UNIFORM LAW CONFERENCE OF CANADA

FINE IN LIEU OF FORFEITURE FOR MONEY SPENT ON LEGAL FEES

Quebec City

Province of Quebec

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INTRODUCTION

[1] On May 24, 2007, the Newfoundland and Labrador Supreme Court handed down a decision on imposing a fine in lieu of forfeiture as provided for in Part XII.2 of the *Criminal Code* (Proceeds of Crime) for funds released to the accused further to an order made under section 462.34 *Criminal Code* (*Cr. Code*) for legal expenses. In *R. v. Appleby #5*, 2007NLTD109,[1] Mr. Justice Barry had to decide whether such a fine under subsection 462.37(3) of the *Cr. Code* should be imposed where funds seized as proceeds of crime had been released to the accused to pay his legal expenses. Since that money was no longer available for forfeiture purposes, the issue was whether such a fine could be imposed as compensation for funds not available for forfeiture.

[2] Barry J. found that the funds released to the offender to pay his legal expenses could not be considered as belonging to the offender since they had been released to the offender's counsel. Since subsection 462.37(3) *Cr. Code* refers to property of the offender, such funds were therefore excluded from the fine in lieu of forfeiture scheme. Exercising the court's discretion provided for in subsection 462.37(3) *Cr. Code*, the judge refused to order such a fine.

[3] Following this decision, a resolution was tabled by the Public Prosecution Service of Canada at the Uniform Law Conference of Canada (ULCC) in September 2007 at Charlottetown (Can-PPSC2007-01).

[4] Following discussions on this resolution, the ULCC adopted the following resolution:

> That a ULCC Working Group of the Criminal Section study the issues of the appropriateness of legal fees paid pursuant to an order made under s. 462.34 (4) (c) of the Criminal Code and of compensatory fines in lieu of forfeiture that may be imposed where the seized or restrained property has been diminished by such an order.

[5] A working group was established. It is comprised of the following individuals:

(1) Luc Labonté	Crown Prosecutor, Province of New Brunswick
(2) Andy Rady	Criminal Defence Lawyer, Ontario
(3) Dean Sinclair	Crown Prosecutor, Province of Saskatchewan
(4) Louis Belleau	Criminal Defence Lawyer, Representative of the Quebec Bar
(5) Ted McNabb	Counsel, Justice Canada, Programs Branch
(6) Paul Saint-Denis	Senior Counsel, Justice Canada, Criminal Law Policy Section
(7) Simon William	Counsel, Public Prosecution Service of Canada, Strategic Operations Section

[6] Four conference calls were held to discuss the problem set out in the resolution. This report, which is the result of the working group's discussions, was approved by all members, and was drafted as neutrally as possible so as to allow for a frank and open discussion.

[7] Finally, as chair of the working group, I would like to take this opportunity to thank all the members of the group for their work and cooperation, without which this report could not have been written.

M**ANDATE**

[8] The first task of the working group was to discuss the scope of its mandate. The resolution adopted by the ULCC concerned only property that could be forfeited under Part XII.2 of the *Cr. Code*. The question was whether the mandate should be extended to also include funds seized as offence-related property. Such funds are not available to the accused to pay his or her legal expenses. The group had to determine whether the mandate should be broadened to include funds seized/restrained as offence-related property under the proceeds of crime regime for the purposes of section 462.34 *Cr. Code*.

[9] After discussion, the group decided, for various reasons, that its mandate should not be broadened to include funds seized as offence-related property. First, although it is not impossible, it is very rare that money is seized as offence-related property. Second, the philosophy of the two regimes is different. The offence-related property regime focuses on property that was used to commit the offence in question. Only this property may be forfeited as offence-related property. It is therefore logical that this regime does not allow the accused to access the property seized/restrained as offence-related property to pay living expenses, business expenses or legal expenses or to pay fines in lieu of forfeiture. To allow this would require a comprehensive review of the regime's philosophy and the existing legislative provisions. Parliament could have provided for it since this already exists in the proceeds of crime regime, but did not. Finally, the working group's tight deadlines did not allow for broadening its mandate for this purpose.

[10] The other question that the working group discussed with respect to its mandate was whether it should also consider the question of the conditions for accessing funds seized/restrained as proceeds of crime that are set out in section 462.34 *Cr. Code* or whether it should simply discuss the appropriateness of a fine in lieu of forfeiture for property released to the accused under an order made pursuant to paragraph 462.34(4)(*c*) *Cr. Code* for the accused's legal expenses.

