

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

B E T W E E N:

YULIK RAFILOVICH

APPLICANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. A fine is a penal sanction. It is a form of punishment that is available to a sentencing Court. The imposition of this type of punishment must be consistent with the principles and purposes of sentencing. And the statutory provisions that govern the imposition of fines must be interpreted in a manner that accords with s.12 of the *Charter of Rights and Freedoms* guaranteeing the right not to be subjected to cruel and unusual treatment or punishment. Although the forfeiture provisions in the *Criminal Code* are distinct from, and apply in addition to, other sentencing provisions, an interpretation of s.462.37 of the *Criminal Code* that entirely separates the process for imposing a fine in lieu of forfeiture from general principles can lead to the imposition of disproportionate, and at times, grossly disproportionate sentences.

2. Fines in lieu of forfeiture subject individuals to what are tantamount to indeterminate sentences because of the collateral consequences that arise from the inability to pay such a fine. Extending the time to pay and refusing to imprison the offender who has no ability to pay do not address these collateral consequences. Individuals with outstanding fine orders issued under these provisions will forever face the threat of imprisonment, will be unable to apply for various licenses or permits, will be unable to obtain a record suspension, and may be subject to civil enforcement proceedings. These consequences affect the ability of the offender to rehabilitate and reintegrate in a pro-social way into the community. The disproportionate nature of these consequences is particularly acute in circumstances where the fine in lieu of forfeiture has been imposed because the individual received the Court's approval to use the seized money to retain a lawyer at a time when he or she was presumed innocent. Use of the money did not defeat the purpose of the proceeds of crime legislation but instead was for the purpose of exercising another important constitutional right under s.10(b) of the *Charter*.

3. It is the position of the CCLA that the Court of Appeal for Ontario's decision is wrong. Sentencing courts must have the ability to consider the impact of the imposition of the additional fine in lieu of forfeiture on the individual as well as whether the funds were dissipated in a manner that frustrated the intention of the legislation.

4. Additionally, this case provides an opportunity for the Court to reconsider the reasoning in *R. v. Lavigne*.¹ In particular, the Court should reconsider² the interpretation of the discretion accorded sentencing judges in s.462.37(3) of the *Criminal Code*. While the Court recognized that the use of the word “may” in the statute should not be interpreted as “shall”, the circumscribed nature of the discretion accorded judges arising from the *Lavigne* decision has led to *de facto* automatic imposition of fines in lieu of forfeiture. Where Crowns request such orders and quantum has been established, Courts impose these orders as a matter of course. The orders have the effect of imposing additional punitive sanctions on an individual with long-term, if not indefinite, consequences that are inconsistent with *Charter* values, inconsistent with the principles and purposes of sentencing, and inconsistent with the statutory purpose underlying the forfeiture provisions.

5. The CCLA takes no position on the facts of this case. However, the CCLA does adopt the arguments advanced by the Appellant and the intervener the Criminal Lawyers' Association (Ontario).

PART II – STATEMENT OF ISSUES

6. The Appellant raises two issues on this appeal. The CCLA will focus on the first issue, and in particular, the importance of interpreting s. 462.37(3) in a manner that is consistent with s. 12 of the *Charter* in light of the significant impacts that a fine in lieu of forfeiture can have on an individual.

PART III – STATEMENT OF ARGUMENT

A FINE IN LIEU OF FORFEITURE IS PART OF AN INDIVIDUAL’S PUNISHMENT AND THE SCOPE OF THE DISCRETION MUST BE INFORMED BY S. 12 OF THE CHARTER

7. While a fine in lieu of forfeiture may not be “regarded as punishment specifically for the designated offence”,³ as it is a “separate component” of the sentence, it is indisputably one of the “arsenal of sanctions” that flows from a finding of guilt and that is intended to advance the

¹ *R. v. Lavigne*, [2016] 1 S.C.R. 692, 2006 SCC 10

² *R. v. Jordan* [2016] 1 S.C.R. 631, 2016 SCC 27

³ *Lavigne*, *supra* at para. 25

sentencing goals of general and specific deterrence.⁴ The fine can be imposed upon a finding of guilt, once the court has been satisfied that property in relation to which the offence was committed is not available for forfeiture.⁵ The fine must be equivalent to the value of the property that would have been forfeited.⁶ As this Court held in *Lavigne*, the purpose of the fine in lieu of forfeiture regime is to “give teeth” to the general sentencing provisions by depriving offenders of their profit, with the intention of deterring future criminal behavior.⁷ The availability of a fine in lieu of forfeiture thereby unquestionably constitutes a punishment and engages s. 12 of the *Charter*.

8. Fines are significant, punitive sanctions. As Justice Martin recently recognized in *R. v. Boudreault*, in the context of the mandatory victim fine surcharge regime, a fine creates a “significant impact on the liberty, security, equality and dignity of those subject to its application.”⁸ The impacts are disproportionately experienced by impecunious individuals, who lack the resources to avoid defaulting on the fine.

