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Criminal

Lack of 'frank disclosure' leaves ownership of stolen diamond in limbo

By **Amanda Jerome**

(June 7, 2017, 3:44 PM EDT) -- A pawnbroker and a deceased's estate interested in the return of the same diamond from police custody will have to wait as an Ontario court has set aside the order of the diamond's return on an appeal.

Paul Adam, Wise Law Office

In *Floward Enterprise Ltd.* (*H. Williams and Co.*) v. *Winberg Estate* 2017 ONCA 448, the Ontario Court of Appeal heard that during a criminal investigation Toronto police seized a diamond from a pawnbroker since they believed it to be stolen. The pawnbroker, Floward Enterprise Ltd., represented by Jordan Green of Green & Luhowy LLP, brought an application under ss. 490(7) and (9)(c) of the *Criminal Code* for the return of the diamond and was successful. However, the estate of the deceased, Martin Winberg, who the diamond was stolen from, appealed the order as it was not given notice of the application brought forth by the pawnbroker. The estate said it was entitled to participate in the application because it is an interested party.

Justice Eileen Gillese wrote: "In my view, there is no question that the pawnbroker failed to make full and frank disclosure. In its written materials and oral submissions on the application, the pawnbroker failed to disclose material facts to the court, including: the estate's claim of an interest in the diamond; the estate's intention to assert its claim; its own unsuccessful attempts to secure the diamond's release from police; the police's refusal to release the diamond because of 'two adverse claims to the property'; and, that the estate had confirmed its interest in the diamond to the police."

Justice Gillese, with Justices Grant Huscroft and Gary Trotter in agreement, determined to allow the appeal and set aside the order, but did not order that the diamond be returned to the estate.

Justice Gillese wrote: "There are serious, complicated factual and legal disputes between the estate and the pawnbroker that must be resolved to determine entitlement to the diamond. The record before this court is wholly inadequate to make such a determination."

The appeal, from the order of Justice Nola Garton of the Superior Court of Justice on Sept. 21, 2015, centred around whether the order to return the diamond to the pawnbroker should be set

aside as "a result of the application being decided in the absence of full and frank disclosure by the pawnbroker."

Justice Gillese wrote: "The need for an applicant to make full and frank disclosure in a s. 490 application is acute. On such an application, the court is tasked with providing judicial oversight to achieve the ultimate goal that a thing seized by peace officers is returned to the lawful owner or person lawfully entitled to its possession when the thing is no longer required for any criminal investigation or proceeding. By its own terms, the application process is done 'summarily.' Furthermore, as I have explained, the process under s. 490(7) is an *ex parte* one. As the Crown points out, absent the requirement of full and frank disclosure, an application under s. 490(7) would allow a party to assert its claim unchallenged, while concealing information about others who would assert their claims if given an opportunity."

Paul Adam, of Wise Law Office and counsel for the Winberg estate, said the main lesson in this case is that lawyers need to think broadly about the situations that require full and frank disclosure of all material facts to the court.

"I think what the court is saying here is that the duty to provide full and frank disclosure, the court cites the term 'in utmost good faith,' applies in every procedural step that is being taken *ex parte*," he said. "You can have a situation like we did here where regardless of whether you're technically required to give somebody notice about a step you're taking, if you know something material about the missing party that has an adverse interest to yours, the chances are the court needs to know what you know as well."

Adam thinks the court's decision to allow the appeal and set aside the order was correct.

"The section of the *Criminal Code* that was in dispute provides that when a party is dispossessed of property by the police, that party can make an application for the return of their property on notice to the Crown. And in many situations, such as this one, the person making the application may know about another party that has some kind of a claim to the seized goods," he said. "In a case like this the applicant may not need to put the adverse party on notice of the step that they're taking but, and I think this is a key takeaway here, they still need to treat the situation like any other *ex parte* hearing and the party who has brought the application needs to disclose any and all material facts it knows about the other adverse claimant to the court."

Adam said the next step in this case is determining who is entitled to the return of stolen goods when a lawful owner and a pawnbroker have competing claims.

"I think that that is a reason for criminal lawyers and civil lawyers who get drawn into the criminal process through section 490(7) to watch this space because if you take a look at other similar cases you may find that there's not a lot of jurisprudence out there about who should be entitled to the return of some seized goods when they were seized from a pawnbroker," he said. "This is something that must be a very common occurrence and the court hasn't made that many decisions about who should be entitled to the return of goods in these cases, but if there was a next step in this process it might involve the court deciding on the merits who's really entitled to have this diamond that is in police custody right now.

"The story of the diamond is definitely not over. The story of section 490(7) is at rest for now, but who the stolen goods actually belong to is, for the time being, yet unwritten," he added.

Counsel for the Crown and the respondent refused to comment on this case.