



About Anthony Price

Anthony graduated from the University of Victoria law co-op program, which included work terms in government and in local law firms. Anthony became an Associate in 2008 and is a member of the litigation team. He has assisted senior counsel in a variety of matters before the British Columbia courts in the areas of civil and commercial litigation.

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Young Farris Associate Goes To The Supreme Court of Canada

By Anthony Price

Introduction

On November 12, 2008 (a mere 10 months after becoming an associate at Farris), I found myself as co-counsel representing the British Columbia Civil Liberties Association at the Supreme Court of Canada hearing for *Chatterjee v. Ontario*. I had spent the previous months researching the law, drafting arguments, and preparing books of authorities, but going to Ottawa is what it is all about.

David Butcher (an experienced criminal lawyer at another law firm) was the senior counsel representing the BCCLA. We were intervening on the side of the Appellant (Mr. Chatterjee), along with the Criminal Lawyers Association and the Canadian Civil Liberties Association. Against us were the Respondent (Ontario), seven provinces, and the federal government.

The Appeal

In 2003, the Ontario police stopped Mr. Chatterjee's vehicle and found \$29,020 in loose bills, marijuana grow-op equipment, and the odour of marijuana. Although there were no criminal charges, the Province sought civil forfeiture, claiming that the cash was the proceeds of crime (drug trafficking). Mr. Chatterjee then challenged Ontario's civil forfeiture legislation as an ultra vires exercise of the criminal law power.

Chatterjee v. Ontario will determine the constitutional status of provincial civil forfeiture in Canada. Under such legislation, provinces can forfeit property acquired from a breach of the Criminal Code. The forfeiture is formally an in rem proceeding: proof of a Criminal Code breach is on a balance of probabilities, there are no formal criminal charges or criminal Charter rights, and the province can serve interrogatories on the owner/criminal. Ontario argues that the statute is valid under the "Property and Civil Rights", emphasizing that civil forfeiture only targets property. The Appellant argues that the in rem form is mere artifice; the essential character of the legislation is to go after criminals.

The Hearing

The two days before the hearing were largely spent in Ottawa hotel rooms preparing the oral submissions of David Butcher. David was staying in the Chateau Laurier.

Lesson #1: the Chateau Laurier is much nicer than the Delta.

On the day of the hearing, I arrived at the SCC more than an hour before the scheduled start, robed up, and stood around with the many other counsel (there were over 20). I talked to a lawyer I know from law school who is with BC's civil forfeiture office, each of us ignoring the fact that I was striving to eliminate his job position. Mostly I worried that something had befallen a somewhat tardy David Butcher (if something happened to him, I'd have to speak!).

Lesson #2: always stay in the same hotel as the senior lawyer, and travel with them to the Court.

David finally did arrive (he wasn't really late), and all counsel were ushered into the hearing room to get a crash course in the new sophisticated computer system. Every counsel seat now has a computer which has the record, the books of authorities, and the factums easily accessible in electronic format. I was impressed, until David's computer froze about 1 minute before the hearing started.

Lesson #3: paper will always be used.

The Chief Justice read through all of the names of counsel (mine too!) as we stood and bowed, and then Richard Macklin, counsel for the Appellant, began submissions. There were no questions for about the first 10 minutes, but then the bench began in earnest. Several of the judges began pressing our side with hard questions: isn't this just in rem, etc.? At least they seemed interested in what we had to say.

A point about Morgentaler seemed to have been missed – just because there is a provincial aspect (health) to legislation does not mean that the double aspect theory is necessarily in play. I scribbled a note to David and he whispered to me to find a portion of Morgentaler for him. I scrambled through the various books, found a useful passage, but a few moments later counsel for an intervener on our side made the same Morgentaler point in his submissions. My one chance to be actually useful during the hearing seemed to have come and gone.

David then rose for his oral submissions. I knew he had planned about 8 minutes for the 10 allocated. About 3 minutes in, David was able to get to the Hansard evidence in which Ontario's A-G had complained about the federal Liberal Party's criminal policies, suggesting that Ontario's civil forfeiture was improperly filling a perceived "gap" in the criminal law. Then the questions came and never stopped. David missed about half of his oral submissions.

Lesson #4: if you have 10 minutes, only prepare 5 minutes of key points, leading with your best point.

At the morning break, the Appellant side of the room stood around expressing some dismay about the more difficult questions asked by Justice Abella; the consensus I think was that she was leaning against us. However, when the hearing reconvened, Justice Abella asked the Respondent hard questions as well, at one point suggesting that the Respondent was being a "bit disingenuous" by arguing that forfeiture proceedings had nothing to do with people committing crimes. Everyone on our side of the room nodded vigorously, as if that mattered.

Lesson #5: it is impossible to really know which side a judge is favouring.

The focus of the bench was becoming apparent. They were not really that concerned with previous caselaw, distinguishing one case from the next, or identifying the authoritative judgment. Rather, they wanted to know what did civil forfeiture legislation do? What was it about? What was its purpose? Why should they care?

Lesson #6: caselaw matters unless it doesn't.

At lunch, we met in the cafeteria in the basement of the SCC and discussed strategy regarding the 5 minutes of reply allocated for the Appellant. I ordered the hot dog.

Lesson #7: do not eat the hot dog in the SCC cafeteria.

The afternoon session consisted of the A-G interveners quickly going through their 10 minutes. Although some of the submissions made effective points, there were almost no questions, and the bench seemed, well, respectfully, a bit disinterested? If anything, I thought that parts of the A-G intervener submissions seemed to support our cause. I had been initially a bit perturbed by the unfairness of so many A-G's, especially as they had an entire lunch hour to prepare to respond to the bench's morning questions. Now I was not so sure.

Lesson #8: more submissions are not always better.

Richard Macklin then rose for the 5 minutes of the Appellant's reply. He quite wisely ignored the two suggestions I had made during the lunch hour, and delivered an effective reply, even pointing to various aspects of the A-G arguments which in fact supported our position. When he was done, we rose, shook hands, and coordinated where we would go to drink beer. My SCC experience was over.

My Prediction

The bench seemed to take our points seriously, and it could go either way on the law. I think we will lose. We have bad facts – provinces are using civil forfeiture to seize family homes after an accused has been acquitted criminally; here, Mr. Chatterjee only lost some cash and was never even charged criminally. More importantly, allowing the appeal would be a political nightmare for the SCC: it would have to invalidate several immensely popular provincial statutes, which are even supported by Ottawa, and it would likely have to say that criminals have a valid possessory interest in the proceeds of their crimes.

I am not that hopeful.