9. Individuals who default on a fine are subject to potentially lengthy additional periods of imprisonment that must be served consecutively to any sentence of imprisonment for the underlying offence. Section 462.37(4) stipulates determinate ranges of imprisonment, from a minimum of 6 months (for fines of \$10,000 and less) to a maximum of 10 years (for fines exceeding \$1,000,000), which increase with the size of the fine. As the difficulty in discharging the fine naturally increases with the amount of the fine, the practical effect is that individuals are more likely to default on fines of a higher amount, and are thus more likely to face the risk of significant penitentiary time that might even exceed the original quantum (if any) of imprisonment. In this context, it is important to remember that the proceeds of crime provisions apply to a wide variety of offences. Not all individuals who receive a fine in lieu of forfeiture will be career criminals, nor will they all have acted at the behest, or for the benefit, of a criminal

⁴ *Lavigne*, *supra* at para. 23. *R. v. Rodgers*, 2006 SCC 15 at para. 63. *R. v. K.R.J.*, 2016 SCC 31 at para. 41

⁵ *Criminal Code*, R.S.C. 1985, c C-46, s. 462.37(3)

⁶ *Lavigne*, *supra* at para. 35

⁷ *Lavigne*, *supra* at para. 16

⁸ *R. v. Boudreault*, 2018 SCC 58 at para. 43

organization⁹. In some cases, the individuals may have been driven to commit the underlying offence out of addiction, lack of economic opportunity, or desperation to feed their family. A fine in lieu of forfeiture may even be imposed on individuals who have received an absolute or conditional discharge, rather than a criminal conviction, and who did not otherwise receive a jail sentence, thereby significantly increasing the punitive nature of the sentence.

10. In *Lavigne*, this Court held that these effects, and particularly the threat of imprisonment, could be relieved by the court's ability to consider an individual's ability to pay in setting the time limit for payment, and in determining whether to issue a warrant for committal upon default.¹⁰ The CCLA respectfully submits that extending time to pay does little, if anything, to ameliorate the burden upon most individuals, nor can it save what is otherwise a grossly disproportionate sentence.

11. First, in many cases where fines in lieu of forfeiture are ordered, individuals are already confronted with significant obstacles to obtaining gainful employment that would enable them to discharge the debt. Such individuals will often have spent time in jail for serious offences. Upon release, the existence of a criminal record, particularly one disclosing a serious offence, can present a significant barrier to employment and further schooling, as colleges and employers are increasingly relying on criminal record checks for admissions and job applications.¹¹ Housing and

⁹ Per s. 467.37(2.02), the forfeiture provisions now also apply to what are effectively regulatory offences under the *Cannabis Act*, S.C. 2018, c. 16. Individuals may well be subject to punitive fines in lieu of forfeiture because they failed to properly register their cannabis business, or failed to understand the complex interplay between the federal legislation and provincial regulations. Individuals in these situations are unlikely to possess a moral culpability commensurate with the impacts of the fine in lieu of forfeiture.

¹⁰ *Lavigne*, *supra* at para. 47

¹¹ [Canadian Civil Liberties Association, "False Promises, Hidden Costs", May 2014](#), pp. 33-43. See also the summary of the expert evidence led on the social and economic effects of criminal records in [Chu v. Canada \(Attorney General\), 2017 BCSC 630](#) at paras. 183-215.

access to social services can also be significantly restricted by the existence of a criminal record.¹² The additional barriers are compounded because an outstanding fine renders individuals ineligible to apply to have their criminal record suspended¹³, even where they have otherwise discharged their debt to the community by having served their sentence and been conviction-free during the waiting period before they would otherwise be able to apply for the same.

12. Second, an extension of the time to pay is a discretionary matter. There is no certainty involved. Nor can an offender have confidence that enforcement proceedings will not be brought against them to require them to serve the time in default for non-payment. As Justice Martin observed in *Boudreault*, “Given the inability to predict whether a particular person can prove a reasonable excuse, it is not correct, in my view, to argue that impoverished offenders do not live under at least a *threat* of imprisonment.”¹⁴ That threat, particularly one which carries a determinate range of sentence, can be a significant source of stress and fear. Even the partially mitigating impact of provincial fine option programs – where they exist – is removed in the context of fine in lieu of forfeiture¹⁵. For individuals subjected to a fine who lack any realistic means of payment, the threat of a lengthy period of imprisonment is ever-present, a metaphorical sword of Damocles hanging over their day-to-day life.

13. Third, an extension of the time to pay simply prolongs the individual’s sentence, creating the risk that the individual will become a permanent debtor to the state. In the event of default, economic reintegration is further inhibited by the risk that the state could decline to issue them

¹² *Chu*, *supra*, at paras. 194-196. A number of Canadian cities participate in the Crime Free Multi-Housing program, including Edmonton, Saskatoon, Ottawa, Brampton and 27 communities in B.C. (Crime-Free Multi-Housing Program: Community Development Research and Report, April 2011, <http://www.nccaregina.ca/wp-content/uploads/2012/06/Crime-Free-Multi-Housing-Final-Report-2011.pdf>, pp. 5-6). In Ottawa, the Ottawa Police Service has set up a “comprehensive screening process for new residents and renewed leases” utilizing criminal record checks (<https://www.ottawapolice.ca/en/safety-and-crime-prevention/crime-free-multihousing.asp>).

¹³ *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4(1)

¹⁴ *Boudreault*, *supra* at para. 71

¹⁵ *Criminal Code*, s. 462.37(5)

permits like driver's licences, necessary for many jobs, while the fine is unpaid¹⁶. These sanctions, far from relieving the burden on the individual, may only increase their despair and prevent their rehabilitation. How can the individual reintegrate into society when he or she sees no realistic path to discharging their debt? For some individuals, desperate to discharge their obligation, this may lead them to conclude that there is little choice but to step back into a life of crime, rendering the focus on deterrence counter-productive. Others will simply labour under what is in effect an indefinite sentence, one which "strikes at the very foundations of our criminal justice system"¹⁷.

