which should have been paid to it under the sentencing judge's restitution order. In response to Travelers's request for relief, the sentencing judge indicated that he could not order further restitution because he was *functus officio*. Travelers then sought relief from forfeiture through an application under s. 462.42 of the *Criminal Code*.

[9] The application judge allowed Travelers's application in part and ordered that the amounts paid as ransom to Mr. Vachon-Desjardins related to Xpertdoc not be forfeited but paid to Travelers. She dismissed Travelers's claim for the deductible paid by Xpertdoc and the other related payments made by Travelers to its insured that arose out of the ransomware operation, including amounts paid to Xpertdoc under its insurance policy for investigation fees, consultation fees, and

legal fees. She found that there was an admitted and erroneous failure to put the Xpertdoc claim before the sentencing judge, and that it would likely have been paid, like the other restitution claims. However, she held that she had no jurisdiction to revisit a sentence that had not been appealed by the offender or the Crown and could not grant restitution to Travelers as relief from forfeiture. She determined that, apart from the ransom payment, Travelers was in the same position as an ordinary creditor and did not have the requisite interest in the forfeited property. She held that its claim for reimbursement of monies beyond Xpertdoc's ransom payment would properly be against Mr. Vachon-Desjardins in civil proceedings.

[10] I would allow the appeal. The restitution and forfeiture provisions of the *Criminal Code* do not transform the Crown into a guarantor or trustee of claims. Even the Crown's erroneous failure to put the Xpertdoc claim forward and bring it to the sentencing judge's attention does not sustain Travelers's claim of an unjust enrichment and a constructive interest in the forfeited property. However, it is the Crown's erroneous omissions, in combination with the near certainty that restitution of the Xpertdoc claim would have been made, that amount to unjust enrichment supporting the requisite proprietary interest by way of a constructive trust in favour of Travelers. The Crown received monies that, but for the Crown's erroneous omissions, should and would have been paid as restitution to Travelers in satisfaction of its subrogated Xpertdoc claim. As a result of the forfeiture, the

Crown was unjustly enriched to the detriment of Travelers and without juristic reason. Those particular circumstances give rise to a constructive trust in favour of Travelers.

[11] The application judge erred in her application of s. 462.42 to the particular circumstances of this case. She erroneously characterized Travelers as being in the position of an ordinary creditor. This caused her to fail to give effect to her findings that support a constructive trust in favour of Travelers. These findings included that the Crown was aware of the Xpertdoc claim and had erroneously failed to put it before the sentencing judge, and, had it done so, the Xpertdoc claim, like the Thibert claim and other claims before the sentencing judge, would have received restitution beyond only the ransom payment. In these circumstances, the Crown erroneously received monies that should have gone to Travelers. As a result, the application judge erred by mischaracterizing Travelers's claim as a claim for restitution rather than an interest in the property forfeited. She erred in finding that there was no claim for unjust enrichment in this case.

[12] This case turns on its unique facts: the Crown received monies that, but for the Crown's errors, should have been paid to Travelers. Travelers therefore had the requisite proprietary interest in the seized proceeds of crime by way of a constructive trust. Travelers should therefore be granted relief from forfeiture beyond the ransom amounts already ordered by the application judge.

B. BACKGROUND FACTS

(a) Ransomware operation and payments

[13] Between May 2020 and January 2021, Mr. Vachon-Desjardins carried out elaborate and far-reaching ransomware attacks in Canada and throughout the world. He breached private computer networks and systems, hijacked victims' data, and held the stolen data for ransom. He distributed stolen data when ransoms were not paid. If and when his victims paid the demanded ransoms in Bitcoin, Mr. Vachon-Desjardins provided a decryption key that allowed his victims to access their data.

[14] Travelers was the cyber-insurer for Xpertdoc and Thibert, victims of the ransom operation. Both insureds made successful claims to Travelers under their respective insurance policies. These losses included the insured's expenditures to negotiate and pay the ransom, acquire and transfer the demanded Bitcoin, and then rehabilitate their data and systems to a usable state once the decryption key was provided. Travelers paid out more than $250,000 to Xpertdoc and, ultimately, around $1 million to Thibert. Both Xpertdoc and Thibert paid a $10,000 deductible under their respective policies.