[11] The working group was of the opinion that it would be difficult to ignore the section 462.34 *Cr. Code* regime on access to seized/restrained property as part of its discussions. Doing so would have excessively limited the scope of the discussions and would not have allowed for a full review of the question as proposed in the mandate.

[12] Consequently, the working group's mandate as provided for in the resolution adopted by the ULCC will not include assets seized as offence-related property. It will be limited to assets seized/restrained as proceeds of crime. To carry out the proposed mandate, the working group will review the section 462.34 *Cr. Code* regime concerning seized/restrained property released to the accused to pay his or her legal expenses.

BACKGROUND

[13] It is necessary to provide a brief overview of the history of section 462.34 *Cr. Code*, particularly with respect to access to seized/restrained property to pay legal expenses. The purpose of this overview is to view the evolution of the provision and shed light on Parliament's intention.

[14] When Part XII.2 *Cr. Code* came into force in January 1989, a number of the major elements of section 462.34 as it reads today were missing:

- the requirement for the applicant to use other assets or means before being allowed to use the seized/restrained property;
- the obligation for the judge to make sure that no other person appears to be the lawful owner of or lawfully entitled to possession of the property referred to in the application;
- the obligation for the judge to take into account the legal aid tariff of the province in determining the legal expenses to be paid;
- the possibility for the Attorney General to make representations as to what could constitute the reasonableness of the legal expenses;
- the various factors that the judge taxing the legal fees must take into account in his or her decision.

[15] These new elements came into force in May 1997, seven years after Part XII.2 came into force. One of the reasons for these amendments was to provide a better framework for the entire issue of legal expenses, to give judges certain parameters when deciding on the reasonableness of the legal expenses, and to give the Attorney General the opportunity to make observations on this question. These legislative amendments were made further to certain court rulings on the question of legal expenses that included hourly rates that were substantially different from those for legal aid. As a result, the money released was for all intents and purposes not available for a possible forfeiture order. This situation disregarded a judge's decision to allow money to be seized/restrained where there were reasonable grounds to believe that the money constituted proceeds of crime that could be subject to forfeiture.

[16] Consequently, in order to strike a certain balance between the possibility of using the seized/restrained money to pay legal fees and a judge's decision to allow the money to be seized/restrained as proceeds of crime, the government passed the amendments in question.

RELEVANT CASE LAW

[17] The decisions concerning the question of access to money under an order pursuant to paragraph 462.34(4)(*c*) *Cr. Code* to pay legal expenses and the imposition of a fine in lieu of forfeiture are few and far between.

[18] One of the first decisions on access to money seized for the purposes of paying the accused's legal expenses was handed down by the Alberta Court of Queen's Bench in *R. v. Love*.[2] In that decision, a bank account had been restrained under an order pursuant to section 462.33 *Cr. Code*, while all other property had been seized under a warrant issued pursuant to section 487 *Cr. Code* as evidence for the charge of being unlawfully in possession of proceeds of crime contrary to section 19.1 of the *Narcotic Control Act*. At paragraph 29 of the decision, the Court specified the following:

> In my opinion, it must be kept in mind that the impecuniosity that has arisen is as a result of seizures that have occurred prior to the conviction of the accused. In this country, an accused is always innocent until the state proves him guilty beyond a reasonable doubt. The accused should have access to his funds so that he can exercise his right to choice of counsel, providing those funds can be obtained and providing that counsel can be obtained on a reasonable fee basis.
>
> At paragraph 30, the judge concluded as follows:
>
> He can have access to funds to pay for reasonable legal expenses. The Legal Aid tariff is not, in my view, determinative of what is reasonable.

[19] It should be mentioned that, at that time, subsection 462.34(5) *Cr. Code* did not specify that the judge was to take into account the legal aid tariff of the province.

