File Number: 37791

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

YULIK RAFILOVICH

APPELLANT
(Respondent)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

and

ATTORNEY GENERAL OF ONTARIO, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Public Prosecution Service of Canada
Ontario Regional Office
130 King Street West
Suite 3500, Box 340
Toronto, Ontario M5X 1E1

Bradley Reitz and Sarah Egan
Tel.: 416-952-5042
Fax: 416-973-8253
Email: breitz@ppsc-sppc.gc.ca

Counsel for the respondent

Kathleen Roussel
Director of Public Prosecutions
160 Elgin Street, 12th Floor
Ottawa, Ontario K1A 0H8

Per: François Lacasse
Tel.: 613-957-4770
Fax: 613- 941-7865
Email: flacasse@ppsc-sppc.gc.ca

Ottawa agent for the respondent

Lafontaine & Associates
Barristers
2001 – 400 University Avenue
Toronto, Ontario M5G 1S5

Gregory Lafontaine
Tel.: 416-214-1835
Fax: 416-204-1849
Email: greg@127john.com

Counsel for the appellant

Edelson & Friedman
Barristers LLP
200 Elgin Street, Suite 600
Ottawa, Ontario K2P 1L5

Solomon Friedman
Tel.: 613-237-2290
Fax: 613-237-0071
Email: solomon@edelsonlaw.ca

Ottawa agent for the appellant

Attorney General of Ontario
Crown Law Office, Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9

Melissa Adams and Brett Cohen
Tel.: 416-326-4600
Fax: 416-326-4656
Email: melissa.adams@ontario.ca
brett.cohen@ontario.ca

Counsel for the intervener, Attorney General of Ontario

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, Ontario K1P 1J9

Nadia Effendi
Tel.: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa agent for the intervener, Attorney General of Ontario

Alan D. Gold Professional Corporation
20 Adelaide Street East, Suite 210
Toronto, Ontario M5C 2T6

Alan D. Gold and Deepa Negandhi
Tel.: 416-368-1726
Fax: 416-368-6811
Email: info@alandgoldlaw.com
dnegandhi@btzlaw.ca

Counsel for the intervener, Criminal Lawyers' Association of Ontario

Supreme Court Advocacy
340, rue Gilmour
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel.: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa agent for the intervener, Criminal Lawyers' Association of Ontario

Brauti Thorning Zibarras LLP
2900-161 Bay Street
Toronto, Ontario M5J 2S1

Michael W. Lacy and Bryan Badali
Tel.: 416-362-4567
Fax: 416-362-8410
Email: mlacy@btzlaw.ca
bbadali@btzlaw.ca

Counsel for the intervener, Canadian Civil Liberties Association

Supreme Court Advocacy
340, rue Gilmour
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel.: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa agent for the intervener, Canadian Civil Liberties Association

Arvay Finlay LLP
1512-808 Nelson Street
Box 12149, Nelson Square
Vancouver, British Columbia V6Z 2H2

Gregory DelBigio, Q.C. and Alison M. Latimer
Tel.: 604-696-9828
Fax: 1-888-575-3281
Email: alatimer@arvayfinlay.ca

Counsel for the intervener, the British Columbia Civil Liberties Association

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3

Matthew Estabrooks
Tel.: 613-786-0211
Fax: 613-788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa agent for the intervener, the British Columbia Civil Liberties Association

Table of Contents

PART I: STATEMENT OF FACTS

A. Overview

1. The appellant was arrested for possession of cocaine for the purpose of trafficking twice in fourteen months. Both times, police seized his inventory of cocaine. They also seized more than $40,000 in cash derived from cocaine sales, but the cash was later returned to the appellant, permitting him to pay a defence lawyer. When the appellant pleaded guilty to charges of possessing cocaine for the purpose of trafficking and possessing proceeds of crime, he admitted that the cash he had used to pay his lawyer was proceeds of crime.

2. When an indictable offence is committed in relation to property that is proceeds of crime, it must be ordered forfeited on application by the Crown. Because the appellant's cash was no longer available to be forfeited, the Crown sought a fine in lieu of forfeiture. The sentencing judge declined to impose the fine because the cash had been spent on a defence lawyer. The Court of Appeal for Ontario allowed the Crown's appeal of the sentencing judge's decision. The Court of Appeal was right; its decision is consistent with principles of statutory interpretation and true to Parliament's intention.

3. Parliament enacted the proceeds of crime provisions in Part XII.2 of the *Criminal Code* to ensure that crime does not pay. Proceeds of crime are forfeited to achieve that result. When the proceeds have been spent or transferred and are unavailable to be forfeited, an equivalent fine in lieu of forfeiture is ordinarily imposed. The appellant argues that an exception should be made when the proceeds of crime have been used to pay a defence lawyer's fees. This Court should reject his argument. Sentencing judges have only a limited discretion to decline to impose a fine in lieu of forfeiture of proceeds of crime. The Court of Appeal was correct to conclude that using seized cash to pay a lawyer — even pursuant to a court order — falls outside the bounds of that limited discretion. The Court of Appeal also correctly concluded that using criminally tainted funds to pay legal fees constitutes a benefit to an accused person, but whether an accused person benefits from spending the proceeds of his crime — however they are spent — is not relevant to determining whether to impose a fine in lieu of forfeiture of those proceeds. The appeal should be dismissed.

B. The appellant's crimes

4. The evidence against the appellant was summarized in an Agreed Statement of Facts.[1] The facts of the case are further summarized in the following paragraphs.