14. These effects must inform the nature of the discretion in s. 462.37(3). While the court may be tasked with looking "beyond the offender",¹⁸ it cannot, in doing so, ignore the effect on the individual subject to the fine. Contrary to the decision of the Court of Appeal for Ontario below, the fact that the fine in lieu of forfeiture regime is "not part of the individualized, general sentencing provisions aimed at sentencing an offender for committing a particular offence"¹⁹ cannot mean that sentencing considerations are irrelevant, or that *Charter* values (both in ss.7 and 12) have no place in the exercise of discretion.

15. Section 462.37(3) is silent on the question of whether a fine in lieu of forfeiture is appropriate where seized funds were released by the court for expenses necessary to meaningfully fulfill an individual's constitutional right to counsel.²⁰ This Court must therefore, as Justice Arbour held in *R. v. Wust*, "choose the interpretation which is consistent with the *Charter*."²¹ The discretion must not be so limited so as to allow for the imposition of fines that are grossly disproportionate and therefore in violation of s. 12 of the *Charter*. Safeguarding against this outcome requires a broader consideration of the impact of a fine on the particular individual.

¹⁶ *Criminal Code*, s. 734.5

¹⁷ *Boudreault*, *supra* at para. 79

¹⁸ *Lavigne*, *supra* at para. 36

¹⁹ *R. v. Rafilovich*, 2017 ONCA 634 at para. 23

²⁰ As Justice Deschamps observed in *Lavigne* at para. 29, "the factual circumstances that may give rise to an exercise of the discretion may vary, and it would be unrealistic to claim to foresee all of them."

²¹ *R. v. Wust*, 2000 SCC 18 at para. 34

TO BE CONSTITUTIONALLY COMPLIANT, THE DISCRETION MUST BE EXERCISED WITH REGARD TO BOTH THE PURPOSES OF THE PROCEEDS OF CRIME LEGISLATION AND THE GENERAL PRINCIPLES AND PURPOSES OF SENTENCING

16. In light of the foregoing, the CCLA submits that, before imposing a fine in lieu of forfeiture, the sentencing court must be satisfied that the fine would not be grossly disproportionate to the individual's moral culpability. An important element of the individual's moral culpability vis-à-vis the imposition of a fine in lieu of forfeiture is the individual's role in rendering the funds unavailable for forfeiture. If the funds are unavailable because they have been dissipated in a manner that frustrates the purpose of the proceeds of crime legislation in deterring the belief that crime pays, then the court must assess whether the individual's moral culpability in dissipating or profiting from those proceeds is sufficient to justify the significant impacts of the fine in determining whether or not to exercise discretion. The mere fact that an individual has profited from the proceeds of crime should not alone justify the automatic imposition of a fine, however. Moreover, if imposing the fine would not advance the purpose of deterring further behavior, then the court *must* exercise the discretion not to impose a fine on the individual because the disproportionate nature of these consequences is particularly acute where an individual has not done anything to defeat the purpose of proceeds of crime legislation.

17. As the proceeds of crime legislation specifically contemplates the possibility that an otherwise impecunious accused person is entitled to utilize seized funds to pay for reasonable living, business or legal expenses, it cannot be said that the use of the funds for those purposes frustrates the purpose of deterring future behaviour. In cases where the funds are unavailable for forfeiture because they have been released from court pursuant to s. 462.34(4), the sentencing judge ought to decline to impose the fine. Because an individual does not profit from the use of the funds for this purpose in the same manner as if the funds had been dissipated for personal gain, the collateral consequences of the fine are grossly disproportionate to the individual's moral culpability. It must be remembered that an accused person is constitutionally entitled to retain a lawyer. The existence of seized funds will often lead Legal Aid services to deny funding to retain counsel, even where the accused person otherwise has no assets or income. In asking the court to release seized funds for reasonable legal or living expenses, the individual does not profit from his or her criminal activity in the same way as someone who dissipates the proceeds on a lavish lifestyle, or seeks to remove the proceeds from the state's reach. Ordering a fine in these

circumstances, with all the attendant consequences described above, will in all likelihood impose a punishment that is grossly disproportionate to the offender's moral culpability.

18. Consideration of the impact of the fine on the individual is not inconsistent with the scheme of the legislation. In fact, s. 462.34(4), the provision governing the release of funds reveals Parliament's concern for ensuring that an accused person, presumed innocent by virtue of s. 11(d) of the *Charter*, is not forced into abject poverty where he or she is able to demonstrate a legitimate lack of any other assets or means to fund their continued life. The requirement to demonstrate that the accused has no other assets or means, and that no other party is lawfully entitled to the proceeds ensures that release of the seized funds does not defeat the purposes of the proceeds of crime legislation. It cannot be the case that Parliament's concern about depriving the individual of basic necessities while awaiting trial simply evaporates upon conviction. As the modern approach to statutory interpretation reminds us, the words must be read harmoniously with the scheme of the Act. Some evidence of Parliament's continuing concern can be seen in the juxtaposition between the mandatory forfeiture of seized funds, and the discretionary nature of the fine in lieu of forfeiture. The discretion is necessary because of the nature of a fine versus a forfeiture of assets or property. The forfeiture may result in significant hardship but ultimately carries no further consequences for the individual beyond the consequences that flow from the loss of assets. A fine on the other hand, as set out above, will result in not only these direct financial consequences but may permanently also shape the rest of the individual's life due to the extended impacts of the fine. In providing for discretion, Parliament could not have intended the court to blind itself to the fine's collateral effects on the individual. To the contrary, Parliament provided sentencing judges with discretion to ensure that the imposition of a fine would not result in a punishment that was grossly disproportionate to the individual's moral culpability.

