Court File No.: 37791

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

B E T W E E N :

YULIK RAFILOVICH

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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CRIMINAL LAWYERS' ASSOCIATION (ONTARIO),
CANADIAN CIVIL LIBERTIES ASSOCIATION and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The issue on appeal is whether judges must order a fine in lieu of forfeiture under section 462.37(3) of the *Criminal Code* where seized funds were released by the court to pay for reasonable legal expenses under section 462.34(4)(c)(ii) of the *Criminal Code*. The Criminal Lawyers' Association (the "CLA") takes the following positions:

- Section 462.37(3) of the *Criminal Code* does not apply to judicially released funds for reasonable legal expenses under section 462.34(4)(c)(ii) of the *Criminal Code*. The amount of funds released for reasonable legal expenses is never subject to a fine in lieu of forfeiture.

- In the alternative, judges have discretion not to order a fine in lieu of forfeiture under section 462.37(3) of the *Criminal Code* where seized funds were released by the court to pay for reasonable legal expenses under section 462.34(4)(c)(ii) of the *Criminal Code*.

2. The CLA's positions are based on interpreting the provisions in light of Parliament's objective of ensuring that "crime does not pay" while upholding the constitutional guarantee of access to justice through legal representation embedded in sections 7, 10(b) and 11(d) of the *Charter*. Parliament's objective is the deprivation of proceeds of crime from the hands of criminals – not the automatic enrichment into the hands of the government. The purpose of a fine or imprisonment in lieu of forfeiture is to deprive criminals of any ability to treat proceeds of their crimes in a totally discretionary manner as if they were lawful assets. It is not to achieve an automatic property interest for the state in each and every dollar produced by crime. The purpose of allowing seized funds to be released for reasonable legal expenses recognizes the constitutional underpinnings of the right to legal representation as an accused may only access seized funds if they have no other financial means to pay for legal representation.

3. Reading the provisions at issue together results in an interpretation that denying the government a small portion of proceeds of crime is a humble price to pay so as to not force an accused to fund their right to counsel of choice with jail time. It is also in the public interest that accused are not forced out of counsel to ensure fair trials and accurate outcomes.

4. In the alternative, if funds released to pay legal expenses are captured under the fine in lieu of forfeiture provisions, the funds are only captured to the extent necessary to fulfil the purpose of ensuring that proceeds of crime are not thwarted. Absent evidence that released funds were thwarted or that the accused had access to additional undisclosed funds, trial judges have the discretion not to impose a fine in lieu of forfeiture.

5. The CLA does not take a position on the facts of this case.

PART II – ISSUES

6. The Appellant has raised the following issues:

1. 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?

2. 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?

7. The CLA's position is that the answer to both questions is yes. The CLA proposes to outline the constitutional right to legal representation and then address the issues in reverse order below.

PART III – ANALYSIS

A. Access to Justice Through Legal Representation Is Constitutionally Guaranteed

8. Courts have recognized that the *Charter* upholds the right to legal representation under sections 7, 10(b) and 11(d) which state:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 10. Everyone has the right on arrest or detention (b) to retain and instruct counsel without delay and to be informed of that right.

> 11. Any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

9. In *R. v. Rowbotham*, the Court of Appeal for Ontario recognized the right to counsel under sections 7 and 11(d) of the *Charter*:

> … in cases not falling within provincial legal aid plans, *ss.* 7 and 11(*d*) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.[1]

10. Further, section 10(b) of the *Charter* encompasses the right to retain counsel and retaining counsel of choice:

> The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right. It has been carried forth as a singular feature of the legal aid plan in this province, and has been inferentially entrenched in the Charter of Rights, which guarantees everyone, upon arrest or detention, the right to retain and instruct counsel without delay.[2]

B. Payment of Legal Fees Is Not A Benefit – Section 462.37(3) Does Not Apply to Funds Released Under Section 462.34(4)(c)(ii)

11. The CLA's position is that properly interpreted, section 462.37(3) does not apply to funds released for legal expenses under section 462.34(4)(c)(ii). The CLA's position is that the Newfoundland and Labrador Court of Appeal decision in *R. v. Appleby* correctly expresses the law on this issue and ought to be adopted by the Supreme Court of Canada as the law that governs across Canada.[3]