[20] The Alberta Court of Queen's Bench examined the question of fines in lieu of forfeiture where monies that were proceeds of crime had been paid to the offender's counsel for legal expenses. In *R. v. Gagnon*,[3] the offender pleaded guilty to trafficking in narcotics and was sentenced to five years' imprisonment. The judge also forfeited property of $130,000.00. As well, the defendant pleaded guilty to possession of stolen property and was sentenced to nine months consecutive. The offender used the stolen property for a business contract and received $1,500.00. This money was later assigned to his counsel for his fees. The Crown sought a fine in lieu of seizure of this amount. The Court dismissed the Crown's application and justified its decision as follows:

> What lawyer would undertake the defence of an accused person if fees paid by the accused could eventually be recovered by the state? What accused would then have the benefit of the constitutional right to a full defence, given the dual problems of finding a lawyer who will act under those conditions and of

> serving time in addition to the sentence imposed for the substantive crime if the lawyers' fees are not repaid to the state as proceeds of crime? (p. 512-513)

[21] The Court found that it would not be appropriate to impose a fine for the following three reasons:

- in this case, the underlying crime was at the low end of the scale of the crimes from which offenders can reap a financial benefit;
- the offender was likely to have received the court's permission to have spent the money on lawyers' fees if an application had been made under section 462.34 *Cr. Code*. Once money has been spent on this type of expenditure, it would be unfair to require the offender to serve additional jail time; he should not serve a longer sentence because he exercised his constitutional right to full defence. Moreover, the imposition of a fine in these circumstances would drive a wedge between persons accused of crimes and the criminal defence bar. That bar is charged with the responsibility of defending the rights of the accused; this responsibility should not be hobbled;
- given the relatively lengthy sentences already imposed, and the forfeiture of substantial property, the imposition of a fine would be merely punitive (p. 514).

[22] The Ontario Court of Appeal handed down a decision on proceeds of crime in *Wilson v. Canada*.[4] The issue in this matter was to determine whether Mr. Wilson was entitled to the money or a portion of the money that had been forfeited as proceeds of crime. Mr. Wilson was a lawyer and his client had assigned to him his interest in the money that had been seized at his residence when he had already been committed for trial on charges under the *Narcotic Control Act*. After the money seized had been forfeited, Mr. Wilson moved for an order under section 462.42 *Cr. Code* as an innocent party to have a portion of the money remitted to him. The trial judge found that Mr. Wilson had no interest in the forfeited money.

[23] In dismissing the appeal, the Court of Appeal made very useful comments on the issue of orders for legal expenses and fines in lieu of forfeiture. At pages 479-480, the Court indicated the following:

> In the case of an application under s. 462.34, the judge must balance the applicant's need for legal assistance against the possibility that property which will turn out to be the proceeds of crime will be used to benefit a person who may be shown to have acquired the property through the commission of a criminal offence.
>
> …
>
> 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 Part 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.

[24] In 1996, the New Brunswick Court of Appeal examined the issue of interest to us in *R. v. MacLean*, [1996] N.B.J. No. 597. This decision dealt directly with the imposition of a fine in lieu of forfeiture where the money had been released for payment of legal expenses further to an order made under section 462.34 *Cr. Code*.

[25] At paragraph 12 of its decision, the New Brunswick Court of Appeal distanced itself from *Gagnon, supra,* by stating the following:

> However, the fact that s. 462.34(4)(c)(ii) authorizes a Judge to release monies to cover the accused's legal fees does not exempt that portion from a forfeiture order under s. 462.37(3). As Doherty, J.A. pointed out in Wilson, the judge can impose a fine in an amount equivalent to the amount released to cover legal fees when it is appropriate.

[26] At paragraph 13, it went on to state that, "[w]hile it is within a judge's power to assess the reasonableness of the expenditures, thus controlling extravagance, the character of the funds has not changed: they are proceeds of crime."

[27] In *MacLean*, the Court had already imposed a fine for property that the offender had transferred to his father and regarding which the Crown had not asked for a forfeiture order. The Court specified that the imposition of a fine for the money released for legal expenses does not alter the default time for the fine relating to the property because the term remains within the range set out in subparagraph 462.37(4)(*a*)(iii) *Cr. Code*. The Court of Appeal therefore ordered the imposition of a fine equal to the amount released for legal expenses.

[28] A more recent decision of the Supreme Court of Canada on proceeds of crime was handed down in *R. v. Lavigne*, [2006] 1 S.C.R. 392. In that case, the issue was whether the offender's ability to pay was a factor in deciding the fine to be imposed. Specifically, it involved interpreting subsection 462.37(3) *Cr. Code*. In allowing the Crown's appeal, the Supreme Court made the following comments:

> The sentence imposed for an offence under Part XII.2 on proceeds of crime consists of two elements: the penalty for committing a designated offence (s. 462.3(1)), and forfeiture of the proceeds of crime (s. 462.37(1)). The new provisions are in addition to existing methods. The intention of Parliament is clear. Not only must the act itself be punished, but it must not benefit the

offender. Parliament's purpose in doing this is to ensure that crime does not pay. (para. 10; emphasis added)