19. For the discretion to perform its role as a constitutional "safety valve"²², it must not be so limited as to be meaningless. The reason that the funds are unavailable for forfeiture is a critical element of the analysis in determining whether to impose a fine in lieu of forfeiture, because it ensures that there is some link between the individual's moral culpability and the impact of the fine on that individual's future prospects. Focusing on whether the funds have been rendered unavailable in a manner that enhances the individual's moral culpability to such a degree that the

²² [R. v. Lloyd, 2016 SCC 13](#) at para. 36

substantial consequences of the fine are not grossly disproportionate provides a principled basis to ensure that the fine is constitutionally compliant. A fine in lieu of forfeiture must only be imposed where the individual's moral culpability in rendering the funds unavailable warrants the significant collateral consequences of the fine to the individual's liberty, security and dignity. Because this moral culpability is lacking where the seized funds are released by Court order for the purposes of reasonable legal expenses, exercising the discretion not to impose a fine is constitutionally necessary.

PART IV – SUBMISSION REGARDING COSTS AND ORDER REQUESTED

20. The Canadian Civil Liberties Association does not request any Order in connection with this appeal. The CCLA is a non-profit organization with limited resources. Its counsel act pro bono publica. The CCLA does not seek costs against any party, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2019

Michael Lacy, Bryan Badali

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PART VI – TABLE OF AUTHORITIES

CASES REFERENCED IN MEMORANDUM	AT PARA.
R. v. Lavigne, [2006] 1 S.C.R. 692, 2006 SCC 10	4, 7, 10, 14, 15
R. v. Jordan [2016] 1 S.C.R. 631, 2016 SCC 27	4
R. v. Rodgers, 2006 SCC 15	7
R. v. K.R.J., 2016 SCC 31	7
R. v. Boudreault, 2018 SCC 58	9, 12, 13
Chu v. Canada (Attorney General), 2017 BCSC 630	11
R. v. Rafilovich, 2017 ONCA 634	14
R. v. Wust, 2000 SCC 18	15
R. v. Lloyd, 2016 SCC 13	19

OTHER REFERENCES	AT PARA.
Canadian Civil Liberties Association, “False Promises, Hidden Costs”, May 2014	11
Crime-Free Multi-Housing Program: Community Development Research and Report, April 2011	11

STATUTORY PROVISIONS

<i>Criminal Code, R.S.C. 1985, c. C-46</i>	<i>Code criminel, L.R.C. (1985), ch. C-46</i>
<p>Order of restoration of property or revocation or variation of order</p> <p>462.34 (4) On an application made to a judge under paragraph (1)(a) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given pursuant to paragraph (2)(b), the judge may order that the property or a part thereof be returned to the applicant or, in the case of a restraint order made under subsection 462.33(3), revoke the order, vary the order to exclude the property or any interest in the property or part thereof from the application of the order or make the order subject to such reasonable conditions as the judge thinks fit,</p>	<p>Restitution ou modification de l’ordonnance de blocage</p> <p>462.34(4) Le juge saisi d’une demande d’ordonnance présentée en vertu du paragraphe (1) peut, après avoir entendu le demandeur, le procureur général et, éventuellement, les personnes à qui le préavis mentionné au paragraphe (2) a été remis, ordonner que les biens soient restitués en tout ou en partie au demandeur, annuler ou modifier l’ordonnance de blocage rendue en vertu du paragraphe 462.33(3) de façon à soustraire, en totalité ou en partie, ces biens ou un droit sur ceux-ci à son application, selon le cas, ou rendre l’ordonnance de blocage sujette aux conditions qu’il estime indiquées dans les</p>