12. Under section 462.34(4)(c)(ii) of the *Criminal Code*, accused can apply to release their funds seized by the state to pay for reasonable legal expenses. These applications are brought before trial when the accused is presumed innocent and the seized funds have not been characterized as proceeds of crime. Such applications are only granted where the accused has no

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[1] *R. v. Rowbotham* (1988), 63 C.R. (3d) 113 at para. 183 (Ont. C.A.) [emphasis omitted].
[2] *R. v. Speid* (1983), 43 O.R. (2d) 596 at para. 5 (C.A.). See also *R. v. McCallen* (1999), 43 O.R. (3d) 56 at paras. 31-37 (C.A.); *R. v. Peterman* (2004), 19 C.R. (6th) 258 at paras. 26-27 (Ont. C.A.).
[3] *R. v. Appleby*, 2009 NLCA 6.

other means to pay for their defence. This is reassessed at the time of sentencing, where if it turns out the funds were improperly obtained to preserve any other hidden resources, then sanctions can undoubtedly be applied. When releasing funds, judges must also consider whether the funds may be subject to forfeiture in the event of a conviction. This provision signals Parliament's commitment to the constitutional underpinnings of the right to counsel.[4]

13. Section 462.37(3) of the *Criminal Code* on the other hand is engaged after a trial or plea. Where seized funds can now be characterized as proceeds of crime, the funds must be forfeited. Where the funds are no longer available the question becomes whether the court can impose a fine on the offender in lieu of forfeiture. Where an offender cannot pay the fine, they face incarceration. It is clear that Parliament's goal in enforcing forfeiture orders through fines was meant to prevent people from improperly dissipating proceeds of crime in order to defeat forfeiture. If an individual were to improperly hide or transfer funds, section 462.37(3) allows for a fine to be imposed instead so the individual would still be "on the hook" for the funds, thereby not allowing them to profit or benefit from crime.[5] This purpose of ensuring that funds are not transferred beyond the government's reach is expressly stated in section 462.37(3) by listing the types of scenarios under which it is evident that an individual has thwarted the funds:

> a court may order the offender to pay a fine if the property or any part of or interest in the property
>
> (a) cannot, on the exercise of due diligence, be located;
>
> (b) has been transferred to a third party;
>
> (c) is located outside Canada;
>
> (d) has been substantially diminished in value or rendered worthless; or
>
> (e) has been commingled with other property that cannot be divided without difficulty.

14. To determine whether funds released to pay for legal fees is the type of transaction Parliament was seeking to prevent when it created the enforcement mechanism of fines in lieu of

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[4] *R. v. Appleby*, 2009 NLCA 6 at paras. 33-47; *R. v. Wilson* (1993), 15 O.R. (3d) 645 at para. 46 (C.A.).
[5] *R. v. Lavigne*, 2006 SCC 10 at paras. 10, 16.

forfeiture, section 464.37(3) must be read with both section 462.34(4) and the constitutional underpinnings to legal representation in mind.

15. The fact that section 462.34(4) exists *at all* demonstrates that releasing funds to pay for reasonable legal expenses is not a transaction that amounts to crime paying:

> Parliament's over-all intention in passing the proceeds of crime provisions was to ensure that crime does not pay. It could have done so by seizing and retaining all suspected proceeds of crime. It chose instead to allow some exemptions from the seizures: food and other reasonable living expenses, lawyers' fees, and recognizances. Parliament's special mention of lawyers' fees must be directed to mitigating some unfortunate results of the American proceeds of crime legislation — the driving of a wedge between persons accused of crime and the criminal defence bar.[6]

16. If Parliament considers the judicial release of seized funds for legal fees as a way of thwarting the proceeds of crime legislation, it would never have enacted section 462.34(4). Instead, releasing funds for reasonable legal expenses in circumstances where accused have no resort to other funding is properly characterized as a credible transaction that upholds access to justice. Such a transaction is not a negative depletion of assets.[7]

17. Public policy also supports exempting released funds for legal expenses from a fine or imprisonment. An accused's use of such funds for counsel of choice as a last resort is not a discretionary expenditure of funds, rather, it is a necessity caused by the state's action in bringing criminal charges and seizing the accused's funds. By creating a disincentive to seek funding for counsel of choice because of the necessity for repayment on conviction and the risk of additional jail time, an accused might be induced to settle for less expensive counsel or even self-represent – situations that could be perceived as being in the state's interest by increasing the risk of conviction but undermine public confidence in the accuracy of decisions. Surely it is unfair and violates the presumption of innocence and right to counsel for the state to take the position that if there is a conviction, then the funds released for counsel were only a loan.

