Translated from the original French

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| Procureure générale du Québec c. Charles | | | | | | 2020 QCCQ 8810 |
| COURT OF QUEBEC | | | | | | |
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| CANADA | | | | | | |
| PROVINCE OF QUEBEC | | | | | | |
| DISTRICT OF | | | GATINEAU | | | |
| LOCALITY OF | | | | GATINEAU | | |
| “Criminal and Penal Division” | | | | | | |
| No.: | | 550-01-108091-184 | | | | |
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| DATE: | September 25, 2020 | | | | | |
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| PRESIDING: | | | THE HONOURABLE | | ROSEMARIE MILLAR, J.C.Q. | |
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| ATTORNEY GENERAL OF QUÉBEC | | | | | | |
| Applicant | | | | | | |
| v. | | | | | | |
| GUY CHARLES | | | | | | |
| Respondent | | | | | | |
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| **JUDGMENT ON AN APPLICATION FOR FORFEITURE**  **(Section 164.2 of the *Criminal Code*)** | | | | | | |
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1. The Court must decide whether the power set out in s. 164.2 *Cr. C*. to order the forfeiture of property includes the discretionary power to extract data that does not concern the offences and to return it, or, in other words, whether s. 164.2 includes the power to order partial forfeiture.

**BACKGROUND**

1. On October 8, 2018, the city of Gatineau police department seized the following property belonging to the respondent, Guy Charles, from his home: **ITEM 1** One computer tower and its *Western Digital* hard drive **ITEM 2** One USB key
2. On October 21, 2019, the respondent pleaded guilty to the following offence before the undersigned:

[translation]

Between October 8, 2017, and September 25, 2018, in Gatineau, District of Gatineau, had in his possession child pornography, thereby committing the offence punishable by summary conviction set out in section 163.1(4)(6) *Cr. C*.

1. It is admitted that the property described in ITEMS 1 and 2 were used during the commission of the offence referred to in the preceding paragraph.
2. The applicant seeks the forfeiture and destruction of these two items.
3. The respondent, a former RCMP officer, consents to the forfeiture but submits that the Court should return the family photos to him as well as the photos of police force crests, which he collects.
4. The applicant submits that s. 164.2 *Cr. C*. does not give the Court the power to order partial forfeiture – it can either order forfeiture, or not.
5. **THE LAW**
6. Section 164.2 provides:

**164.2 (1)** On application of the Attorney General, a court that convicts a person of an offence under section 162.1, 163.1, 172.1 or 172.2, in addition to any other punishment that it may impose, may order that anything — other than real property — be forfeited to Her Majesty and disposed of as the Attorney General directs if it is satisfied, on a balance of probabilities, that the thing:

* **(a)** was used in the commission of the offence; and;
* **(b)** is the property of
  + **(i)** the convicted person or another person who was a party to the offence, or
  + **(ii)** a person who acquired the thing from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that it was transferred for the purpose of avoiding forfeiture.

1. The forfeiture scheme governing sexual exploitation offences is the most recent scheme established by Parliament.
2. Section 164.2 gives the Court the discretionary power to order, in addition to any other punishment, the forfeiture to Her Majesty of movable property if the Court is satisfied that the thing was used in the commission of the offence and that it is the property of the person convicted of the offence or another person who was a party to the offence.