(b) Proceedings in the Ontario Court of Justice

[15] In January 2021, the RCMP seized just under 700 Bitcoins and several hundred thousand dollars in cash from Mr. Vachon-Desjardins's accounts. In or about December 2021, the Sûreté du Québec contacted victims, including

Xpertdoc and Thibert, seeking particulars of their claims for losses incurred because of the cyber attacks. On behalf of its insureds, Travelers advised of the amounts lost by Xpertdoc and Thibert, including their deductibles, as well as the amounts paid and anticipated to be paid by Travelers.

[16] On January 31, 2022, Mr. Vachon-Desjardins pleaded guilty to five counts related to the ransomware attacks, including against Xpertdoc and Thibert. On February 1, 2022, Renwick J. of the Ontario Court of Justice (the "sentencing judge") released the reasons for sentence. He accepted the joint submission and sentenced Mr. Vachon-Desjardins to seven years' imprisonment, forfeiture of the assets seized, restitution, and a DNA order. Under s. 462.37(2.01) of the *Criminal Code*, the following assets were forfeited: approximately 680 Bitcoins, nearly 16 Monero (XMR), and approximately $742,000 in cash.

[17] The sentencing judge did not distinguish among the victims of the cyberattacks. According to the agreed statement of fact and the sentencing judge's reasons, the claims of the six other victims of the cyberattacks were paid out in full. Thibert received restitution for its claims except for the amounts claimed as "loss of profits" as described in the agreed statement of fact. As part of the aggravating features that supported the restitution order, the sentencing judge found the following with respect to the victims:

> i. The offences involved many victims, over an extended period of time;
>
> …

> iv. These offences caused direct loss of at least $2.8 million in Canada;
>
> v. Victims suffered commercial, reputational, and operational harm; these offences caused other unquantifiable losses to the victims in terms of time, productivity, and resources dedicated to replacing/reinforcing security measures to prevent similar attacks; victims lost secret and confidential data; in some cases the data was leaked (when ransoms were not paid) causing untold further harm. [Footnote omitted]

[18] The sentencing judge ordered restitution out of the forfeited funds under s. 462.49(2) to seven Canadian victims that had requested it. Travelers received $706,921 for the Thibert claim, but nothing with respect to the Xpertdoc claim. This omission was explained in the sentencing judge's reasons, in a footnote, that some victims had not sought restitution: "Xpertdoc, for example, reported a total loss of $258,300, but because it was re-imbursed by [its] insurance for $255,800 (a loss which is not included in the $2.8 million estimate), no claim for restitution was sought."

[19] As the application judge noted in her reasons, both parties agreed that "it is not known why the claim of Xpertdoc was not put before Justice Renwick or why he believed Xpertdoc was not seeking restitution." The application judge characterized the Crown's failure to put Travelers's subrogated claim for Xpertdoc's losses before the sentencing judge as having been "erroneously omitted". The application judge acknowledged that the claims adjuster for Xpertdoc and Thibert provided the investigating officer of the Sûreté du Québec, who was

collecting the information for the RCMP, with relevant information supporting Travelers's subrogated claims. Moreover, the sentencing judge ordered restitution for the other victims' claims, including Thibert's losses for consultation fees and the ransom payment. As the application judge further noted, "Travelers was entitled to seek restitution as the insured for both Thibert and Xpertdoc", and "had its claim on behalf of Xpertdoc been properly represented to Justice Renwick, it would have benefited from a generous restitution order as well."

[20] On May 10, 2022, the Crown received notice from the U.S. Department of Justice that there were over 400 victims worldwide of Mr. Vachon-Desjardins's ransomware criminal enterprise and that an indictment against Mr. Vachon-Desjardins was issued in Florida on December 2, 2020. Confident that it would obtain a restitution order, the U.S. Department of Justice indicated its interest in the forfeited funds, after the amounts under the sentencing judge's restitution order were paid, to provide restitution to the victims it had identified.