…

Forfeiture of the proceeds of crime is not always practicable, however. The proceeds of a crime may have been used, transferred or transformed, or may simply be impossible to find. To ensure that the proceeds of a crime do not indirectly benefit those who committed it, Parliament has provided that the court may impose a fine instead of forfeiture of the proceeds of crime. (para. 18)

…

The list of circumstances in which the court may, *inter alia*, impose a fine instead of forfeiture also illustrates the limits of the discretion. For instance, the discretion may be exercised (*a*) where the property cannot, on the exercise of due diligence, be located or (*b*) where the property has been transferred to a third party. The list does not appear to be restrictive, given the use of the expression "in particular", which suggests that there are other circumstances that do not appear on the list. However, those circumstances must be similar in nature to the ones that are expressly mentioned. The judge could not therefore decline to impose a fine simply because the offender is no longer in possession of the property or simply because (*c*) the property is located outside Canada. (para. 24)

…

Obviously, where a sum of money is concerned, a reduction in the value of such property is most often associated with the use thereof, which is itself often associated with an absence of other income. If one of the objectives is to ensure that crime does not pay, use of the proceeds of crime must be a basis for ordering a fine instead of forfeiture of the property and cannot be a basis for mitigating the impact of the measure. (para. 31)

…

In *Wu*, the Court reviewed a few principles recognized by the common law, including the following: (1) "[i]f it is clear that the offender does not have the means to pay immediately, he or she should be given time to pay", and (2) "[t]he time should be what is reasonable in all the circumstances" (para. 31). These general principles apply with equal force to a fine instead of forfeiture. While the court that imposes the fine has no discretion to vary the amount of the fine based on ability to pay, the ability to pay may nonetheless be taken into consideration in determining the time limit for payment. In addition, under s. 734.7(1)(*b*) *Cr. C.*, when the time allowed for

> payment of the fine instead of forfeiture has expired, the court asked to issue a warrant of committal may not do so unless it is satisfied that the offender has, without reasonable excuse, refused to pay the fine. According to *Wu*, failure to pay because of poverty cannot be equated to refusal to pay. The same factors do not apply at the various stages -- the decision to impose the fine, the determination of the value of the property and the setting of a time limit -- and these stages must not be confused. (para. 47)

[29] Three decisions were recently handed down on the issue of concern to us. The decision behind the resolution adopted by the ULCC is *R. v. Appleby #5*, 2007 NLTD 109, Newfoundland and Labrador Supreme Court.[5]

[30] As indicated in the introduction, the Court found in this decision that the legal expenses approved under section 462.34 *Cr. Code* could not be considered to be property of the offender, the expression used in subsection 462.37(3) *Cr. Code*, since the money had been released to his lawyer. In addition, the Court believed that a fine in lieu in such a context would render the right to counsel an illusory right, since the more services rendered by a lawyer to the client, the higher the fees, thereby increasing the risk of an additional prison sentence concurrent with any other sentence if the fine in lieu is not paid.

[31] In *R. v. Martin*,[6] the British Columbia Supreme Court did not follow *Appleby #5* in interpreting the reference to property of the offender in subsection 462.37(3) *Cr. Code*. Beames J. indicated that money released pursuant to an order made under section 462.34 *Cr. Code* for legal expenses or for living or business expenses is included in the definition of the word "property" in section 462.37.[7] In support of its position, the Court cited paragraph 10 of *Lavigne*, reproduced above.

[32] The Court stated that there are a number of situations in which a fine should be imposed in lieu of an amount paid out pursuant to judicial authorization, whether for living or business expenses, or for legal expenses. For example,

- in circumstances of large criminal organizations, to ensure that crime does not pay;
- where evidence is discovered after an order is made under section 462.34 *Cr. Code*, indicating that the accused has or had other assets which were not divulged when the application was heard under 462.34 *Cr. Code* and were available for paying legal expenses;
- the money recognized as proceeds of crime cannot be forfeited because it was squandered before it could be seized/restrained (see *Lavigne*) (para. 25).