**THE APPLICANT’S SUBMISSIONS**

1. According to the applicant, because the Court does not have inherent jurisdiction in matters of forfeiture, the statutory interpretation of s. 164.2 *Cr. C*. based on its overall context, structure, and purpose, limits the Court’s discretion to either ordering the forfeiture of property or not.
2. To that end, it submits that it is necessary to examine the legislative structure of the three forfeiture schemes, that is, the general scheme set out in s. 490.1 *Cr. C*., the specific scheme set out in ss. 16 and 19 of the *Controlled Drugs and Substances Act* (*CDSA*), and the scheme set out in s. 164.2 *Cr. C*.
3. In the case of the general forfeiture scheme, while expanding forfeiture to any offence-related property, Parliamentintroduced a proportionality test in s. 490.41(3) *Cr. C.* that permits the Court not to order the forfeiture of property if it is satisfied that the impact of an order of forfeiture would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence, and the criminal record of the person concerned.
4. The forfeiture scheme specific to narcotics set out in the *CDSA* was amended in 2001, *inter alia*, to introduce the criterion of proportionality with respect to immovable property.
5. Under that scheme, forfeiture of offence-related property is mandatory except for immovable property, to which a proportionality test applies.
6. Therefore, according to the applicant, because the specific schemes set out in s. 164.2 *Cr. C*. and the *CDSA* concern only certain specific offences, it is clear that Parliament wants to address those crimes, and accordingly, the forfeiture order must be imposed vigorously.
7. Similarly, according to the applicant, the specific forfeiture schemes, including that set out in s. 164.2 *Cr. C.*, do not provide for a proportionality test for movable property, contrary to the general forfeiture scheme.
8. The applicant also submits that the legislative context of s. 164.2 *Cr. C*. must be taken into account because, under that scheme, even in the absence of an indictment (s. 164.1 *Cr. C*.), a judge may order the seizure of material if he or she has reasonable grounds to believe that it is child pornography, a voyeuristic recording, an intimate image, or an advertisement of sexual services.
9. In addition, the applicant notes that the provisions of s. 164.1 *Cr. C*. distinguish the material contents from the computer itself, a distinction that is not made in s. 164.2 *Cr. C*.
10. Finally, it submits that because of the particular nature of the items, the data contained in the property are inextricably linked to the storage medium that contains it, and the risk of contamination when returning the files in question would be high.

**THE RESPONDENT’S SUBMISSIONS**

1. The respondent submits that the discretionary power granted to the Court under s. 164.2 *Cr. C*. is broader than the proportionality test included in other schemes.
2. According to the respondent, s. 164.1 *Cr. C*. makes the distinction between the content and the container, and the same is true with respect to s. 164.3 *Cr. C.*
3. He submits that it would be absurd for Parliament to make no distinction between the content and the container in s. 164.2 *Cr. C.* because the Court could decide not to order forfeiture even though the content was used in the commission of one of the offences referred to in that section.

**ANALYSIS**

1. Parliament is silent in s. 164.2 *Cr. C*. with respect to the possibility of partial forfeiture.
2. Parliament’s silence is distinguishable from s. 490.41(3) *Cr. C*. and s. 19.1(3) *CDSA,* which specifically provide for the possibility of a proportionality analysis to refuse to order the forfeiture of “the property or part of the property”.
3. These two provisions read as follows:

**490.41(3)**

Subject to an order made under subsection 490.4(3), if a court is satisfied that the impact of an order of forfeiture made under subsection 490.1(1) or 490.2(2) would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part.

**19.1(3)** Where a court is satisfied that any person, other than

**(a)** a person who was charged with a designated substance offence, or

**(b)** a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,

is the lawful owner or is lawfully entitled to possession of any property or any part of any property that would otherwise be forfeited pursuant to an order made under subsection 16(1) or 17(2) and that the person appears innocent of any complicity in an offence referred to in paragraph (a) or of any collusion in relation to such an offence, the court may order that the property or part be returned to that person.

(Emphasis added.)

1. In *Craig*,[[1]](#footnote-1) the Supreme Court, per Abella, J., stated the following:

The fairness of a forfeiture order under the CDSA is further ensured by the availability of partial forfeiture. Partial forfeiture is consistent with the plain language of the statute, as well as with a contextual interpretation of s. 19.1(3), and allows a court to tailor the amount of property to be forfeited in a way that takes into account the relative weight of the listed factors. The proportionality analysis under s. 19.1(3) and partial forfeiture have a common source, in that both recognize that real property is a qualitatively and quantitatively different kind of asset, and that ordering its forfeiture can be a draconian measure.[[2]](#footnote-2)