[21] On July 13, 2022, approximately five months after the sentencing judge's decision was issued, counsel for Travelers wrote to him via email seeking to correct the misunderstanding that a restitution claim for Xpertdoc had not been put forward, which, Travelers submitted, occurred "through inadvertence on either the RCMP or the Crown's part." Travelers received the following response from the Ontario Court of Justice: "Please be advised that your letter was forwarded today

to his Honour. Justice Renwick takes the position that as a statutory court, he is now *functus officio*."

(c) Application for Relief from Forfeiture

[22] Travelers brought an application under s. 462.42 of the *Criminal Code* for relief from forfeiture, seeking additional payment from the forfeited funds for monies paid to Thibert and also to Xpertdoc. Travelers claimed reimbursement of the amount of $270,550 with respect to Xpertdoc. The Crown conceded the reimbursement of the ransom payment made on behalf of Xpertdoc but opposed repayment of the other amounts claimed by Travelers.

[23] The application judge noted that the Crown is holding, as restitution, more than the amount Travelers is seeking but that at the time of the application, "[t]he demand on the remaining forfeited funds now far exceeds what is being held." She concluded that while Travelers could have sought restitution for the amounts claimed at sentencing and obtained a "generous restitution order", Travelers could not claim restitution on its application under s. 462.42. Claims for restitution had to be made at the sentencing stage through the Crown and she had no jurisdiction to revisit a sentence that had not been appealed by Mr. Vachon-Desjardins or the Crown.

[24] With respect to the request for relief from forfeiture, the application judge determined that apart from the payments paid for the ransom remitted to Mr. Vachon-Desjardins, she could not grant further relief from forfeiture with

respect to any of the other amounts claimed because they did not form part of the forfeited property. She concluded that: “[t]here is no claim for unjust enrichment here because the Crown has not been enriched by the amounts paid out by Travelers for lost profits, consultation fees or legal fees.”

[25] The application judge reasoned that anyone claiming relief from forfeiture must establish that the claim goes beyond that of an ordinary unsecured creditor of the offender and attaches to the forfeited property itself. She concluded that only the amounts paid as ransom satisfied the interest in property branch of the test under s. 462.42. She explained that monies paid out by Travelers to its insured for loss of profits, consultation fees, and legal fees, while losses amenable to a restitution claim or a civil action against Mr. Vachon-Desjardins, were never monies paid to or possessed by Mr. Vachon-Desjardins. As a result, Travelers’s claim for these other amounts could not constitute an interest in the forfeited property seized from Mr. Vachon-Desjardins.

[26] Moreover, she noted that relief from forfeiture is discretionary, and concluded that exercising her discretion to allow payment of the losses from the forfeited funds, where Travelers had no interest in the forfeited property, would give Mr. Vachon-Desjardins a benefit by satisfying a potential civil judgment in Travelers’s favour. She held that to do so would defeat the purpose of the forfeiture provisions under the *Criminal Code*.

C. ISSUES

[27] Travelers does not appeal the application judge's dismissal of its claim with respect to the additional Thibert payments. It confines its appeal to the dismissal of its claim in relation to the non-ransom portions of the Xpertdoc claim that, according to the agreed statement of fact before the sentencing judge, consisted of consulting fees, the ransom payment, investigation fees, and lawyers' fees. Travelers raises the following issues:

1. Did the application judge err in her interpretation of what constitutes an "interest in property forfeited" under s. 462.42 of the *Criminal Code*?
2. Did the application judge err in failing to conclude that Travelers was a victim of crime and had the requisite interest in the forfeited proceeds?
3. Did the application judge err in finding that she did not have discretion to grant relief from forfeiture in the circumstances and in failing to exercise her discretion to repair the errors in the Crown's process?

[28] This case turns on its unusual and particular facts. As I shall explain, the application judge erred in failing to give effect to her factual findings and misapprehended the nature of Travelers's status and its interest in the forfeited property. As a result, the application judge erred in finding that Travelers had no proprietary interest in the forfeited proceeds. I am also of the view that the application judge took an unduly restrictive approach to the scope of her discretion and failed to consider and apply the overall purpose of the relief from forfeiture

provisions to all the relevant circumstances, especially the erroneous exclusion of Travelers's restitution claim from the sentencing judge's consideration and the failure to give Travelers the requisite notice of the Crown's forfeiture application.