[33] The Court concluded that this was one of the cases in which the Court has discretion to refuse to order a fine for the following reasons:

- the money was for funding legal counsel;

- there is no evidence to suggest a benefit from the proceeds of crime to the offender, other than having legal counsel;
- there is no evidence of squandering other assets or a choice having been made to divert undisclosed assets to other purposes rather than paying counsel;
- the right to counsel is a constitutional right;
- Parliament decided that a judge may authorize the release of funds that have been seized/restrained as proceeds of crime for the purpose of paying legal expenses.

[34] Finally, in *Her Majesty the Queen v. Smith* 2008 SKCA 20, the Court of Appeal adopted the reasoning of Beames J. in *Martin*. The Court was of the opinion that money that was released to pay legal expenses further to an order made under section 462.34 *Cr. Code* and that is subsequently recognized as proceeds of crime may be the subject of a fine in lieu. It rejected the offender's argument that he could have no lawful interest in the money recognized as proceeds of crime, and thus the reference to the property of the offender in subsection 462.37(3) *Cr. Code*, which provides for a fine in lieu of forfeiture, could not apply. In addition, evidence discovered after the order threw doubt on the assertion that there was no other property or means available to the offender to pay his legal fees.

[35] The Court of Appeal was of the opinion that the offender benefited from the money released to him after the order made under section 462.34 *Cr. Code* because he was able to satisfy his entire legal bill from funds determined beyond reasonable doubt to constitute proceeds of crime. His right to counsel was fully respected, and the offender was represented by counsel of his choice throughout the proceedings. The offender received the benefit of the presumption of innocence and the right to counsel in the most meaningful way—through ready access to the funds seized.

[36] Finally, the Court indicated that, even where legal counsel is state-funded (*Rowbotham*), the offender may be obliged to repay the government all or a portion of the legal costs. In this context, it is difficult to claim that the offender's constitutional rights would be breached if he was subject to similar consequences, particularly where doubt was cast on the veracity of his assertions that he had no assets or means to pay his legal expenses.

[37] The Court of Appeal therefore imposed a fine in lieu of forfeiture equal to the money released to the offender under the order made pursuant to subsection 462.34(4) *Cr. Code*.

PRINCIPLES UNDERLYING THE DISCUSSIONS

[38] As part of its discussions, the working group considered that the following principles should be taken into account in the decision on the issue in question.

I. As stated in the *Charter*, every person is presumed innocent until proven guilty at a fair trial. In some cases, a fair trial means that the accused is represented by counsel. In order to be represented by counsel, the accused should have access to his or her money that has been seized/restrained as proceeds of crime in order to pay legal expenses.

II. The accused should not benefit from the proceeds of his or her crime; in other words, crime should not pay. That is why Parliament adopted the measures set out in Part XII.2 of the *Criminal Code*. Consequently, allowing the accused to have access to money that has been seized/restrained as proceeds of crime without the possibility of sanctions if this money is recognized as proceeds of crime would be contrary to Parliament's intention.

III. Where representation by counsel is essential for a fair trial, and where the accused wishes to be represented by counsel but lacks the necessary financial resources, the state has a constitutional obligation to ensure that the accused is represented by counsel. Access to seized/restrained money will enable the accused to benefit from a fair trial. Not allowing the accused to access such funds may mean that the state must use its financial resources to pay the accused's counsel through a *Rowbotham/Fisher* application or legal aid.

IV. As a rule, the accused has a fundamental right to be represented by counsel of his or her choice. However, it has also been recognized that this fundamental right is not absolute and that it may be limited depending on the circumstances. The Court must balance "the individual right, public policy and public interest in the administration of justice and basic principles of fundamental fairness."[8]

IMPORTANT POINTS RAISED DURING DISCUSSIONS

[39] A number of important points were raised during discussions. This information is relevant and useful because it allows decision-makers to make a more enlightened decision.

- To date, there is no evidence that paragraph 462.34(4)(*c*) *Cr. Code* has been improperly used, particularly with regard to legal expenses.
- From 2000 to 2007, some $8.3 million was released in federal proceedings to accused persons under an order made pursuant to paragraph 462.34(4)(*c*) *Cr. Code* for living expenses and legal expenses, out of a total of some $573 million in seized/restrained money, which represents approximately 1.5%.[9]
- There is still uncertainty in the case law on the issue of imposing a fine in lieu of forfeiture for money released under an order pursuant to section 462.34 *Cr. Code* for legal expenses.
- Section 462.34 *Cr. Code* provides all the mechanisms/proceedings necessary to ensure that orders for legal expenses are not improperly used.