…

The argument was advanced that, because s. 19.1(3) is made *subject to* “an order made under subsection 19(3)”, the “part” referred to in s. 19.1(3) refers to the “part” remaining available for forfeiture after the court orders property returned to innocent third parties under s. 19(3). As previously noted, that section provides a recovery mechanism for certain lawful owners of “any property or any part of any property that would otherwise be forfeited”. However, in my view, since s. 19.1(3) is already made *subject to* an order under s. 19(3), the court would only be entitled to order the forfeiture of that “part” remaining of the property in any event. Interpreting the language of the section to allow for partial forfeiture, on the other hand, gives the words “part of the property” fuller effect.[[3]](#footnote-3)

1. *Craig* makes it clear that the terms “any property or any part of any property” and “part of the property” legitimize orders of partial forfeiture*.*
2. That interpretation is consistent with the wording of s. 19.1(3) of the *CDSA*, but the words “any property or any part of any property” and “part of the property” are absent from s. 164.2 *Cr. C.*
3. Does Parliament’s omission in s. 164.2 *Cr. C.* prevent the Court from ordering partial forfeiture?
4. That is the Court’s conclusion at first glance.
5. It is also the conclusion reached by Lavergne, J. of the Court of Quebec in *Ménard*,[[4]](#footnote-4) the facts of which are similar to this case.
6. However, trial judges in other provinces have ordered partial forfeiture when making forfeiture orders under s. 164.2 *Cr. C*.[[5]](#footnote-5)
7. As appears in the excerpts from the judgments concerning sexual exploitation cited in the previous paragraph, trial judges have ordered the forfeiture of property but permitted the return of personal files, sometimes at the expense of the respondents in question, yet without specifying the legal principle justifying such return:

*R.* *v*. *Jonat*, 2019 ONSC 1633

[88]   Accordingly, Mr. Jonat shall be sentenced as follows:

…

1. An order of forfeiture in respect of the computers and cell phones seized pursuant to s. 164.2(1) of the *Criminal Code* also modified as indicated below shall be made.

…

[90]   The forfeiture order was subject to some negotiation between the parties as well. There was no issue that Mr. Jonat's two computers (the laptop and the desktop including the two hard drives) that were found to contain child pornography should be subject to a forfeiture order. The defence did object to the laptop of Mr. Jonat's spouse being subject to the proposed forfeiture order. The parties have worked out appropriate language that I have approved to enable the personal documents and photos of Mr. Jonat's spouse to be returned to her. The computers are of little tangible value being more than seven years old at this point.

*R.* *v*. *Riffon*, 2014 ONCJ 262

[35] I grant the Crown’s Application for DNA. I grant the Crown’s Application for forfeiture of all the hard drives seized by the police and permit destruction of same except for any file folder containing family photos. The isolation of such data is to be performed at the expense of the Defendant.

*R. v. Young*, 2012 ONCJ 716

[61] I make an order pursuant to s. 164.2(1) of the *Criminal Code*, directing that the property seized by the police, including any computer, hard drive, CDs, or other media shall be forfeited to Her Majesty and disposed of as the Attorney General directs. Should the appropriate authorities choose to, they may, but are not required to preserve and return to Mr. Young copies of data that was lawfully possessed by Mr. Young, upon payment by him of the reasonable costs of preserving such data.

*R.* *v*. *R.(A.)*, 2013 ONCJ 221

[12]   The Crown seeks a three year jail sentence.  It seeks several ancillary orders including a DNA order; a SOIRA order; forfeiture orders relative to all items seized (except for any family photos on the various devices); and a twenty year prohibition order under section 161, subsections (a), (b), (c) and (d).

*R.* *v*. *Sayre*, 2009 NBQB 232

[39]   Finally, there were various materials that were seized by the police, including computers, disks and related bits and pieces. The evidence was that the computer from the home also had the financial records of Mr. Sayre’s father. I do not want to do anything here that will present any problems for accounting and management of the estate or administration of his father’s affairs. Accordingly I am not going to order the forfeiture to the Crown of any computers. I will order the forfeiture to the Crown of Exhibit C-9. I will authorize the police, if need be, to ensure that there is no accessible child porn on any of the computers that they return. I do not want to do anything that will present problems about accounting on financial records.