5. On May 21, 2008, police followed the appellant as he drove around Toronto with his girlfriend. They watched as he carried out hand-to-hand transactions; believing that the appellant was selling drugs, the police arrested him in his car. When they searched the car, the police seized fourteen small baggies of cocaine totaling 11.33 grams. They also seized $2,000 cash from the appellant's fanny pack. Later that day, police executed a search warrant at the Toronto condominium that the appellant co-owned with his mother. They seized:

- A vacuum-sealed bag containing 497.9 grams of cocaine from under the bed;
- A cash counting machine and a vacuum sealer from the living room;
- Two scales and plastic bags covered with white powder, three small plastic bags containing 24.61 grams of cocaine, twelve ecstasy pills and $2,034.63 from a kitchen drawer;
- $21,955.88 in Canadian and American currency from inside the oven; and,
- A false social insurance card in the name of Boris Zilberman.

6. The total value of the seized currency was $23,990.51. The 533.84 grams of cocaine had an estimated street value between $42,000 and $52,500. The appellant was charged with offences including possession of cocaine for the purpose of trafficking and possession of the proceeds of crime. He was released on bail.

7. Fourteen months later, the appellant was arrested again outside a Toronto apartment building and charged with offences including possession of cocaine for the purpose of trafficking and possession of proceeds of crime. Incidental to arrest, police seized $2,000 cash and a key to the appellant's apartment. When police executed a search warrant in the apartment, they seized:

- Twenty-seven grams of cocaine in a bag on a kitchen shelf;
- Approximately $13,000 in a kitchen cupboard;
- Approximately $2,000 in a dresser in the bedroom; and,

[1] Appellant's Record, Vol. II, pages 8 to 12 [*Agreed Statement of Facts*, Exhibit 2 on sentencing].

- Four mobile phones, plastic baggies, and documents in the appellant's name.

C. The seized cash is restored to the appellant

8. The total amount of cash seized from all locations on the two offence dates was $41,130.41 (CAD) and $651 (USD). Three-and-a-half months after the second offence date, on October 26, 2009, an order was made pursuant to s. 462.34(4)(c)(ii) of the *Code* releasing all the cash to defence counsel to meet the respondent's legal expenses.

D. The appellant's guilty plea and sentencing

9. All charges against the appellant were resolved when he pleaded guilty to two counts of possession of cocaine for the purpose of trafficking, one for each offence date, and two counts of possessing property obtained by crime, also one for each date. He also pleaded guilty to possessing a counterfeit social insurance card on the first date. The sentencing judge concluded that a three-year sentence would be appropriate, but she credited 13 months for pre-sentence custody and 9 months on account of restrictive bail conditions. The appellant therefore had 14 more months to serve. The sentencing judge also ordered forfeiture of the appellant's fifty-percent share of the equity in the Toronto condominium, valued at $100,000, having concluded that the condominium was offence-related property.

10. The appellant's guilty plea was an acknowledgment that the cash seized on the two offence dates belonged to him and that it was proceeds of crime. The cash, having been released to pay the appellant's lawyer, was not available to be forfeited so the Crown sought a fine in lieu of forfeiture. The sentencing judge declined to impose the fine for two reasons. First, she concluded that because the appellant used the seized funds to pay his lawyer, he obtained no benefit from them and did not profit from his crime. Second, because the appellant could spend more time in prison if he did not pay the fine, he could be subject to a longer term of imprisonment than a similarly situated offender who either had funds from a legitimate source or who qualified for legal aid.

E. The Court of Appeal's decision

11. The appellant and the Crown both appealed to the Court of Appeal for Ontario. The appellant argued that the sentencing judge had over-valued his share of the equity in the Toronto condominium. The Crown claimed that the sentencing judge erred by declining to impose a fine in lieu of forfeiture. The Court of Appeal — Weiler, Hourigan and Pardu JJ.A. — dismissed the appellant's appeal, but allowed the Crown's. The appellant challenges only the latter decision in this Court.

12. The Court of Appeal found that the sentencing judge had committed two errors in principle in refusing to order a fine in lieu of forfeiture. First, she erred by concluding that the appellant did not profit from his crimes. The Court of Appeal held that the appellant's choice to spend the proceeds of his crimes on legal fees was not a bar to a fine in lieu of forfeiture of those proceeds. Second, the sentencing judge erred by concluding that imposing a fine on the appellant would subject him to a longer term of imprisonment than would be served by a similarly situated offender who did not choose to pay his lawyer with criminally-tainted money.

13. Having found those errors, the Court of Appeal imposed a fine in lieu of forfeiture totaling $41,976.39. In default of payment of the fine, the Court imposed a sentence of twelve months' imprisonment in accordance with s. 462.37(4)(iii) of the *Code*.

PART II: ISSUES

14. The appellant frames the issues in the following way:

i. Did the Court of Appeal for Ontario err in concluding that the limited discretion provided to a sentencing judge by s. 462.37(3) is not a basis to refuse a fine in lieu of forfeiture where funds have been released to pay legal fees?

The Crown's position is that the correct answer is "no"; the Court of Appeal's decision conforms to the purpose of the fine in lieu of forfeiture provision.

ii. Did the Court of Appeal for Ontario err in finding that the payment of legal fees — in the absence of qualification for legal aid coverage — is a clear "benefit" that frustrates the legislation and jurisprudence respecting fines in lieu of forfeiture?

Again, the Crown's answer is "no"; the appellant's crimes were undeniably profitable. He certainly received a benefit by spending their proceeds to retain a lawyer, but that benefit is not relevant to determining whether to impose a fine in lieu of forfeiture of those proceeds. The character of the cash as proceeds of crime remains unchanged no matter how the cash is spent.