- It must be remembered that there will be a negative financial impact on the various legal aid systems in Canada if amendments are made to section 462.34 *Cr. Code* with regard to access to seized/restrained money to pay legal expenses.
- The 462.34 *Cr. Code* regime applies differently depending on the offence of which the person is accused (*Criminal Code* offences vs. *CDSA* offences). For example, in the case of a bank robbery, there is a lawful owner of the seized/restrained money. Consequently, the accused cannot have access to the seized/restrained money to pay his or her legal expenses. The situation is different in the case of an offence under the *Controlled Drugs and Substances Act*.

APPROACH IN OTHER JURISDICTIONS

[40] While recognizing that the legal system in other countries may be significantly different from Canada's, it is interesting to see how certain countries deal with the issue of the accused's access to assets that have been seized/restrained as proceeds of crime in order to pay legal expenses.

[41] Because of our limited time and space, we cannot undertake an exhaustive comparative law analysis. We have limited our analysis to the situation prevailing in the United States and the United Kingdom. We believe that it is important to see how these countries, with which we have many similarities, have approached this issue.

United States

[42] The Sixth Amendment of the United States Constitution provides for the right to have the assistance of counsel in criminal matters. Persons without financial means will be appointed counsel by the court.

[43] Proceeds of crime either remain the property of the victim or, under the "relation back doctrine," become the property of the government as soon as the offence is committed. Consequently, the accused does not have access to the money that has been seized/restrained as proceeds of crime because it belongs either to the victim or to the government (see 21 U.S.C.§ 853(c)). An accused cannot use the money of someone else to pay his or her legal expenses. The state will step in to appoint counsel for the accused if he or she can not financially afford one.

[44] The accused may contest the search warrant or the restraint order if he or she does not have other financial means to pay for counsel. If the prosecution meets its burden of probable cause (or its Canadian equivalent, belief on reasonable grounds), the property will remain restrained.

[45] Counsel of an offender whose property has been forfeited may be required to return the money paid to him or her by the client unless counsel can show on a balance of probabilities that he or she was a *bona fide* purchaser for value and that counsel had no

reasonable grounds to believe that the money paid by the client was forfeitable. If counsel fails to return the money, he or she may be charged with contempt of court or the government may exercise civil remedies.

United Kingdom

[46] In 2002, the United Kingdom passed new legislation on proceeds of crime, the *Proceeds of Crime Act 2002* (the Act). Under this legislation, a person's realisable property can be restrained by prohibiting the person from dealing with the property. This is an *in personam* order. "Realisable property" is defined in s. 83 of the Act as any free property[10] held by the defendant or any free property held by the recipient of a tainted gift. Thus, the order can be made with respect to the defendant or to a third party. The property can be restrained if there are reasonable grounds to believe that the defendant benefited from his or her criminal conduct. The restraint order may be applied for during the criminal investigation or at the time proceedings for an offence have been started in court. It may be obtained for narcotics offences and indictable offences.

[47] The most important change from the system in place at the time the Act came into force is that the defendant now has access to the restrained property to pay his or her legal expenses unless it is related to offences for which the restraint was obtained.

[48] At the time the Act was passed, the *Access to Justice Act* was amended to enable the accused to be represented by counsel paid by the state if he or she had insufficient financial means.

[49] In the United Kingdom, confiscation is compulsory. It consists of an order requiring the offender (*in personam*) to pay a sum of money representing the benefit that the offender obtained further to the commission of the offence for which he or she was convicted or based on general criminal conduct (criminal lifestyle) or a course of criminal conduct. To determine the amount of the confiscation, the court must determine the recoverable amount, which is equal to the benefit obtained by the offender. If the offender shows to the court that the available amount is less than the recoverable amount, then the confiscation will be equal to the available amount. The money returned to the offender to pay his or her legal expenses will be taken into account in the determination of the available amount.

[50] Take the example where the Crown obtains a restraint order for an individual's property, which includes £100,000. The court releases to the offender £10,000 for legal expenses related to an offence other than the one for which the money was restrained. If the court determines that the recoverable amount or the benefit obtained is £100,000 and the money available is £90,000 (£100,000 - £10,000 for legal expenses), the confiscation order will be for £90,000. If the amount available is £157,000, then the confiscation order will be for £100,000.

[51] A sentence of imprisonment that is consecutive to any other sentence will be imposed if the offender does not pay the confiscation order. The confiscation order will remain payable even if the offender serves the prison sentence.