[40]   Exhibit C-9 will be forfeited. The CD of old family photos and the music CD that can be returned and I will leave that with the police to work out what is to be returned so that he gets back the computer that has personal records on it, minus any child porn. I am sure that they will be able to figure out how to do that.

*R.* *v*. *Strohmeier*, 2007 ONCJ 141

[15]      The forfeiture order was qualified and needs to be further explained. It applies to the monitor, tower, six extra hard drives and related equipment seized from the offender. He claims there is other personal and lawful information stored on computer, including, immigration, medical, and employment records. He asks that these records be returned. I do not know if this is an easy or difficult task and, in all the circumstances, I do not wish to place an undue burden on scarce resources. The forfeiture of computer equipment seized by police is subject to reasonable efforts being made by the police, to preserve data and/or return equipment that is lawfully possessed by the offender. This data and/or equipment must be identified by the offender and communicated to the police within 90 days and he must pay for the reasonable costs of preserving any data.

1. Some would argue that the power to order partial forfeiture could be based on an implicit or tacit power given to a court so that justice may be rendered in a particular case.
2. Thus, in *Criminal Lawyer’s Association of Ontario*,[[6]](#footnote-6) the Supreme Court found that “[a] court’s inherent jurisdiction to appoint an *amicus* in criminal trials is grounded in its authority to control its own process and function as a court of law”, whereas an order requiring the Attorney General to compensate counsel at a particular rate must be grounded in law.
3. The situation in this case is completely different.
4. The Court’s power to control its own process and function as a court of law is not at issue here in the context of an application for forfeiture.
5. According to the respondent, there are only seven photos constituting child pornography in the items seized, in addition to certain other problematic photos that have been extracted.
6. The respondent claims that interpreting the provision as requiring the Court to order the forfeiture of the material unrelated to the offence would be unreasonable and inequitable.
7. With respect, the Court notes that it does not rule in equity, but in law.
8. In 2002, could Parliament, which wanted to protect children against sexual exploitation on the internet, have predicted the massive use of computers to store family photos formerly kept in albums?
9. It is highly unlikely.
10. However, s. 164.2 *Cr. C*. is clear and cannot be interpreted as permitting the partial forfeiture of property seized.
11. The Court finds that it does not have the power to order partial forfeiture under s. 164.2 *Cr. C.*
12. Accordingly, the Court grants the application.

**FOR THESE REASONS, THE COURT:**

**GRANTS** the application for forfeiture;

**ORDERS** the destruction and forfeiture of the property described in ITEMS 1 and 2 to the Attorney General of Quebec, so that it may be disposed of according to the Attorney General of Quebec’s instructions, the whole as provided by law.

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| **Mtre Christine Lambert** | | |
| Office of the Director of criminal and penal prosecutions  Counsel for the prosecution | | |
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| **Mtre Michel Swanston** | | |
| Counsel for the respondent | | |
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| Date of hearing: | July 9, 2020 | |

1. *R. v. Craig*, 2009 SCC 23. [↑](#footnote-ref-1)
2. *Ibid*. at para. 50. [↑](#footnote-ref-2)
3. *Ibid*. at para. 52. [↑](#footnote-ref-3)
4. *R. c. Ménard*, 2018 QCCQ 19640. [↑](#footnote-ref-4)
5. *R. v. Jonat*, 2019 ONSC 1633, *R. v. Riffon*, 2014 ONCJ 262*, R. v. Young*, 2012 ONCJ 716,

   *R. v. R.(A*.*),* 2013 ONCJ 221, *R. v. Sayre*, 2009 NBQB 232, *R. v. Strohmeier*, 2007 ONCJ 141. [↑](#footnote-ref-5)
6. *Ontario v. Criminal Lawyer’s Association of Ontario*, 2013 SCC 43 at paras. 46 and 60. [↑](#footnote-ref-6)