



Case in Brief: ***R. v. Rafilovich***

Judgment of November 8, 2019 | On appeal from the Court of Appeal for Ontario
Neutral citation: 2019 SCC 51

Judges don't have to make someone pay a fine equal to the earnings from crime they used (with permission) to pay for their defence, the Supreme Court has ruled.

People shouldn't profit from crimes. Property someone gets through crime is called "proceeds of crime." The *Criminal Code* says the Crown (the prosecution) can take the property if it is probably proceeds of crime. The property is held during the owner's trial. If the person is found not guilty, and the property is not proven to be proceeds of crime, they can have it back. If they are found guilty, the Crown can keep it if a judge says so.

Without the seized property, a person accused of crimes may not be able to afford a lawyer to defend them. The *Criminal Code* says they can ask a judge to let some of the property be used to pay legal fees. If the judge agrees, they can set conditions to make sure the money is only used to pay for legal fees.

If the person is found guilty, a judge will decide their sentence. The sentencing judge also has to decide exactly what property came from crime. The Crown usually gets to keep this. If the amount the Crown holds at sentencing is less than the amount the judge decides came from crime, the judge can make the person pay a fine. This is to prevent people from spending or hiding the proceeds of crime before they can be taken permanently. If the person doesn't pay, they can go to prison (or go to prison longer).

Mr. Rafilovich was arrested for dealing drugs. The police found almost \$50,000 worth of cocaine and \$42,000 in cash. The Crown seized the cash as it was probably proceeds of crime. In 2009, before his trial, Mr. Rafilovich asked to use the money to pay for his lawyer. The judge said yes, and set a number of conditions, including an hourly rate and the maximum number of hours the lawyer could bill.

Mr. Rafilovich pleaded guilty and was sentenced to jail. The judge decided the money the police found was proceeds of crime. But the money was gone because it had all been used to pay Mr. Rafilovich's lawyer. The Crown said Mr. Rafilovich should still have to pay the total amount as a fine. But the sentencing judge said no. He only used the money to hire a lawyer, which he wouldn't have been able to do if the money wasn't returned.

The Court of Appeal said the sentencing judge had to charge the fine. It said paying for a lawyer with proceeds of crime let Mr. Rafilovich benefit from his crime. The point of seizing proceeds of crime was to prevent people from benefiting from crime. It fined Mr. Rafilovich almost \$42,000.

In the past, lower courts disagreed about what to do in this kind of situation. The Supreme Court had to decide what to do when an accused person got a judge's permission to use possible proceeds of crime for legal fees.

The majority said judges can decide whether or not to charge a fine, depending on the situation. The sentencing judge was allowed to decide *not* to fine Mr. Rafilovich.

The majority said that sentencing judges shouldn't normally fine someone to get back the amount that was used (with a judge's approval) to pay for their legal defence. This would be unfair. An accused person is presumed to be innocent during their trial. (The presumption of innocence is part of the reason the *Criminal Code* says the money can be returned if a judge gives permission.) If the accused person had to pay the amount they spent on legal fees to the Crown if they lost, they might decide not to hire a lawyer. The majority said the purpose of the fine was to prevent people from spending or hiding the proceeds of crime. It wasn't to punish someone from relying on the presumption of innocence and hiring a lawyer to defend themselves. Criminal justice is meant to provide a fair process to get a just result. It isn't about getting maximum punishment at any cost.

This case was about how a judge should use their "discretion." Discretion is a judge's freedom to decide certain issues. That freedom has limits set by the law. This was the first time the court looked at a judge's discretion to order a fine to get back proceeds of crime used to pay legal fees.

Breakdown of the decision: *Majority:* Justice Sheilah [Martin](#) allowed the appeal (Justices [Abella](#), [Karakatsanis](#), [Gascon](#), [Brown](#), and [Rowe](#) agreed) | *Dissenting in part:* Justice Michael [Moldaver](#) said that, to ensure crime doesn't pay, Mr. Rafilovich should have to pay back proceeds of crime spent on counsel unless counsel was necessary to protect his right to a fair trial; however because the record wasn't clear on this point, the case should go back to the sentencing judge to decide (Chief Justice [Wagner](#) and Justice [Côté](#) agreed)

More information (case # 37791): [Decision](#) | [Case information](#) | [Webcast of hearing](#)

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