PART III: ARGUMENT

A. The modern rule of statutory interpretation

15. The Court of Appeal for Ontario's decision not to exempt proceeds of crime spent on legal fees from the limited discretion provided by s. 462.37(3) conforms to the purpose of the fine in lieu of forfeiture provision as a feature of the overall statutory scheme. This approach is guided by the "modern rule" of statutory interpretation, conveniently summarized by McLachlin C.J.C. and Charron J. in *Katigbak*:

> [59] It is trite law that the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act* and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; and *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 21. In addition, every word of a statute is presumed to have a role in achieving the objective of the *Act*. No word or provision should be interpreted so as to render it mere surplusage: *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28; *McIntosh*, at para. 21; *Rizzo*, at para. 21; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 6 and 210-13.[2]

16. The statute explicitly contemplates the imposition of a fine in lieu of forfeiture where "the property or any part of or interest in the property […] has been transferred to a third party". The French version is to the same effect ; it provides that a fine in lieu of forfeiture can be made "à l'égard d'un bien – d'une partie d'un bien ou d'un droit sur celui-ci" dans le cas d'une "remise à un tiers".[3] The language is unambiguous in both official versions. If Parliament had intended to exempt transfers for legal fees, or any other category of property, it would have done so in similarly unambiguous terms. Instead, Parliament conferred a discretion on sentencing judges, but a limited discretion to be exercised in accordance with the purpose of the *Criminal Code* proceeds of crime provisions, which are in turn animated by Canada's international obligations.

B. The purpose of the *Criminal Code* proceeds of crime provisions

17. Parliament's purpose in enacting the proceeds of crime provisions in Part XII.2 of the *Code* was to deprive offenders and organized crime groups of the proceeds of their crimes to achieve

---

[2] *R. v. Katigbak*, 2011 SCC 48 at ¶ 59.
[3] Section 462.37(3)(*b*) of the *Criminal Code*.

specific and general deterrence and to ensure that crime does not pay.[4] A further intention was to meet Canada's international obligations arising from the 1988 "Vienna Convention" – the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*[5] – as was expressly recognized by this Court in *Lavigne*.[6]

18. Since the "Vienna Convention" was adopted in 1988, global efforts to combat transnational crime and to deprive wrongdoers of the proceeds of their criminal activities have been enhanced by other multilateral treaties, adopted by the United Nations General Assembly and binding on Canada:

- In 2000, the *United Nations Convention against Transnational Organized Crime* and three protocols to the *Convention* to address trafficking in persons, smuggling migrants and the illicit manufacturing and trafficking of firearms.[7]
- In 2003, the *United Nations Convention against Corruption*.[8]

19. These multilateral Conventions all broadly define "proceeds" or "proceeds of crime" as property or funds that are derived from or obtained, directly or indirectly, through the commission of an offence. They define "property" in similarly broad terms as "assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets."[9]

20. The definitions of the same terms in the proceeds of crime provisions of the *Code* are also very broad:

---

[4] *R. v. Lavigne*, 2006 SCC 10 at ¶ 10, 16.
[5] *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Can. T.S. 1990 No. 42.
[6] *Lavigne*, *supra* at ¶ 8-9.
[7] *United Nations Convention against Transnational Organized Crime*; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; Protocol against the Smuggling of Migrants by Land, Sea and Air; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition*, Can. T.S. 2003 No. 28.
[8] *United Nations Convention against Corruption*, Can. T.S. 2007 No. 7.
[9] *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, supra* Art. 1(q). Also see *United Nations Convention against Transnational Organized Crime, supra* Art. 2(d); *United Nations Convention against Corruption, supra* Art. 2(d).

- "Proceeds of crime" is defined as any property, benefit or advantage, in Canada or elsewhere, obtained or derived directly or indirectly as a result of the commission of a designated offence [*Code*, s. 462.3].
- "Property" includes real and personal property of every description, as well as property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange [*Code*, s. 462.3].
- "Designated offence" means any offence that can be prosecuted by indictment under any Act of Parliament, as well as conspiring or attempting to commit or counselling the commission of such an offence [*Code*, s. 2].

21. When a designated offence is committed in relation to property that is proceeds of crime it must be ordered forfeited if the Crown: (i) seeks forfeiture and (ii) proves on a balance of probabilities that the property is proceeds of crime [*Code*, s. 462.37(1)]. Alternatively, if the court is not satisfied that the designated offence was committed in relation to the property, a forfeiture order may nevertheless be made if the property is proven to be proceeds of crime beyond a reasonable doubt [*Code*, s. 462.37(2)]. In either case, the offender need not be convicted of the offence; a discharge under s. 730 is sufficient. In *Lavigne*, this Court explained the purpose of the forfeiture provisions as follows:

> Parliament's intention in enacting the forfeiture provisions was to give teeth to the general sentencing provisions. While the purpose of the latter provisions is to punish an offender for committing a particular offence, the objective of forfeiture is rather to deprive the offender and the criminal organization of the proceeds of their crime and to deter them from committing crimes in the future. The severity and broad scope of the provisions suggest that Parliament is seeking to avert crime by showing that the proceeds of crime themselves, or the equivalent thereof, may be forfeited.[10]

C. The purpose of a fine in lieu of forfeiture

22. A fine in lieu of forfeiture is one of the "teeth" that Parliament included in Part XII.2; "technically part of the sentence, it is nevertheless distinguished by the fact that its purpose is to replace the proceeds of crime. It is not regarded as punishment specifically for the designated

[10] *Lavigne*, *supra* at ¶ 16.

offence."[11] Subsection 462.37(3) permits the sentencing court to order a fine in lieu of forfeiture if satisfied that "any property of an offender" [«*un bien…d'un contrevenant*»] is proceeds of crime but cannot be made the subject of a forfeiture order because it cannot be located, has been transferred to a third party, is outside Canada, has diminished in value or been rendered worthless, has been comingled with other property, or other like reasons [*Code*, s. 462.37(3)(a)–(e)].