<p>(a) if the applicant enters into a recognizance before the judge, with or without sureties, in such amount and with such conditions, if any, as the judge directs and, where the judge considers it appropriate, deposits with the judge such sum of money or other valuable security as the judge directs;</p> <p>(b) if the conditions referred to in subsection (6) are satisfied; or</p> <p>(c) for the purpose of</p> <p style="padding-left: 2em;">(i) meeting the reasonable living expenses of the person who was in possession of the property at the time the warrant was executed or the order was made or any person who, in the opinion of the judge, has a valid interest in the property and of the dependants of that person,</p> <p style="padding-left: 2em;">(ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph (i), or</p> <p style="padding-left: 2em;">(iii) permitting the use of the property in order to enter into a recognizance under Part XVI,</p> <p>if the judge is satisfied that the applicant has no other assets or means available for the purposes set out in this paragraph and that no other person appears to be the lawful owner of or lawfully entitled to possession of the property.</p>	<p>cas suivants :</p> <p>a) le demandeur contracte devant le juge un engagement, avec ou sans caution, d'un montant que celui-ci fixe ou estime indiqué et, si le juge l'estime indiqué, dépose auprès du juge la somme d'argent ou l'autre valeur que celui-ci fixe;</p> <p>b) les conditions mentionnées au paragraphe (6) sont remplies;</p> <p>c) afin de permettre :</p> <p style="padding-left: 2em;">(i) au détenteur des biens bloqués ou saisis — ou à toute autre personne qui, de l'avis du juge, a un droit valable sur ces biens — de prélever, sur les biens ou certains de ceux-ci, les sommes raisonnables pour ses dépenses courantes et celles des personnes à sa charge,</p> <p style="padding-left: 2em;">(ii) à l'une des personnes mentionnées au sous-alinéa (i) de faire face à ses dépenses commerciales courantes et de payer ses frais juridiques dans la mesure où ces dépenses et frais sont raisonnables,</p> <p style="padding-left: 2em;">(iii) à une personne d'utiliser ces biens pour contracter un engagement sous le régime de la partie XVI,</p> <p>lorsque le juge est convaincu que l'auteur de la demande ne possède pas d'autres biens ou moyens pour ce faire et que nulle autre personne ne semble être le propriétaire légitime de ces biens ou avoir droit à leur possession légitime.</p>
<p>Order of forfeiture of property</p> <p>462.37 (1) Subject to this section and sections 462.39 to 462.41, if an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence on or discharging the offender, on</p>	<p>Confiscation</p> <p>462.37 (1) Sur demande du procureur général, le tribunal qui détermine la peine à infliger à un contrevenant condamné pour une infraction désignée — ou qui l'en absout en vertu de l'article 730 — est tenu, sous réserve des</p>

application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime obtained through the commission of the designated offence, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

Proceeds of crime — other offences

(2) If the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) was obtained through the commission of the designated offence of which the offender is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

Order of forfeiture — particular circumstances

(2.01) A court imposing sentence on an offender convicted of an offence described in subsection (2.02) shall, on application of the Attorney General and subject to this section and sections 462.4 and 462.41, order that any property of the offender that is identified by the Attorney General in the application be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law if the court is satisfied, on a balance of probabilities, that

(a) within 10 years before the proceedings were commenced in respect of the offence for which the offender is being sentenced, the offender engaged in a pattern of criminal activity for the purpose of directly or indirectly receiving a material benefit, including a financial benefit; or

(b) the income of the offender from sources unrelated to designated offences

autres dispositions du présent article et des articles 462.39 à 462.41, d'ordonner la confiscation au profit de Sa Majesté des biens dont il est convaincu, selon la prépondérance des probabilités, qu'ils constituent des produits de la criminalité obtenus par la perpétration de cette infraction désignée; l'ordonnance prévoit qu'il est disposé de ces biens selon les instructions du procureur général ou autrement en conformité avec le droit applicable.

Produits de la criminalité : autre infraction

(2) Le tribunal peut rendre une ordonnance de confiscation aux termes du paragraphe (1) à l'égard de biens dont il n'est pas convaincu qu'ils ont été obtenus par la perpétration de l'infraction désignée pour laquelle le contrevenant a été condamné — ou à l'égard de laquelle il a été absous — s'il est convaincu, hors de tout doute raisonnable, qu'il s'agit de produits de la criminalité.

Confiscation — circonstances particulières

(2.01) Dans le cas où le contrevenant est condamné pour une infraction mentionnée au paragraphe (2.02), le tribunal qui détermine la peine à infliger est tenu, sur demande du procureur général et sous réserve des autres dispositions du présent article et des articles 462.4 et 462.41, d'ordonner la confiscation au profit de Sa Majesté des biens du contrevenant précisés par le procureur général dans la demande et de prévoir dans l'ordonnance qu'il est disposé de ces biens selon les instructions du procureur général ou autrement en conformité avec le droit applicable, s'il est convaincu, selon la prépondérance des probabilités, de l'un ou l'autre des faits suivants :

a) le contrevenant s'est livré, dans les dix ans précédant l'inculpation relative à

cannot reasonably account for the value of all the property of the offender.

Offences

(2.02) The offences are the following:

(a) a criminal organization offence punishable by five or more years of imprisonment;

(b) an offence under section 5, 6 or 7 of the *Controlled Drugs and Substances Act* — or a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to an offence under those sections — prosecuted by indictment; and

(c) an offence under subsection 9(1) or (2), 10(1) or (2), 11(1) or (2), 12(1), (4), (5), (6) or (7), 13(1) or 14(1) of the *Cannabis Act* — or a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to an offence under any of those subsections — prosecuted by indictment.

Offender may establish that property is not proceeds of crime

(2.03) A court shall not make an order of forfeiture under subsection (2.01) in respect of any property that the offender establishes, on a balance of probabilities, is not proceeds of crime.

Pattern of criminal activity

(2.04) In determining whether the offender has engaged in a pattern of criminal activity described in paragraph (2.01)(a), the court shall consider

(a) the circumstances of the offence for which the offender is being sentenced;

(b) any act or omission — other than an act or omission that constitutes the offence for which the offender is being sentenced — that the court is satisfied, on a balance

l'infraction en cause, à des activités criminelles répétées visant à lui procurer, directement ou indirectement, un avantage matériel, notamment pécuniaire;

b) le revenu du contrevenant de sources non liées à des infractions désignées ne peut justifier de façon raisonnable la valeur de son patrimoine.