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[6] *R. v. Gagnon*, [1992] A.J. No. 842 at para. 31 (Q.B.); *R. v. Gagnon*, [1993] A.J. No. 356 at para. 4 (Q.B.).

[7] *R. v. Appleby*, 2009 NBCA 6 at para. 34.

18. Further, it is unfair and inconsistent with any appearance of justice to create a situation in which an accused and their defence counsel effectively wager on outcome, where counsel always gains (their fees) and the client is the only potential loser (debt and possibly jail). Counsel standing ready to do their best pursuant to an accused's right to counsel of choice must accordingly discuss with the accused potential outcomes and assess the future eventuality of a fine or jail for every step taken. Any counsel with conscience must suffer some pangs from the reality that their very fees depend upon the accused's decision to seek funding in the face of a fine and any prediction and advice may be impacted by the fees at stake. At the very least, the accused might think that after conviction. There can be no suggestion that independent legal advice offers solace because there is nothing that independent legal advice can add to the discussion.

19. After properly reconciling Parliament's intentions under section 462.37(3), section 462.34(4) and the constitutional right to representation along with the policy and practical implications above, Courts have correctly concluded that funds released for legal expenses are beyond the scope of the fine and jail in lieu of forfeiture provisions.[8]

20. The Court of Appeal for Ontario's *obiter* comments in *R. v. Wilson* are not persuasive when contextualized by the facts of that case. In *Wilson*, the offenders pled guilty and funds that had been seized were ordered forfeited as proceeds. After the matter was disposed of, counsel for the offenders brought an application in their own names under section 462.42 of the *Criminal Code* seeking the forfeited funds relying on an assignment from their clients to an interest in the proceeds for payment of legal expenses. In dismissing counsel's claim, the Court of Appeal held the offenders no longer retained an interest in the funds once forfeited that could be assigned to anyone. A significant fact was that the offenders had diverted their own resources into one of the offender's businesses, and chose to pay for counsel directly out of the proceeds of crime. Based on those facts, the Court commented in *obiter* that had the offenders applied for legal fees under section 462.34(4), they would not have been successful as they would have had to disclose that they had other assets that they diverted. In that context, the Court briefly mentions that had the funds been released to counsel by court order, they could be subject to a fine in lieu of

[8] *R. v. Gagnon*, [1993] A.J. No. 356 at paras. 27, 39 (Q.B.); *R. v. Appleby*, 2009 NBCA 6 at para. 61.

forfeiture.[9] This *obiter* is not persuasive as the Court in *Wilson* did not address section 462.34(4) or the question of whether judicially released legal funds are exempt from the enforcement mechanism of fines in lieu of forfeiture. Omitting consideration of the purpose of section 462.34(4) led to an erroneous analysis in *obiter* comments.[10] Based on the facts of that case, where there was evidence that the offenders had other funds, the Court was simply commenting that it would not be inclined to allow the offender to have gotten away with improperly diverting funds had the court released funds for legal expenses. Factually, if the offenders had been diverting funds, their application to release funds for legal expenses would not have been successful.

21. The policies and interests that oppose the *Wilson* interpretation of the legislation and that support the *Appleby* decision are substantial and significant with constitutional underpinnings that far outweigh any claim that the government must get its hands on every penny of "ill-gotten gains" so that even funds released under judicial supervision as a last resort to pay for the constitutional right to counsel of choice must ultimately be reclaimed by the government.

C. Judges Retain Discretion Not to Impose a Fine In Lieu of Forfeiture Under Section 462.37(3) Where Funds Are Released Under Section 462.34(4)(c)(ii)

22. In the alternative, if funds released for legal expenses are captured by the enforcement mechanism of section 462.37(3), the CLA submits that there must be discretion not to impose a fine in lieu of forfeiture based on the constitutional principles, policy considerations and issues that will arise in practice outlined above.