D. ANALYSIS

(a) General principles of equity and relevant statutory provisions

[29] To place Travelers's appeal in the proper context, it is helpful to start with a review of the forfeiture provisions under the *Criminal Code*.

[30] Sections 462.37(1), 462.37(2.01), and 462.38(2) are the forfeiture provisions that permit the court to order, on application by the Attorney General, that any property that is proceeds of crime obtained through the commission of a designated offence (including the ones in issue here) be forfeited to the Crown "to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law." In this case, the forfeiture order was made under s. 462.37(2.01), and, unlike a forfeiture order under s. 462.38, Travelers had no right to appeal from that order: *Criminal Code*, s. 462.44.

[31] Section 462.41(1) requires that, before making a forfeiture order in relation to any property, "a court shall require notice in accordance with subsection (2) to be given to and may hear any person who, in the opinion of the court, appears to have a valid interest in the property." In complying with this requirement, the court must rely on the assistance of the Crown, as the party seeking forfeiture, to identify possible interested parties, and it is the responsibility of the Crown to provide the

court with the necessary information to permit the judge to make the appropriate orders under s. 462.41(4): *Connolly* NLCA, at paras. 12-14.

[32] Section 462.42 sets out the relief from forfeiture provisions. Section 462.42(1) allows any person[2] "who claims an interest in property that is forfeited" to the Crown to apply for an order under s. 462.42(4). Section 462.42(4) allows a judge to order relief from forfeiture. Under s. 462.42(4), the judge hearing the application "may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest." Before making such an order, however, the application judge must be satisfied that the applicant has established, among other requirements, that they have a valid interest in the property that goes beyond the interest of a general or an ordinary creditor and that it is appropriate in the circumstances for their interest to take priority over the forfeiture order: see *Criminal Code*, s. 462.41(1); *1431633 Ontario Inc. v. Canada (Attorney General)*, 2010 ONSC 266, 250 C.C.C. (3d) 354, at para. 26. If the application judge grants the order, the Attorney General "shall", following the expiry of the appeal period or the determination of an appeal under s. 462.42(5), upon application pursuant to s. 462.42(6) by the person who obtained the order, return the property to that person or remit an amount equal to the value of the interest to them.

[2] "Any person" is subject to the exceptions under s. 462.41(1)(a)-(b). Neither of these exceptions apply in this case.

[33] Relief from forfeiture is discretionary. Accordingly, it is important not to take a narrow view of the rules and procedures in the *Criminal Code* concerning the forfeiture of proceeds of crime: *Chun v. R.*, 2015 QCCA 590, *per* Kasirer J.A. (as he then was), at fn. 12. Courts considering an application for relief from forfeiture must not lose sight of the rationale behind the scheme and the effect of forfeiture on innocent third parties with a legitimate interest in the forfeited property: *R. v. 170888 Canada Ltée*, [1999] 174 D.L.R. (4th) 340, at pp. 347-48 (Que. C.A.). As the Court of Appeal of Quebec, *per* Fish J.A. (as he then was), further observed in *170888 Canada Ltée*, at p. 349:

> An important objective of that scheme is to afford a meaningful recourse to innocent third parties whose property rights are affected by an order of forfeiture under s. 462.37 - not ultimately, in the civil courts, but rather immediately, before a court of criminal jurisdiction and within the framework of the forfeiture scheme itself.

(b) Application to the present case

(i) Analytical errors

[34] Travelers submits that the application judge erred in failing to recognize that it was a victim and not an ordinary creditor and that with respect to the amounts paid to Xpertdoc, it had a claim for unjust enrichment and the requisite constructive interest in the property forfeited in the amount of $270,550. It argues that the relevant amount in which it has a constructive property interest is the amount that should have been and was not paid as restitution by the sentencing judge because of the Crown's erroneous omissions. While she alluded to the admitted and

erroneous omission of Travelers's Xpertdoc claim by the Crown, Travelers submits that the application judge erred by concluding that it had no claim for unjust enrichment.