Infractions

(2.02) Les infractions visées sont les suivantes :

a) toute infraction d'organisation criminelle passible d'un emprisonnement de cinq ans ou plus;

b) toute infraction aux articles 5, 6 ou 7 de la *Loi réglementant certaines drogues et autres substances* — y compris le complot ou la tentative de commettre une telle infraction, la complicité après le fait à son égard ou le fait de conseiller de la commettre — poursuivie par voie de mise en accusation;

c) toute infraction aux paragraphes 9(1) ou (2), 10(1) ou (2), 11(1) ou (2), 12(1), (4), (5), (6) ou (7), 13(1) ou 14(1) de la *Loi sur le cannabis* — y compris le complot ou la tentative de commettre une telle infraction, la complicité après le fait à son égard ou le fait de conseiller de la commettre — poursuivie par voie de mise en accusation.

Biens qui ne sont pas des produits de la criminalité

(2.03) L'ordonnance visée au paragraphe (2.01) ne peut être rendue à l'égard de biens dont le contrevenant démontre, selon la prépondérance des probabilités, qu'ils ne constituent pas des produits de la criminalité.

of probabilities, was committed by the offender and constitutes an offence punishable by indictment under any Act of Parliament;

(c) any act or omission that the court is satisfied, on a balance of probabilities, was committed by the offender and is an offence in the place where it was committed and, if committed in Canada, would constitute an offence punishable by indictment under any Act of Parliament; and

(d) any other factor that the court considers relevant.

Conditions — pattern of criminal activity

(2.05) A court shall not determine that an offender has engaged in a pattern of criminal activity unless the court is satisfied, on a balance of probabilities, that the offender committed, within the period referred to in paragraph (2.01)(a),

(a) acts or omissions — other than an act or omission that constitutes the offence for which the offender is being sentenced — that constitute at least two serious offences or one criminal organization offence;

(b) acts or omissions that are offences in the place where they were committed and, if committed in Canada, would constitute at least two serious offences or one criminal organization offence; or

(c) an act or omission described in paragraph (a) that constitutes a serious offence and an act or omission described in paragraph (b) that, if committed in Canada, would constitute a serious offence.

Application under subsection (1) not prevented

(2.06) Nothing in subsection (2.01) shall be interpreted as preventing the Attorney General from making an application under subsection

Activités criminelles répétées

(2.04) Pour décider si le contrevenant s'est livré à des activités criminelles répétées, le tribunal prend en compte :

a) les circonstances de la perpétration de l'infraction en cause;

b) tout acte ou omission — autre que celui relatif à l'infraction en cause — dont il est convaincu, selon la prépondérance des probabilités, qu'il a été commis par le contrevenant et qu'il constitue une infraction à une loi fédérale punissable par acte d'accusation;

c) tout acte ou omission dont il est convaincu, selon la prépondérance des probabilités, qu'il a été commis par le contrevenant, qu'il constitue une infraction dans le lieu où il a été commis et qu'il constituerait, s'il était commis au Canada, une infraction à une loi fédérale punissable par acte d'accusation;

d) tout autre facteur qu'il juge pertinent.

Conditions

(2.05) Toutefois, il ne peut se prononcer pour l'affirmative que s'il est convaincu, selon la prépondérance des probabilités, que l'une ou l'autre des conditions suivantes est remplie :

a) le contrevenant a commis, au cours de la période visée à l'alinéa (2.01)a), des actes ou omissions — autres que celui relatif à l'infraction en cause — qui constituent au moins deux infractions graves ou une infraction d'organisation criminelle;

b) le contrevenant a commis, au cours de la période visée à l'alinéa (2.01)a), des actes ou omissions qui constituent une infraction dans

<p>(1) in respect of any property.</p> <p>Exception</p> <p>(2.07) A court may, if it considers it in the interests of justice, decline to make an order of forfeiture against any property that would otherwise be subject to forfeiture under subsection (2.01). The court shall give reasons for its decision.</p> <p>Property outside Canada</p> <p>(2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.</p> <p>Fine instead of forfeiture</p> <p>(3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property</p> <ul style="list-style-type: none"> (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. <p>Imprisonment in default of payment of fine</p> <p>(4) Where a court orders an offender to pay a</p>	<p>le lieu où ils ont été commis et qui, commis au Canada, constitueraient au moins deux infractions graves ou une infraction d'organisation criminelle;</p> <p>c) les conditions énoncées aux alinéas a) et b) sont toutes deux remplies, mais chacune à l'égard d'une seule infraction grave.</p> <p>Mesure n'empêchant pas une demande au titre du paragraphe (1)</p> <p>(2.06) Le paragraphe (2.01) n'a pas pour effet d'empêcher le procureur général de faire une demande au titre du paragraphe (1) à l'égard de tout bien.</p> <p>Limite</p> <p>(2.07) Le tribunal peut, s'il est d'avis que l'intérêt de la justice l'exige, refuser d'ordonner la confiscation de tout bien qui ferait par ailleurs l'objet d'une confiscation au titre du paragraphe (2.01). Il est tenu de motiver sa décision.</p> <p>Biens à l'étranger</p> <p>(2.1) Les ordonnances visées au présent article peuvent être rendues à l'égard de biens situés à l'étranger, avec les adaptations nécessaires.</p> <p>Amende</p> <p>(3) Le tribunal qui est convaincu qu'une ordonnance de confiscation devrait être rendue à l'égard d'un bien — d'une partie d'un bien ou d'un droit sur celui-ci — d'un contrevenant peut, en remplacement de l'ordonnance, infliger au contrevenant une amende égale à la valeur du bien s'il est convaincu que le bien ne peut pas faire l'objet d'une telle ordonnance et notamment dans les cas</p>
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fine pursuant to subsection (3), the court shall