D. The discretion conferred by s. 462.37(3) is limited

23. Although s. 462.37(3) says "the court may" order a fine in lieu of forfeiture, the use of the permissive "may" does not signify a Parliamentary intention to confer a broad discretion on sentencing judges. In *Lavigne*, this Court made it clear that a sentencing judge's discretion is limited by the words of the subsection, by the purpose of the proceeds of crime provisions in Part XII.2 and of the related sentencing provisions in Part XXIII of the *Code*:

> In their ordinary sense, the words used in s. 462.37(3) mean that the judge must determine the value of the property and impose a fine equal to that value. When considered in conjunction with the general sentencing provisions, and in particular with s. 734(2), they must be interpreted as precluding consideration of the ability to pay. When considered in the context of the objective of deterrence and the intention to deprive offenders and criminal organizations of the proceeds of their crimes, s. 462.37(3) also precludes any decision based on the offender's ability to pay. In short, the judge has a discretion that is limited both by the words of the provision and by its context.[12]

Just as the discretion not to impose a fine is limited, the offender's ability to pay "may not be taken into consideration either in the decision to impose the fine or in the determination of the amount of the fine."[13]

24. In some circumstances, achieving the objectives of the provisions does not require that a fine be imposed; for example "if the offender did not profit from the crime and if it was an isolated crime committed by an offender acting alone."[14] Courts have also reduced a fine in lieu of forfeiture to account for the fact that property has already been forfeited under provincial

---

[11] *Lavigne*, *supra* at ¶ 25. Also see *R. v. Dwyer*, 2013 ONCA 34 at ¶ 18.
[12] *Lavigne*, *supra* at ¶ 44.
[13] *Lavigne*, *supra* at ¶ 1 and at ¶ 37. Also see *Dwyer*, *supra* at ¶ 19.
[14] *Lavigne*, *supra* at ¶ 28.

legislation.[15] Ordinarily then, when proceeds of crime are not available to be forfeited, a fine in lieu of forfeiture will be appropriate.

25. In some cases, the amount of the fine in lieu of forfeiture may be easily determined. For example, one member of a drug trafficking conspiracy may sell drugs to an undercover police officer for an agreed-upon sum but transfer that sum to other conspirators.[16] Or — as in the appellant's case — an offender may be found guilty of possessing a sum of money obtained from the commission of an indictable offence contrary to s. 354 of the *Code*, but later recover the money to pay legal expenses. In other cases, the court may have to infer the quantum of the proceeds that the offender possessed,[17] and may rely on an in increase in an offender's net worth that cannot be explained by legitimate income [*Code*, s. 462.39]. In any case, a sentencing judge need not determine the benefit the offender derived from the proceeds or the net profit of the offender's crime; the fine in lieu of forfeiture is equal to the total value of the property that was proceeds of crime.[18]

26. Whatever the quantum, when a fine in lieu of forfeiture is ordered, the court must impose a term of imprisonment in default of payment. Subsection 462.37(4) of the *Code* contains a sliding scale for "default time"; the larger the fine, the longer the term of imprisonment. For fines greater than $20,000 but no more than $50,000, the default time is between twelve and eighteen months in prison [*Code*, s. 462.37(4)(a)(iii)]. In this case, the Court of Appeal gave the appellant until August 3, 2019 to pay the fine in lieu of forfeiture,[19] and ordered that he serve twelve months' imprisonment in default of payment.[20]

---

[15] *R. v. Dritsas*, 2015 MBCA 19.
[16] *R. v. Dow*, 2014 NBCA 15; *R. v. A.S.*, 2010 ONCA 441.
[17] For example, *Dritsas*, *supra*.
[18] *R. v. Siddiqi*, 2015 ONCA 374 at ¶ 6; *R. v. Piccinini*, 2015 ONCA 446 at ¶ 18-19; *R. v. Dieckmann*, 2017 ONCA 575 at ¶ 100, leave refused on March 12, 2018.
[19] Appellant's Record, Vol. I, pages 36A to 37B [Addendum to the judgment of the Court of Appeal].
[20] Appellant's Record, Vol. II, page 4 [Order of the Court of Appeal for Ontario dated October 24, 2017].

E. The statutory context includes other types of orders

27. A fine in lieu of forfeiture of proceeds of crime is one potential financial or pecuniary consequence for an offender who has been found guilty of a crime, but a sentencing judge may make other orders that either require the offender to pay a sum of money or that deprive the offender of property.

28. First, a fine may be imposed upon conviction [*Code*, s. 734]. Apart from statutory minimum fines, the amount of a fine is a matter of the sentencing judge's discretion, to be exercised in accordance with the principles of sentencing contained in Part XXIII of the *Code*.

29. Second, a restitution order may be made requiring an offender who has been convicted or discharged to compensate a victim for financial losses suffered because of the offender's crime. Restitution may be imposed either as a condition of a probation order [*Code*, s. 732.1(3.1)(a)] or as a "free-standing" order [*Code*, s. 737.1].

30. Third, offence-related property may be ordered forfeited upon conviction [*Code*, s. 490.1; *Controlled Drugs and Substances Act*,[21] s. 16]. Like forfeiture of proceeds of crime and fines in lieu, the forfeiture of offence-related property is not a punishment for the offender.[22] Forfeiture of offence-related property is a "discrete and distinct" issue, separate from the application of the sentencing principles contained in s. 718.1 and s. 718.2 of the *Code*.[23]

31. There are similarities and differences between these various orders. For example, a fine in lieu of forfeiture, like a fine imposed as a punishment, can result in imprisonment for default of payment, but "default time" is calculated by applying a different formula [*Code*, s. 462.37(4)(a) and s. 734(5)]. The offender's ability to pay is not taken into consideration before ordering restitution or a fine in lieu of forfeiture;[24] by contrast, before imposing a fine under s. 734(1), a sentencing judge must consider the offender's ability to pay [*Code*, s. 734(2)]. If an offender defaults in paying a fine under s. 734 or a fine in lieu of forfeiture under s. 462.37(3), a warrant of

---

[21] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
[22] *Lavigne*, *supra* at ¶ 16; *R. v. Craig*, 2009 SCC 23 at ¶ 11.
[23] *Craig*, *supra* at ¶ 11-12.
[24] *Lavigne*, *supra* at ¶ 1 and at ¶ 37. Also see *Dwyer*, *supra* at ¶ 19.

committal may be issued only if the court is satisfied that the offender is refusing to pay the fine, but the *Code* contains no provision for issuing a warrant of committal for defaulting on a restitution order. Unpaid restitution can be collected by enforcing the order in the same manner as a civil judgment [*Code*, s. 741; *Canadian Victims Bill of Rights*[25], s. 17]. Fines, whether imposed as punishment or in lieu of forfeiture may be enforced in the same way [*Code*, s. 734.6].