[35] The Crown submits that Travelers has no claim for unjust enrichment in respect of the forfeited proceeds. Rather, it submits that its claim for relief from forfeiture is effectively a claim for restitution that cannot be recovered under the relief from forfeiture provisions of the *Criminal Code*.

[36] As I explain in greater detail below, the application judge's conclusions are the product of a cascade of analytical errors: 1) the application judge erred in failing to give effect to her various factual findings about the Crown's erroneous omissions and the likelihood of restitution to Travelers for the Xpertdoc claim; 2) the failure to give effect to her factual findings led her to erroneously divorce what happened before the sentencing judge from her consideration of Travelers's application; 3) she also failed to consider whether Travelers could have an interest in the property forfeited to the Crown by way of constructive trust that goes beyond the direct transfer of property to the offender; 4) as a result, she concluded that, apart from the ransom payment, Travelers was an ordinary creditor without an interest in the forfeited property; and 5) she concluded that it would therefore be inappropriate for her to exercise her discretion to grant relief from forfeiture.

[37] The application judge correctly recognized Travelers's position for the purpose of obtaining relief from forfeiture of the ransom payment. Having paid out

Xpertdoc's losses, Travelers stepped into the shoes of its insured and was entitled to seek compensation for its subrogated claim as a victim of the offences: *R. v. Popert*, 2010 ONCA 89, 258 O.A.C. 163; *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109, at para. 50. However, with respect to the balance of Travelers's claim, the application judge misapplied the test for ordering relief from forfeiture under s. 462.42 by finding that Travelers did not discharge its onus that it "has a valid interest in the property that goes beyond the interest of a general creditor and that the nature and extent of that claim has been proven" and that it would be "appropriate in the circumstances for [Travelers's] interest to take priority over the [f]orfeiture [o]rder": *1431633 Ontario Inc.*, at para. 26 [emphasis added].

[38] Because of her mischaracterization of Travelers as an ordinary creditor for the balance of its claim, the sentencing judge too narrowly construed Travelers's "interest in property forfeited" for the purposes of s. 426.42(1) as only an interest in the funds that were paid as ransom to Mr. Vachon-Desjardins. She failed to consider whether the circumstances of the Crown's erroneous omissions and the likelihood of restitution to Travelers gave rise to a claim for unjust enrichment supporting a constructive trust over the proceeds in the amount of the Xpertdoc claim in the circumstances of this case.

[39] Further, because of her mischaracterization of Travelers as an ordinary creditor, in considering whether to exercise her discretion, the application judge

erred by relying on inapplicable policy concerns that payment out of Travelers's subrogated claims from the forfeited proceeds of crime would benefit the offender, as expressed in *Lumen Inc. v. Canada (Attorney General)* (1997), 151 D.L.R. (4th) 661 (Que. C.A.), leave to appeal refused [1997] C.S.C.R. No. 448 and other cases. The Court of Appeal of Quebec noted in *Lumen*, at p. 665, that ordinary creditors do not as a general rule have an enforceable interest in any particular assets of debtors.

[40] However, the present case does not involve a third-party debt, the payment of which would benefit Mr. Vachon-Desjardins because the proceeds of crime would pay down or extinguish his debt. Rather, this is compensation to the victim of the very crime which gave rise to the forfeiture order: *R. v. Tatarchuk*, [1993] 133 A.R. 6 (Alta. Q.B.), at para. 5. As the Alberta Court of Queen's Bench noted in *Tatarchuk*, at para. 5: "Payment of proceeds of crime to one of the victims of the crimes cannot in any fashion be seen as benefitting the wrongdoer." Further, to the extent there is any indirect benefit to the wrongdoer from ordering relief from forfeiture, it must be balanced against the victim's legitimate interests in the property: see *Wilson v. R.*, [1994] 15 O.R. (3d) 645 (C.A.), at p. 657; *Connolly* NLCA, at para. 38.

[41] As a result of the application judge's analytical errors, I would accord no deference to her dismissal of the balance of Travelers's Xpertdoc claim and

undertake afresh the required analysis of whether Travelers is entitled to relief from forfeiture.