Conclusion

[52] In both the United States and the United Kingdom, the accused can never access money that has been seized/restrained as proceeds of crime to pay his or her legal expenses. It is the state that finances the accused's defence unless the accused has other assets to cover his or her legal expenses. However, the United Kingdom allows the accused to access restrained money to pay legal expenses that are not related to the offence for which the money was restrained.

OPTIONS

[53] Further to the working group's discussions, the following list of five options was drawn up:

1. Status quo
2. Amending subsection 462.37(3) *Cr. Code* to exclude from the fine in lieu of forfeiture regime the money released under an order made further to section 462.34 *Cr. Code* for legal expenses
3. Eliminating from section 462.34 *Cr. Code* the possibility of access to seized/restrained property for legal expenses, thereby allowing the accused to obtain legal aid or submit a *Rowbotham/Fisher* application
4. Amending section 462.34 *Cr. Code* to limit access to seized/restrained property for legal expenses (for example, making the legal aid tariff mandatory, eliminating the possibility for the accused's dependants to have access to the money for their legal expenses, limiting access only to proceedings for which the money was seized/restrained)
5. Option 4 and excluding the money released from the fine in lieu of forfeiture regime

1. STATUS QUO

ADVANTAGES

- No legislative amendment required
- Recognizes the decision of the Courts of Appeal of Ontario, New Brunswick and Saskatchewan, which all arrived at the same conclusion that a fine in lieu of forfeiture may be imposed for money released under an order pursuant to section 462.34 *Cr. Code* for legal expenses

- Recognizes that even if the money released under an order pursuant to section 462.34 *Cr. Code* is covered by the fine in lieu of forfeiture regime, the court still has discretion to not impose a fine
- Recognizes that the inclusion of the money released for payment of legal expenses under an order pursuant to section 462.34 *Cr. Code* in the fine in lieu of forfeiture regime is in compliance with Parliament's intention; an appropriate reading of the provisions concerned confirms this interpretation
- Recognizes that there is no clear evidence that the system does not work
- Recognizes that no additional term of imprisonment will be served if the offender refuses to pay the fine without a reasonable excuse. An inability to pay cannot be considered a refusal to pay
- Recognizes that the percentage of money released for legal expenses vs. the total money seized/restrained as proceeds of crime is insignificant and does not justify an amendment to the current regime

DISADVANTAGES

- Does not resolve the problem that the "test" under section 462.34 *Cr. Code* for releasing money to pay legal expenses is not consistently applied
- Offers no solution for the problem that the current regime places the defence counsel in a difficult position. The greater the amount spent on defending the client, the greater the risk to the client of a longer additional prison sentence
- The current regime may jeopardize the accused's rights to a full defence and counsel of his or her choice
- The *status quo* does not allow for the possibility of resolving certain issues relating to section 462.34 *Cr. Code* that could have full consensus

2. AMENDING SUBSECTION 462.37(3) *CR. CODE* TO SPECIFICALLY EXCLUDE FROM THE FINE IN LIEU OF FORFEITURE REGIME THE MONEY RELEASED UNDER AN ORDER MADE FURTHER TO SECTION 462.34 *CR. CODE* FOR LEGAL EXPENSES

ADVANTAGES

- Resolves the issue of a full defence and the counsel of the accused's choice mentioned in option 1
- Avoids placing the defence counsel in a difficult position
- Easy solution to implement despite the fact that it requires a legislative amendment

DISADVANTAGES

- Requires a legislative amendment

- Is contrary to Parliament's clear intention and the decisions of the courts of appeal
- Could create a negative impact in the media, especially since general public opinion, for better or worse, is that the system should not allow the accused access to proceeds of crime to pay legal expenses
- Some may be of the opinion that there is no point in seizing/restraining money since it will be used to pay the accused's legal expenses, and the state will be prevented from having it forfeited or requiring a fine in lieu of forfeiture
- The accused would benefit from his or her crime
- No sanctions against the offender for the money used to pay legal expenses and that is subsequently recognized as proceeds of crime
- The offender would be the sole beneficiary of this option
- Creates a disparity between an offender who uses the seized/restrained money for his or her legal expenses and the money is subsequently recognized as proceeds of crime by the Court with no sanctions, and an offender who does not have assets to seize/restrain but had proceeds of crime in his or her possession and will therefore be imposed a fine in lieu of forfeiture
- Less incentive for the accused to settle the matter as soon as possible