32. No matter the type of order made against an offender — a fine imposed as a sentence, a restitution order, or a fine in lieu of forfeiture of proceeds of crime — the offender can use any funds available to him to pay the debt. The source may be the offender's own money, or a loan or a gift; the statute is indifferent. Likewise, it makes no difference what the offender has chosen to spend his money on before he is sentenced. For example, in *R. v. A.S.*[26] a drug dealer had received $37,100 from an undercover police officer. When he was sentenced, the money was gone; he was unable to pay a fine in lieu of forfeiture. The Ontario Court of Appeal succinctly and correctly found that the sentencing judge had erred by not imposing a fine:

> [14] Having regard to *Lavigne*, we are satisfied that the sentencing judge erred in not imposing a fine in lieu of forfeiture. The respondent received $37,100 in drug buy money. He did not act alone and his actions extended over a considerable period of time. Receiving the money was a "benefit" in keeping with the purpose of the provisions. What the respondent then chose to do with the money (i.e. pay his supplier, purchase drugs, etc.) need not be the subject of inquiry by the sentencing judge.[27]

33. The same logic applies when an offender chooses to spend his money on a lawyer; a sentencing court does not reduce a fine or a restitution order to account for the offender's legal fees. That is so whether the lawyer's fees are paid from legitimate assets or from restrained cash that is allegedly proceeds of crime. In the latter case, the transfer of cash to the offender occurs pursuant to court order under s. 462.34 of the *Code*. The provision is broadly worded. Any person, including an accused person, who has an interest in seized property may apply under s. 462.34(4) for return of property or for revocation or variation of an order restraining the property. Such an order may be made:

a. If the applicant enters into a recognizance with or without sureties: s. 462.34(4)(a);

---

[25] *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2.
[26] *R. v. A.S.*, *supra.*
[27] *Ibid* at ¶ 14.

b. If the conditions in s. 462.34(6) are satisfied;

c. For the purpose of meeting the reasonable living expenses of the person who was in possession of the property when it was seized, or of any person with a valid interest in the property and of the dependants of that person: s. 462.34(4)(c)(i);

d. As in this case, for meeting the reasonable business and legal expenses of such a person: s.462.34(4)(c)(ii);

e. To permit the property to be used to enter into a recognizance of bail under Part XVI of the *Code*: s. 462.34(4)(c)(iii).

34. In any of those circumstances, the judge must be satisfied that the applicant has no other assets or means available, and that no one else owns or is lawfully entitled to possession of the property. Although the property is tainted with the allegation that it is proceeds of crime, the applicant need not establish that possession of the property is lawful.[28] Courts have held that reasonable legal expenses can include expenses for matters unrelated to those that led to the restraint order or seizure,[29] and that reasonable living expenses can include monthly mortgage payments and arrears.[30] In any case, when seized or restrained cash is released to an accused person to pay legal fees, it remains that person's property until it is transferred to a third party, a lawyer.

F. The Court of Appeal's decision is consistent with most earlier appellate authority

35. The fine in lieu of forfeiture provision permits a sentencing judge to impose a fine if "satisfied that an order of forfeiture…should be made in respect of any property of an offender", but the property is no longer available to be forfeited [*Code*, s. 462.37(3)]. Four provincial appellate courts have considered whether "property of an offender" includes cash seized by police but restored to the offender to pay a lawyer under s. 462.34(4)(c)(ii) of the *Code*. Three of the courts — those in Ontario, New Brunswick and Saskatchewan — concluded that seized money

---

[28] *Canada (A.G.) v. Markovic*, [2000] O.J. No. 3528 at ¶ 3.
[29] *Halpert v. Canada (Attorney General of)*, 1998 CanLII 6401 (BC SC), leave refused [1998] S.C.C.A. No. 210; *R. v. Duncan*, 2002 MBQB 318; *R. v. Lynds*, 2011 NSSC 400; *R. v. Davidson*, 2016 ONSC 7440.
[30] *R. v. Kearsey*, 2003 NLSCTD 87.

spent on an offender's legal expenses remains subject to a fine in lieu of forfeiture. The only outlier is the Newfoundland and Labrador Court of Appeal in *Appleby*.[31] The respondent's position is that the appellate courts in Ontario, New Brunswick and Saskatchewan were correct and that *Appleby* was wrongly decided.

36. Before this Court's decision in *Lavigne*, the Ontario Court of Appeal considered the relationship between restoration and forfeiture in *Wilson*.[32] Cash was seized from the offender when he was arrested. He assigned his interest in the cash to his lawyers, but the Crown applied for forfeiture. After the cash was forfeited, the lawyers applied for relief from forfeiture under s. 462.42, relying on the assignment to argue that they were entitled to be paid their fees from the forfeited funds. The application was dismissed by the sentencing judge and on appeal. The Court of Appeal held that any right the offender had to the seized money was extinguished by the forfeiture order. Even if the applicant lawyers had a valid interest, the Court of Appeal held that their interest should not override the state's interest in depriving the offender of the benefit of his crimes.