(ii) Travelers has an interest in the property forfeited by way of a constructive trust

[42] I start with the question of whether Travelers has the requisite "interest in property that is forfeited" under s. 462.42(1) of the *Criminal Code*. An "interest in property that is forfeited" has been interpreted to mean "a person who has title or is entitled to possession" of the property in question: *Tatarchuk*, at para. 4. An "interest in property that is forfeited" can be by way of a constructive trust imposed because of an unjust enrichment: e.g., *1431633 Ontario Inc.*, at paras. 44, 64. As the Supreme Court instructed in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at pp. 850-51: "The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs."

[43] Moreover, Travelers would have the requisite "interest in property that is forfeited" under s. 462.42. The Crown fairly acknowledges that for the purpose of unjust enrichment, the concept of "loss" may capture a benefit that was never in Travelers's possession but that would have accrued to its benefit had it not been received by the Crown instead. The Crown submits, however, that there was no unjust enrichment because the Crown was not enriched by the non-ransom amounts to the corresponding deprivation of Travelers. Even if that were the case,

it is the Crown's position that there is a juristic reason barring any claim the appellant may have for unjust enrichment.

[44] The test for unjust enrichment that gives rise to a constructive trust, as set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30, is as follows: 1) Was there an enrichment of the Crown through the forfeiture of the monies that Travelers maintains should and would have been paid to Travelers absent the Crown's admitted and erroneous omissions?; 2) Was there a corresponding deprivation suffered by Travelers?; and 3) Is there an absence of juristic reason for the Crown's enrichment?

(iii) Was there an unjust enrichment and a corresponding deprivation?

[45] The Crown maintains that the forfeiture of the proceeds did not result in an unjust enrichment to the Crown or a corresponding deprivation of Travelers. First, there was no benefit that would have accrued to Travelers: it was never entitled to restitution of the Xpertdoc claim because restitution is discretionary, and it is not possible to create an interest in the forfeited property because the Crown did not seek restitution on Xpertdoc's behalf. Further, other than the ransom, which was repaid, Travelers has no right to recover against the Crown where Travelers suffered a loss wholly unrelated to the Crown's gain, namely, the forfeited proceeds that are related to the other victims of Mr. Vachon-Desjardins. As a result, the application judge did not err in her determination that there "is no claim

for unjust enrichment here because the Crown has not been enriched by the amounts paid out by Travelers for lost profits, consultation fees or legal fees".

[46] I do not accept the Crown's submissions.

[47] First, the Crown's submissions, like the application judge's reasons, ignore the effect of the Crown's erroneous omissions and the virtual certainty that Travelers's Xpertdoc claim would have been paid out in full. In my view, there can be no doubt that the sentencing judge would have ordered restitution of Travelers's claim in respect of Xpertdoc's losses. I come to this conclusion having considered all of the relevant and uncontroverted circumstances in this case. The other Canadian claims before the sentencing judge were paid. This includes the categories of the Thibert claim that overlapped with the Xpertdoc claim. Moreover, the sentencing judge's query as to why the Xpertdoc claim was not put forward further supports the likelihood that restitution would have been ordered for that claim. Finally, as the application judge noted, the Crown's erroneous omission led to the Xpertdoc claim not being put before the sentencing judge.

[48] As the application judge further found, and as the Crown agreed, if the Xpertdoc claim had been put forward, Travelers would have received "generous restitution". The amounts paid to Thibert were drawn from the same agreed statement of facts that also contained Xpertdoc's reported losses. Moreover, the Crown's erroneous omission of failing to bring the Xpertdoc claim to the attention of the sentencing judge meant that Travelers did not have the opportunity to put forward

the Xpertdoc claim before restitution and forfeiture were ordered and the sentencing judge became *functus*. The only reason that the Xpertdoc claim was not paid out was because of the Crown's erroneous omissions. As a result of those erroneous omissions, the monies that should have gone to Travelers went to the Crown.