(a) impose, in default of payment of that fine, a term of imprisonment

(i) not exceeding six months, where the amount of the fine does not exceed ten thousand dollars,

(ii) of not less than six months and not exceeding twelve months, where the amount of the fine exceeds ten thousand dollars but does not exceed twenty thousand dollars,

(iii) of not less than twelve months and not exceeding eighteen months, where the amount of the fine exceeds twenty thousand dollars but does not exceed fifty thousand dollars,

(iv) of not less than eighteen months and not exceeding two years, where the amount of the fine exceeds fifty thousand dollars but does not exceed one hundred thousand dollars,

(v) of not less than two years and not exceeding three years, where the amount of the fine exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars,

(vi) of not less than three years and not exceeding five years, where the amount of the fine exceeds two hundred and fifty thousand dollars but does not exceed one million dollars, or

(vii) of not less than five years and not exceeding ten years, where the amount of the fine exceeds one million dollars; and

(b) direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other term of imprisonment imposed on the offender or

suiuants :

a) impossibilité, malgré des efforts en ce sens, de retrouver le bien;

b) remise à un tiers;

c) situation du bien à l'extérieur du Canada;

d) diminution importante de valeur;

e) fusion avec un autre bien qu'il est par ailleurs difficile de diviser.

Incarcération

(4) Le tribunal qui inflige une amende en vertu du paragraphe (3) est tenu :

a) d'infliger, à défaut du paiement de l'amende, une peine d'emprisonnement :

(i) maximale de six mois, si l'amende est égale ou inférieure à dix mille dollars,

(ii) de six mois à un an, si l'amende est supérieure à dix mille dollars mais égale ou inférieure à vingt mille dollars,

(iii) de un an à dix-huit mois, si l'amende est supérieure à vingt mille dollars mais égale ou inférieure à cinquante mille dollars,

(iv) de dix-huit mois à deux ans, si l'amende est supérieure à cinquante mille dollars mais égale ou inférieure à cent mille dollars,

(v) de deux ans à trois ans, si l'amende

<p>that the offender is then serving.</p> <p>Fine option program not available to offender</p> <p>(5) Section 736 does not apply to an offender against whom a fine is imposed pursuant to subsection (3).</p>	<p>est supérieure à cent mille dollars mais égale ou inférieure à deux cent cinquante mille dollars,</p> <p>(vi) de trois ans à cinq ans, si l'amende est supérieure à deux cent cinquante mille dollars mais égale ou inférieure à un million de dollars,</p> <p>(vii) de cinq ans à dix ans, si l'amende est supérieure à un million de dollars;</p> <p>b) d'ordonner que la peine d'emprisonnement visée à l'alinéa a) soit purgée après toute autre peine d'emprisonnement infligée au contrevenant ou que celui-ci est en train de purger.</p> <p>Mode facultatif de paiement</p> <p>(5) L'article 736 ne s'applique pas au contrevenant à qui une amende est infligée en vertu du paragraphe (3).</p>
<p>Licences, permits, etc.</p> <p>734.5 If an offender is in default of payment of a fine,</p> <p>(a) where the proceeds of the fine belong to Her Majesty in right of a province by virtue of subsection 734.4(1), the person responsible, by or under an Act of the</p>	<p>Licences, permis, etc.</p> <p>734.5 Lorsque le délinquant est en défaut de paiement d'une amende :</p> <p>a) dans le cas où le produit de l'amende est attribué à Sa Majesté du chef d'une province en application du paragraphe 734.4(1), la personne responsable, sous le régime d'une loi</p>

legislature of the province, for issuing, renewing or suspending a licence, permit or other similar instrument in relation to the offender may refuse to issue or renew or may suspend the licence, permit or other instrument until the fine is paid in full, proof of which lies on the offender; or

(b) where the proceeds of the fine belong to Her Majesty in right of Canada by virtue of subsection 734.4(2), the person responsible, by or under an Act of Parliament, for issuing or renewing a licence, permit or other similar instrument in relation to the offender may refuse to issue or renew or may suspend the licence, permit or other instrument until the fine is paid in full, proof of which lies on the offender.

Civil enforcement of fines, forfeiture

734.6 (1) Where

(a) an offender is in default of payment of a fine, or

(b) a forfeiture imposed by law is not paid as required by the order imposing it,

then, in addition to any other method provided by law for recovering the fine or forfeiture,

(c) the Attorney General of the province to whom the proceeds of the fine or forfeiture belong, or

(d) the Attorney General of Canada, where the proceeds of the fine or forfeiture belong to Her Majesty in right of Canada,

may, by filing the order, enter as a judgment the amount of the fine or forfeiture, and costs, if any, in any civil court in Canada that has jurisdiction to enter a judgment for that amount.