Ontario

37. In *Wilson*, there had been no application to release the seized cash to pay the offender's lawyers. In *obiter* comments, Justice Doherty contrasted restoration applications under s. 462.34 with post-forfeiture relief applications under s. 462.42:

> Not only are the competing interests different on the two applications, the effect of granting the relief sought in each application on the overall goal of Pt. XII.2 of the *Criminal Code* is very different. If a person on whose behalf funds were released to pay reasonable legal expenses is found guilty of an enterprise crime, and if the other criteria for forfeiture are met, then the entirety of the seized property including that which has been released for payment of legal fees, will be subject to forfeiture under s. 462.37. The part of the property that has been transferred to the offender's lawyer for the payment of legal fees would, however, no longer be available for forfeiture. The sentencing judge could then turn to s. 462.37(3), and if appropriate, impose a fine on the offender in an amount equal to the fees paid to his or her lawyers. In this way the ultimate purpose of Pt. XII.2 would be served, while at the same time allowing the accused access to the seized property for the purposes of paying reasonable legal expenses. As indicated above, the fine option is not available under

[31] *R. v. Appleby*, 2009 NLCA 6, leave refused [2009] 3 S.C.R. ix.
[32] *Wilson v. R.*, [1993] O.J. No. 2523.

> s. 462.42 because the offender has already been sentenced. To the extent that the interests of the third party are favoured on an application under s. 462.42, the overall goal of Pt. XII.2 of the *Criminal Code* suffers.[33]

38. The appellant argues that Justice Doherty's reference to an "enterprise crime" should be equated with a "criminal organization offence" as that term is currently defined in s. 2 of the *Code*. He correctly observes that he was not found guilty of such an offence, but his argument is misconceived. When *Wilson* was decided in 1993, s. 462.3 defined "proceeds of crime" as any property, benefit or advantage obtained or derived directly or indirectly as a result of the commission of either an "enterprise crime offence" or a "designated drug offence". Both of those terms were defined in s. 462.3; both definitions consisted of lists of offences. Justice Doherty's reference to "enterprise crime" had nothing to do with today's criminal organization offences; it was simply a reference to the criteria for forfeiture of proceeds of crime in the version of the *Code* in force at the time. In today's *Code*, the old definitions have been replaced with "designated offence", defined much more broadly as "any offence that may be prosecuted as an indictable offence".

New Brunswick

39. In *MacLean*,[34] the Crown sought a fine equal to the value of two assets that were no longer available to be forfeited: (i) a parcel of land that was the proceeds of crime but that had been transferred to the offender's father and (ii) bail money that had been released to pay legal fees pursuant to s. 462.34. The sentencing judge declined to order a fine in lieu of forfeiture, but the New Brunswick Court of Appeal allowed an appeal by the Crown. Concerning the bail money, Chief Justice Hoyt applied Justice Doherty's comments in *Wilson* to impose a fine equivalent to the amount released to cover the offender's legal fees.

Saskatchewan

40. In *Smith*,[35] the offender was an integral member of a cross-border marihuana distribution organization. When arrested, he was in possession of about $750,000 cash derived from drug sales.

---

[33] *Wilson*, *supra* at ¶ 49.
[34] *R. v. MacLean*, [1996] N.B.J. No. 597.
[35] *R. v. Smith*, 2008 SKCA 20.

Shortly after arrest, he successfully applied for access to that cash to pay his lawyer; his legal fees ultimately amounted to more than $200,000. The Crown sought a fine in lieu of forfeiture of the cash paid out for the legal fees. The sentencing judge denied the Crown's request, because the offender's "legal counsel was entitled to be paid." [36] The Saskatchewan Court of Appeal allowed the Crown's appeal citing the limited discretion not to order a fine in lieu of forfeiture. The court accepted that cash that has been released to pay legal fees may be subject to a fine; it remains "property of an offender" within the meaning of s. 462.37. The court concluded that those words were not "intended to capture attributes of unimpeachable or indefeasible title, in any pure sense."[37]

Newfoundland and Labrador

41. The only appellate authority inconsistent with *Wilson*, *MacLean* and *Smith* is the Newfoundland and Labrador's 2009 decision in *Appleby*. At the end of an investigation into marihuana distribution, $700,000 cash was seized and the Applebys were charged with possession of the proceeds of crime. They were denied legal aid because they had the option of applying for the release of some of the cash under s. 462.34. Pursuant to court order under that section, approximately $330,000 were released to pay defence counsel. After a preliminary inquiry and several pre-trial motions, the Applebys pleaded guilty and were sentenced to three years in prison. The sentencing judge declined to impose a fine in lieu of forfeiture of the $330,000 paid out to fund the Applebys' defence, and the Newfoundland and Labrador Court of Appeal dismissed the Crown's appeal.

42. Central to the Court of Appeal's judgment is the distinction between the words "any property" in s. 462.37(1), which provides for mandatory forfeiture of any property found to be proceeds of crime, and the expression "any property of an offender" [«*un bien…d'un contrevenant*»] in the fine in lieu provision, s. 462.37(3). The court concluded that property of an offender "could not possibly include monies in respect of which the lawful entitlement to claim possession has been transferred to a third party on the basis of a court order provided for in the

[36] *Ibid* at ¶ 13.
[37] *Ibid* at ¶ 102.

Criminal Code."[38] The Crown's application for leave to appeal the Newfoundland and Labrador Court of Appeal's decision was dismissed by this Court.[39]

i. *Appleby* was wrongly decided

43. The authors of *Drug* Offences *in Canada* prefer the reasoning of the Saskatchewan Court of Appeal in *Smith* and the Ontario Court of Appeal in this case to that of the Newfoundland and Labrador Court of Appeal in *Appleby*:

> In our view, the reasoning of the Saskatchewan and Ontario appellate courts is preferable to that of the Newfoundland and Labrador appellate court. The issue is one of statutory interpretation — can it be said that the seized "property of an offender" loses its character as property of the offender when a court allows the offender to use it to pay legal fees? We think the answer must be no. Property of an offender that has been seized or restrained is the offender's property until it is ordered forfeited. If an offender brings an application under s. 462.34, a judge may order that all or part of the seized property be "returned" to the applicant, or may vary or revoke the restraint order, for the purpose of paying his or her reasonable legal expenses (s. 462.34(4)(*c*)). The funds remain the property of the offender, even after they are released for that purpose. If the accused person's seized or restrained funds are used to pay legal fees, it seems to us that property of the offender has been transferred to a third party. It strains the meaning of ss. 462.34 and 462.37(3)(*b*) to suggest that, just because the transfer has occurred with the imprimatur of a judicial official, a fine in lieu of forfeiture cannot be ordered.[40]