[49] Second, the Crown's argument that the requisite "interest in property that is forfeited" is restricted to the ransom payments made by the victims to Mr. Vachon-Desjardins fails to recognize that "interest in property that is forfeited" can arise in other ways. Specifically, this argument ignores the question of whether Travelers's interest might arise by way of a constructive trust in the particular circumstances of this case. This mirrors the application judge's analytical error.

[50] In the circumstances of this case, the erroneous forfeiture to the Crown of the monies that should have gone to Travelers amounts to an unjust enrichment to the Crown with a corresponding deprivation to Travelers.

(iv) Is there a juristic reason for the Crown to retain the forfeited funds claimed by Travelers?

[51] The Crown argues that Part XII.2 of the *Criminal Code* is a comprehensive statutory regime relating to proceeds of crime, including its seizure, restraint, and forfeiture, and s. 462.42 specifically provides the complete statutory framework allowing for relief from forfeiture of property that is otherwise lawfully forfeited to the Crown. Travelers's claim does not comply with the statutory provisions under

s. 462.42 because it is not “an interest in property forfeited” but a claim for losses that might have otherwise been ordered as restitution by the sentencing judge.

[52] I disagree. As I explained earlier in these reasons, Travelers’s claim is “an interest in property that is forfeited” – it arises by way of a constructive trust because of the particular circumstances of this case. As Travelers has an interest in the property forfeited under s. 462.42, this factor distinguishes *Gladstone v. Canada*, 2005 SCC 21, [2005] 1 S.C.R. 325, on which the Crown relies. In *Gladstone*, the respondents were claiming interest as an equitable remedy beyond the statutory scheme in addition to their interest in the property forfeited. The Supreme Court was satisfied that the statutory scheme in that case was a complete code that did not provide for the payment of interest on property seized. That is not the case here.

[53] The forfeiture provisions under the *Criminal Code* do not provide a juristic reason for the Crown to keep the erroneously forfeited funds that should have been paid to Travelers. The purpose of the forfeiture provisions is to deprive wrongdoers of the profits of their crimes, not victims and innocent third parties who have a legitimate interest in the forfeited proceeds. As a result, the forfeiture provisions are subject to the rights of persons who have an interest in the property and who are seeking an exemption from their operation. The forfeiture provisions of the *Criminal Code* do not constitute either a disposition of law or statutory right, or obligation, which would permit the Crown to keep the enrichment; they provide a

mechanism whereby the Crown can seek a court order depriving a wrongdoer of the profits of crime: *1431633 Ontario Inc.*, at para. 57.

[54] The Crown has not provided any other juristic reason for the enrichment. Moreover, in considering whether there is a juristic reason for the Crown's enrichment, it is also necessary to take into account the reasonable expectations of the parties and the relevant public policy considerations: *Garland*, at para. 46; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 43. Those factors favour Travelers.

[55] Here, the reasonable expectations of the parties were that the Crown would put forward Travelers's subrogated Xpertdoc claim before the sentencing judge for restitution. As the application judge found, the Crown erroneously omitted to do so. Further, s. 462.41(1) creates a statutory obligation to provide notice to parties who may have an interest in the property that the Crown seeks to forfeit as proceeds of crime. Moreover, it is the Crown's responsibility to bring any known claim to the court's attention so that notice may be provided: *Connolly* NLCA, at paras. 14, 16. The Crown was aware of Travelers's subrogated claim, it was within the reasonable expectation of the parties that the Crown would fulfill its responsibility and identify Travelers to the court as an interested party to whom notice of the forfeiture application would be given. Again, the Crown did not do so.

[56] I reject the Crown's submission that the issue of service of notice of the forfeiture hearing was of no moment. The failure to provide notice of a forfeiture

hearing is “a factor to be considered in interpreting any apparent statutory limitations and requirements for a post forfeiture application under s. 462.42”: *Connolly v. R.*, 2004 NLTD 228, [2005] 243 Nfld. & P.E.I.R. 226, at para. 40, aff’d *Connolly* NLCA. This reflects the recognition by Parliament that persons who are innocent of complicity in the criminal activity in issue and who have an interest in the property to be forfeited deserve an opportunity to be heard in order to protect their interests.