Effect of filing order

(2) An order that is entered as a judgment under this section is enforceable in the same

de la province, de la délivrance, du renouvellement ou de la suspension d'un document — licence ou permis — en ce qui concerne le délinquant peut refuser de délivrer ou de renouveler tel document ou peut le suspendre jusqu'au paiement intégral de l'amende, dont la preuve incombe au délinquant;

b) dans le cas où le produit de l'amende est attribué à Sa Majesté du chef du Canada en application du paragraphe 734.4(2), la personne responsable, sous le régime d'une loi fédérale, de la délivrance ou du renouvellement d'un document — licence ou permis — en ce qui concerne le délinquant peut refuser de délivrer ou de renouveler tel document ou peut le suspendre jusqu'au paiement intégral de l'amende, dont la preuve incombe au délinquant.

Exécution civile

734.6 (1) Lorsque le délinquant est en défaut de paiement d'une amende ou lorsqu'une confiscation est imposée par la loi, le procureur général de la province ou le procureur général du Canada, selon l'autorité à laquelle le produit de l'amende ou de la confiscation est attribué, peut, en plus des autres recours prévus par la loi, par le dépôt du jugement infligeant l'amende ou de l'ordonnance de confiscation, faire inscrire ce produit, ainsi que les frais éventuels, au tribunal civil compétent.

Conséquences du dépôt de l'ordonnance

(2) L'inscription vaut jugement exécutoire

manner as if it were a judgment obtained by the Attorney General of the province or the Attorney General of Canada, as the case may be, in civil proceedings.

Warrant of committal

734.7 (1) Where time has been allowed for payment of a fine, the court shall not issue a warrant of committal in default of payment of the fine

(a) until the expiration of the time allowed for payment of the fine in full; and

(b) unless the court is satisfied

(i) that the mechanisms provided by sections 734.5 and 734.6 are not appropriate in the circumstances, or

(ii) that the offender has, without reasonable excuse, refused to pay the fine or discharge it under section 736.

Reasons for committal

(2) Where no time has been allowed for payment of a fine and a warrant committing the offender to prison for default of payment of the fine is issued, the court shall state in the warrant the reason for immediate committal.

Period of imprisonment

(2.1) The period of imprisonment in default of payment of the fine shall be specified in a warrant of committal referred to in subsection (1) or (2).

Compelling appearance of person bound

(3) The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under paragraph (1)(b).

Effect of imprisonment

(4) The imprisonment of an offender for default of payment of a fine terminates the operation of sections 734.5 and 734.6 in

contre le délinquant comme s'il s'agissait d'un jugement rendu contre lui, devant ce tribunal, au terme d'une action civile au profit du procureur général de la province ou du procureur général du Canada, selon le cas.

Mandat d'incarcération

734.7 (1) Lorsqu'un délai de paiement a été accordé, l'émission d'un mandat d'incarcération par le tribunal à défaut du paiement de l'amende est subordonné aux conditions suivantes :

a) le délai accordé pour le paiement intégral de l'amende est expiré;

b) le tribunal est convaincu que l'application des articles 734.5 et 734.6 n'est pas justifiée dans les circonstances ou que le délinquant a, sans excuse raisonnable, refusé de payer l'amende ou de s'en acquitter en application de l'article 736.

Motifs d'incarcération

(2) Si aucun délai de paiement n'a été accordé et qu'un mandat ordonnant l'incarcération du délinquant à défaut du paiement de l'amende est délivré, le tribunal énonce dans le mandat le motif de l'incarcération immédiate.

Période d'emprisonnement

(2.1) Le mandat d'incarcération délivré au titre des paragraphes (1) ou (2) précise la période d'emprisonnement en cas de défaut de paiement de l'amende.

Comparution forcée de la personne soumise à l'ordonnance

(3) Les dispositions des parties XVI et XVIII relatives à la comparution forcée d'un accusé devant un juge de paix s'appliquent, avec les adaptations nécessaires, aux procédures prévues à l'alinéa (1)b).

Effet de l'emprisonnement

<p>relation to that fine.</p>	<p>(4) L'emprisonnement du délinquant pour défaut de paiement d'une amende met fin à l'application des articles 734.5 et 734.6 à cette amende.</p>
<p><i>Criminal Records Act, R.S.C. 1980, c. C-47</i></p>	<p><i>Loi sur le casier judiciaire, L.R.C. (1985), ch. C-47</i></p>
<p>Restrictions on application for record suspension</p> <p>4 (1) A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:</p> <p>(a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the <i>National Defence Act</i>; or</p> <p>(b) five years, in the case of an offence that is punishable on summary conviction or is a service offence other than a service offence referred to in paragraph (a).</p>	<p>Restrictions relatives aux demandes de suspension du casier</p> <p>4 (1) Nul n'est admissible à présenter une demande de suspension du casier avant que la période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, énoncée ci-après ne soit écoulée :</p> <p>a) dix ans pour l'infraction qui a fait l'objet d'une poursuite par voie de mise en accusation ou qui est une infraction d'ordre militaire en cas de condamnation à une amende de plus de cinq mille dollars, à une peine de détention de plus de six mois, à la destitution du service de Sa Majesté, à l'emprisonnement de plus de six mois ou à une peine plus lourde que l'emprisonnement pour moins de deux ans selon l'échelle des peines établie au paragraphe 139(1) de la <i>Loi sur la défense nationale</i>;</p> <p>b) cinq ans pour l'infraction qui est punissable sur déclaration de culpabilité par procédure sommaire ou qui est une infraction d'ordre militaire autre que celle visée à l'alinéa a).</p>