44. When property belonging to an accused person has been seized or restrained, it remains that person's property until a forfeiture order is made. A court ordered restoration of the property — usually cash — under s. 462.34 so that the accused can pay a lawyer does not exempt the property from forfeiture. The same is true for property released to pay reasonable living or business expenses. The character of the property as proceeds of crime does not change when the accused transfers the property, no matter whether the transfer is to a mortgage lender, a creditor or a defence lawyer. In each case, the property has been "transferred to a third party" [*Code*, s. 462.37(3)(b)] and remains tainted with the allegation that it is proceeds of crime. Once that allegation has been proven, a fine in lieu of forfeiture is appropriate. The Newfoundland and Labrador Court of Appeal

---

[38] *Ibid* at ¶ 64.
[39] *R. v. Appleby*, [2009] 3 S.C.R. ix.
[40] MacFarlane, Bruce A., Q.C., Robert J. Frater, Q.C. and Croft Michaelson Q.C. *Drug Offences in Canada*, 4th ed., Toronto, Ont.: Thomson Reuters, 2018 (loose-leaf updated November, 2018), chapter 14:180.40.120.

was wrong to effectively exclude from forfeiture property that had been restored to the offender to pay a lawyer. Such a result confounds Parliament's objective in enacting the proceeds of crime provisions in Part XII.2 of the *Code* — to deprive offenders of the profits of their crimes to ensure that crime does not pay.

G. The appellant profited from his crimes

45. The appellant focuses his argument on whether the payment of legal fees conferred a benefit upon him. Ultimately, whether the appellant "benefited" from his choice to spend the cash on a lawyer is extraneous to the outcome of his case. In *Lavigne*, this Court held that an offender who does not profit from his crime may not be subject to a fine in lieu of forfeiture.[41] In this case, the appellant's crimes were certainly profitable — they yielded more than $40,000 in proceeds of crime — but a sentencing judge need not consider how an offender disposes of the proceeds of his crime, either before those proceeds are seized or restrained or after.[42]

46. The Court of Appeal was correct to conclude that there is "no injustice in refusing to allow an accused to benefit from proceeds of crime, and requiring him to account for those funds, even if some of them have been released for payment of legal fees or living expenses."[43] The payment of legal fees — in this case, in excess of $40,000 — did nothing to change the character of the seized cash as proceeds of crime. Possession of those proceeds, later accessed under court order to retain a lawyer, conferred an obvious benefit on the appellant. As the Ontario Court of Appeal observed in another context, "Even in the increasingly complicated world of Canadian criminal law, some things are obvious."[44]

47. The important role that lawyers play in the administration of justice has been recognized by this Court.[45] Whether an accused person retains counsel privately through legitimate means, or with funds restrained as proceeds of crime, or through a provincial legal aid plan, legal

---

[41] *Lavigne*, *supra* at ¶ 28.
[42] *Lavigne*, *supra* at ¶ 31-32.
[43] Appellant's Record, Vol. I, page 22 [Reasons for judgment of the Ontario Court of Appeal, dated August 3, 2017]. Now reported as *R. v. Rafilovich*, 2017 ONCA 634 at ¶ 25.
[44] *R. v. Khatchatourov*, 2014 ONCA 464 at ¶ 52.
[45] *R. v. G.D.B.*, 2000 SCC 22 at ¶ 23-25; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 187, *per* McIntyre J.; *R. v. Joanisse*, [1995] O.J. No. 2883 at ¶ 66, leave refused [1996] S.C.C.A. No. 347.

representation is undoubtedly beneficial to a person charged with a crime. The words of the Saskatchewan Court of Appeal in *Smith* are apposite:

> [106] It is specious to argue that the respondent received no benefit. He had his entire legal bill satisfied from the seized funds – funds that, at trial, were determined beyond reasonable doubt to constitute proceeds of crime. The respondent argues that imposing a fine in lieu of forfeiture for the amount spent on legal fees would be somehow inimical to *Charter* values and his constitutional right to counsel. The right to counsel was respected and fostered, and the respondent retained counsel of his own choosing. In all respects, the respondent received the benefit of the presumption of innocence and the right to counsel in the most meaningful way – through ready access to the seized funds. Counsel was paid, and will remain paid.[46]

48. The Court of Appeal was correct to find fault with the sentencing judge's conclusion that the appellant did not profit from his crime by paying his lawyer from the proceeds of that crime. The sentencing judge observed that the seized funds permitted the appellant "to pay for legal representation to which he is constitutionally entitled."[47] But that entitlement was met by the order under s. 462.34 releasing the seized funds to meet the appellant's legal expenses.

49. The appellant paid his legal bill from money that he admitted was proceeds of crime. The sentencing judge's conclusion that no benefit was conferred on the appellant was wrong in fact and law. The appellant retained an experienced lawyer at a cost of more than $40,000. To allow the appellant to divert the proceeds of his crimes to pay for his defence allows him to avoid the financial cost of paying for his defence with legitimate funds, a clear benefit that thwarts the purpose of the legislation. Simply put, being permitted to pay your lawyer from your drug money, to defend you on the charges you face as a result of your criminal business, flies in the face of the idea that crime should not pay — unless a fine is imposed in lieu of forfeiture. Preventing this sort of illicit benefit is exactly the reason the fine in lieu provisions exist.