3. ELIMINATING FROM SECTION 462.34 *CR. CODE* THE POSSIBILITY OF ACCESS TO SEIZED/RESTRAINED PROPERTY FOR LEGAL EXPENSES, THEREBY ALLOWING THE ACCUSED TO OBTAIN LEGAL AID OR SUBMIT A *ROWBOTHAM/FISHER* APPLICATION

ADVANTAGES

- Simple solution for resolving the issue of money released for legal expenses and the fine in lieu of forfeiture
- Avoids putting the defence counsel in a difficult position
- Settles the question of the accused benefiting from his or her crime
- All accused treated the same way
- The accused's Charter rights not affected

DISADVANTAGES

- Requires legislative amendments
- Would likely have a major financial impact on provincial legal aid
- Would likely have a major financial impact on the finances of the provinces and of the federal government
- Risk of greater delays in proceedings given the increased number of applications
- Since every person is innocent until proven guilty, the accused should have access to seized/restrained property to defend himself or herself

- If the seized/restrained property is not declared to be proceeds of crime, the accused will benefit from a windfall: his or her legal expenses will be paid by the state and, at the end of the proceedings, his or her property will be returned free of all charges

4. AMENDING SECTION 462.34 *CR. CODE* TO LIMIT ACCESS TO SEIZED/RESTRAINED PROPERTY FOR LEGAL EXPENSES (FOR EXAMPLE, MAKING THE LEGAL AID TARIFF MANDATORY, ELIMINATING THE POSSIBILITY FOR THE ACCUSED'S DEPENDANTS TO HAVE ACCESS TO THE MONEY FOR THEIR LEGAL EXPENSES, LIMITING ACCESS ONLY TO PROCEEDINGS FOR WHICH THE MONEY WAS SEIZED/RESTRAINED)

ADVANTAGES

- Conforms to Parliament's intention to have legal expenses covered by the fine in lieu of forfeiture regime
- Also conforms to the decisions of the courts of appeal on this subject, namely, that the money released under an order is covered by the fine in lieu of forfeiture regime
- Limits dissipation of seized/restrained property that could eventually be forfeited

DISADVANTAGES

- Requires legislative amendments and discussions on how to limit access to seized/restrained property; could be difficult to arrive at a compromise on this issue
- Defence counsel still in a difficult position
- Breaches to a certain extent the principle that the accused is innocent until proven guilty and the accused's right to counsel of his or her choice
- There is already a mechanism in section 462.34 *Cr. Code* (taxation) for limiting access to seized/restrained money for paying legal expenses
- The information available shows that little money is released to the accused to pay legal expenses, living expenses and business expenses (1.5% of the total seized/restrained)

5. OPTION 4 AND EXCLUDING THE MONEY RELEASED FROM THE FINE IN LIEU OF FORFEITURE REGIME

ADVANTAGES

- Compromise solution where access to seized/restrained property is limited but where the fine in lieu of forfeiture is not applicable
- Prevents defence counsel from being in a difficult position

- Right to counsel, right to full defence and the principle of innocence until proven guilty protected

DISADVANTAGES

- Requires legislative amendments and discussions on how to limit access to seized/restrained property; could be difficult to arrive at a compromise on this issue
- Contrary to Parliament's intention
- Accused benefits from his or her crime
- No sanction for money used for legal expenses that is subsequently recognized as proceeds of crime

CONCLUSION

[54] In this document, we have tried to present and explain, as fully and objectively as possible, the problem of money released under an order pursuant to section 462.34 *Cr. Code* to pay legal expenses and the imposition of a fine in lieu of forfeiture. The goal was not to take a position on one of the proposed options but rather to encourage discussions on the question.

[55] That being said, it will be difficult to arrive at a consensus. As the Supreme Court of Canada has pointed out on many occasions in matters where Charter issues have been raised, it is a question of balancing the constitutional rights of the individual with those of society, in this case, to ensure that crime does not pay.

[1] This decision is currently being appealed by the federal Crown.
[2] [1990] A.J. No. 1290.
[3] 80 C.C.C. (3d) 508.
[4] 86 C.C.C. (3d) 464.
[5] This decision is being appealed by the Crown.
[6] [2007] B.C.J. No. 1791.
[7] See para. 24.
[8] *R. v. Hart*, [2002] B.C.J. No. 1839, para. 14.
[9] Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism, Canada, Financial Action Task Force, February 29, 2008, para. 293.
[10] As defined in section 82 of the Act.