23. If funds released for legal expenses under section 462.34(4) must be subject to a fine or jail in lieu of forfeiture, people who are presumed innocent face a choice that denies access to justice. They will have to choose between applying for the funds to pay for legal representation and risk having to pay a fine or be imprisoned in lieu of forfeiture if the funds are later characterized as proceeds of crime, or risk being self-represented which may increase the risk of conviction.

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[9] *R. v. Wilson* (1993), 15 O.R. (3d) 645 at paras. 37-39, 49 (C.A.). See also *R. v. Smith*, 2008 SKCA 20 at para. 98; *R. v. MacLean* (1996), 184 N.B.R. (2d) 26 at paras. 9-10 (C.A.).
[10] *R. v. Wilson* (1993), 15 O.R. (3d) 645 at paras. 49-50 (C.A.).

24. The dilemma of deciding to make an application under section 462.34(4) is often exacerbated by legal aid's position that if there are seized funds that can be applied for, legal aid funding will not be granted.[11] If there is no discretion, and if the state maintains its current approach of denying legal aid where there are seized funds but will later apply to have those funds forfeited, the state can effectively deny accused people access to any legal representation whatsoever or potentially increase the length of imprisonment as the price paid for legal defence. Such an outcome violates accused's rights under section 7, 11(d) and 10(b) as outlined above.

25. This Court in *R. v. Lavigne* held that it would run counter to the purpose of the proceeds of crime legislation if an accused could simply spend their proceeds of crime and escape the enforcement of forfeiture orders based on an inability to pay, and as such, there is limited discretion not to impose a fine in lieu of forfeiture.[12] The Court in *Lavigne* did not consider the purpose of section 462.34(4) or its constitutional underpinnings. When these factors are added to the analysis, it becomes clear that there must be discretion in these circumstances. To hold otherwise means that Parliament has knowingly set up a choice for accused between the right to counsel or face possible imprisonment where that right is exercised. Such an intention cannot be attributed to Parliament because it would render the rights under sections 7, 11(d) and 10(b) meaningless.

26. The CLA's position is that if funds released for legal expenses are caught under the enforcement mechanism of section 462.37(3), it must only be to fulfill the purpose of ensuring that offenders are not thwarting the enforcement of forfeiture orders. Where there is evidence of thwarting funds after an order under section 462.37(3), only in those circumstances should judges decline to exercise their discretion and fines should be imposed.

PART IV – COSTS

27. The CLA requests no costs and requests that no costs be ordered against it.

PART V – ORDERS SOUGHT

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[11] Examples of where accused have been denied legal aid because of the availability of seized funds include this case before the Court and *R. v. Appleby*, 2009 NLCA 6 at para. 44(v).
[12] *R. v. Lavigne*, 2006 SCC 10 at paras. 29-30.

28. The CLA does not seek any additional orders.

All of which is respectfully submitted this 7th day of January, 2019.

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PART VI – TABLE OF AUTHORITIES

Authorities	Paragraphs
R. v. Appleby, 2009 NLCA 6	33-47, 61
R. v. Gagnon, [1992] A.J. No. 842 (Q.B.)	31
R. v. Gagnon, [1993] A.J. No. 356 (Q.B.)	4, 27, 39
R. v. Lavigne, 2006 SCC 10	10, 16, 29-30
R. v. MacLean (1996), 184 N.B.R. (2d) 26 (C.A.)	9-10
R. v. McCallen (1999), 43 O.R. (3d) 56 (C.A.)	31-37
R. v. Peterman (2004), 19 C.R. (6th) 258 (Ont. C.A.)	26-27
R. v. Rowbotham (1988), 63 C.R. (3d) 113 (Ont. C.A.)	183
R. v. Smith, 2008 SKCA 20	98
R. v. Speid (1983), 43 O.R. (2d) 596 (C.A.)	5
R. v. Wilson (1993), 15 O.R. (3d) 645 (C.A)	37-39, 46, 49-50

STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, ss. 7, 10, 11

Charte Canadienne des Droits et Libertés, partie I de la *Loi Constitutionnelle de 1982*, ss. 7, 10, 11

Criminal Code, R.S.C. 1985 c. C-46, ss. 462.34(4), 462.37(3)

Code criminel, L.R.C. (1985), ch. C-46, ss. 462.34(4), 462.37(3)