H. The sentencing judge misunderstood the consequences of a fine in lieu of forfeiture

50. The sentencing judge dismissed the Crown's application for a fine in lieu of forfeiture in part because, "if the offender does not pay the fine, he or she is subject to imprisonment. For Mr.

---

[46] *Smith*, *supra* at ¶ 106.
[47] Appellant's Record, Vol. I, page 1 [Reasons for sentencing of Justice Croll delivered orally on November 25, 2013]. Now reported as *R. v. Rafilovich*, 2013 ONSC 7293 at ¶ 67.

Rafilovich, the imprisonment would be between 12 and 18 months. This would subject Mr. Rafilovich to a longer term of imprisonment than a similarly situated offender who had funds for his or her legal expenses or who qualified for legal aid."[48] This passage reveals two errors in principle. First, an offender's ability to pay is not a relevant consideration. Second, an offender is only imprisoned for willfully refusing to pay the fine.

51. An offender's ability to pay a fine is a relevant consideration when the fine is being imposed as a punishment, but not when it is imposed in lieu of forfeiture. When the fine in lieu of forfeiture is imposed, ability to pay is only relevant to determine how much time the offender ought to be given to pay.[49] A fine in lieu of forfeiture is not a punishment;[50] imprisonment in default of payment is likewise not a punishment, but an "enforcement mechanism"[51] to encourage payment of the fine. An offender who is unable — as opposed to unwilling — to pay the fine is not required to serve time in default. For example, in *Gour*[52] the Crown applied for a warrant of committal for an offender who was in default of a $288,000 fine in lieu of forfeiture. The court was not satisfied that the offender had refused to pay the fine; he was impecunious and unable to pay so no warrant of committal was issued.

52. Yet in such circumstances, the Crown is not left without an enforcement mechanism. The fine remains outstanding and the Attorney General can file the order and take steps to enforce it in the same manner as any judgment obtained in civil proceedings. In this case, the sentencing judge erred by failing to take account of all the statutory mechanisms available to enforce a fine in lieu of forfeiture.

53. The appellant claims that the Court of Appeal's judgment creates a "Sophie's Choice" for an accused person who must pick between (i) making a restoration application under s. 462.34(4) thereby risking "future imprisonment for failing to pay if their defence is unsuccessful" and (ii) going without legal representation at trial.[53] The appellant's position is misconceived. An accused

---

[48] *Ibid* at ¶ 68.
[49] *Lavigne*, *supra* at ¶ 47-48.
[50] *Lavigne*, *supra* at ¶ 25.
[51] *Khatchatourov*, *supra* at ¶ 55-56.
[52] *R. v. Gour*, 2017 ONSC 5397.
[53] *Appellant's Factum* at ¶ 35.

person's constitutionally-protected right to counsel is vindicated when the restoration order is made. As this court observed in *Wu*, the Dickensian concept of debtors' prison has been abolished.[54] To obtain a warrant of committal, the Crown must show more than "failing" to pay the fine; a willful refusal to pay is required.

I. Applying these principles to the appellant's case

54. The appellant spent more than $40,000 of criminally-tainted cash to pay a lawyer, and later acknowledged that the cash was proceeds of crime. His crimes were profitable, and cannot reasonably be described as isolated; in a little more than a year, he was arrested twice. Drugs and the proceeds of their sale were seized both times, as well as the tools of the drug trade — packaging, scales and so on. The appellant did not act alone. Although his cocaine supplier was not identified, he must have had one; cocaine is not indigenous to Canada. As the cash seized from the appellant was proceeds of crime, it would have been forfeited had it not been transferred to the appellant to pay a lawyer. Like a restitution order or any other fine, the fine in lieu of forfeiture should not be reduced to account for money spent on legal fees. Such a deduction undermines the purpose of Part XII.2 of the *Criminal Code* — ensuring that crime does not pay. The Court of Appeal for Ontario was correct; there is no reason to exercise the "limited discretion" not to impose a fine in lieu of forfeiture in this case.

[54] *R. v. Wu*, 2003 SCC 73 at ¶ 2, 34, *per* Binnie J.

PART IV: COSTS

55. In accordance with the usual practice in criminal matters, no costs should be ordered.

PART V: NATURE OF ORDER SOUGHT

56. The respondent requests that the appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Ottawa, in the Province of Ontario, this 13th day of December, 2018.

Bradley Reitz Counsel for the respondent	Sarah Egan Counsel for the respondent

PART VI: TABLE OF AUTHORITIES

AUTHORITIES	PARAGRAPHS
Jurisprudence	
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143	47
Canada (A.G.) v. Markovic, [2000] O.J. No. 3528	34
Halpert v. Canada (Attorney General of), 1998 CanLII 6401 (BC SC), leave refused [1998] S.C.C.A. No. 210	34
R. v. A.S., 2010 ONCA 441	25, 32
R. v. Appleby, 2009 NLCA 6, leave refused [2009] S.C.R. ix	35, 41, 42, 43, 44
R. v. Craig, 2009 SCC 23	30
R. v. Davidson, 2016 ONSC 7440	34
R. v. Dieckmann, 2017 ONCA 575, leave refused on March 12, 2018.	25
R. v. Dow, 2014 NBCA 15	25
R. v. Dritsas, 2015 MBCA 19	24, 25
R. v. Duncan, 2002 MBQB 318	34
R. v. Dwyer, 2013 ONCA 34	22, 23, 31
R. v. G.D.B., 2000 SCC 22	47
R. v. Gour, 2017 ONSC 5397	51
R. v. Joanisse, [1995] O.J. No. 2883, leave refused [1996] S.C.C.A. No. 347	47
R. v. Katigbak, 2011 SCC 48	15
R. v. Kearsey, 2003 NLSCTD 87	34
R. v. Khatchatourov, 2014 ONCA 464	46, 51

Persons, especially Women and Children; *Protocol against the Smuggling of Migrants by Land, Sea and Air*; *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition*, Can. T.S. 2003 No. 28	