[57] In the circumstances of this case, had the Crown properly identified Travelers’s interest in the forfeited property to the court, at least because of its payment of the ransom, Travelers would have received notice of the Crown’s forfeiture application, which was scheduled to take place at the same time as the sentencing hearing. Travelers would have been able to attend and make submissions at the forfeiture hearing. As earlier noted, the rights of victims to participate with respect to restitution are addressed through the Crown at a sentencing hearing. However, had Travelers received notice of the Crown’s forfeiture application, it would have been in a practical position to note the Crown’s omission with respect to Xpertdoc’s subrogated claim and to have the omission corrected and its claim put before the sentencing judge prior to forfeiture being ordered.

[58] There is no public policy consideration in these circumstances that would favour the Crown retaining the funds that should and would have been paid to Travelers but for the Crown’s erroneous omissions. It is well established that the

erroneous payment of monies to one party that should have been paid to another amounts to an unjust enrichment and may give rise to a constructive trust. As the Supreme Court instructed in *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 44:

> The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the court finds would have accrued for his or her benefit had it not been received by the defendant instead [Emphasis added. Citation omitted.]

[59] Granting relief from forfeiture to Travelers in the circumstances of this case does not expand the law of constructive trust or the duties of the Crown towards victims and innocent third parties. It bears repeating that the Crown is not a guarantor or trustee of claims under the restitution and relief from forfeiture provisions of the *Criminal Code*. The imposition of a constructive trust in favour of Travelers arises on the unique circumstances of this case.

[60] For these reasons, I conclude that Travelers has a valid claim for unjust enrichment supporting a constructive trust over the portion of the proceeds forfeited to the Crown in the amount of Xpertdoc's claim that was paid out by Travelers as at the time of sentencing.

[61] On the application and on appeal, Travelers claimed that it was entitled to $270,550. However, according to the agreed statement of fact and the sentencing judge's reasons, the amount paid out by Travelers to Xpertdoc as at the time of

sentencing was $255,800. I would therefore quantify the amount held in trust by the Crown as $255,800.

(v) The court's discretion should be exercised to order relief from forfeiture

[62] The fact that Travelers has the requisite interest by way of a constructive trust in the forfeited property is not the end of the inquiry. Section 462.42(4) provides that "the judge may make an order". Accordingly, the court still retains the discretion not to order relief from forfeiture even if the preconditions of s. 462.42 are met, but that discretion must be exercised judicially: *Wilson*, at p. 655.

[63] Molloy J.'s observation in *1431633 Ontario Inc*., at para. 30, assists with this part of the analysis:

> Although Parliament intended to deprive criminals of the fruits of their crimes, it clearly did not intend to do so at the expense of innocent third parties who may have a legitimate interest in that same property. That is the purpose of the provisions permitting relief from forfeiture…and that purpose must be kept in mind when considering whether a particular applicant is entitled to the relief sought.

[64] This is an appropriate case in which to exercise the court's discretion to order relief from forfeiture. Travelers stepped into the place of a victim of criminal conduct and would have benefited from a generous restitution order if the Crown had properly put its claim before the sentencing judge or if it had the opportunity, by way of notice of the Crown's application for forfeiture, to bring its claim to the

sentencing judge's attention. In the circumstances of this case, it has a legitimate interest in the property forfeited.

Disposition

[65] I would therefore allow the appeal and make an order under ss. 462.42(4) and (6)(b) of the *Criminal Code* that Travelers be paid forthwith from the forfeited funds an amount in addition to the amount of the ransom payment already ordered to be paid by the application judge.

[66] However, the amount that should be ordered is not clear from the parties' submissions. The amount of $255,800 appears to include the ransom payment that was already ordered by the application judge. If the parties cannot agree on the amount, I would allow them to make brief written submissions of no more than two pages on the issue.

[67] Travelers has requested its costs of the appeal and the forfeiture hearing. If the parties cannot agree on the disposition of costs, I would permit them to make brief written submissions of no more than two pages, plus a costs outline, concerning Travelers's entitlement to any costs and the quantum.

Released: July 12, 2024 "M.L.B."

"L.B. Roberts J.A."
"I agree. M.L. Benotto J.A."
"I agree. L. Favreau J.A."