



SUPREME COURT OF CANADA

CITATION: R. v. Rafilovich, 2019 SCC 51

APPEAL HEARD: January 25, 2019
JUDGMENT RENDERED: November 8, 2019
DOCKET: 37791

BETWEEN:

Yulik Rafilovich
Appellant

and

Her Majesty The Queen
Respondent

- and -

**Attorney General of Ontario,
Canadian Civil Liberties Association,
Criminal Lawyers' Association of Ontario and
British Columbia Civil Liberties Association**
Interveners

CORAM : Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Martin J. (Abella, Karakatsanis, Gascon, Brown and Rowe JJ. concurring)
(paras. 1 to 87)

REASONS DISSENTING IN PART: Moldaver J. (Wagner C.J. and Côté J. concurring)
(paras. 88 to 176)

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R. v. RAFILOVICH

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Appellant

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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Proceeds of crime — Fine instead of forfeiture — Return of seized property for legal expenses — Property believed to be proceeds of crime seized from accused — Judge ordering that property be returned to accused for payment of reasonable legal expenses for his defence — Accused convicted — Sentencing judge deeming returned property to be proceeds of crime subject to forfeiture — Property used for legal expenses and no longer available for forfeiture — Whether fine instead of forfeiture may be imposed in relation to funds that have been judicially returned for payment of legal expenses for accused's defence — Criminal Code, R.S.C. 1985, c. C-46, ss. 462.34(4)(c)(ii), 462.37(3).

R was arrested for possession of cocaine for the purpose of trafficking. The police seized about \$42,000 in cash, found when searching his car and apartments, as potential proceeds of crime under Part XII.2 of the *Criminal Code*. Before trial, R applied under s. 462.34(4)(c)(ii) of the *Criminal Code* for the return of the seized funds to pay for reasonable legal expenses associated with his case. The application was allowed and the funds returned to pay for reasonable legal fees, with conditions. R pled guilty to several offences at trial. The sentencing judge imposed a term of imprisonment and forfeiture of R's interest in an apartment, but declined to impose a fine instead of forfeiture equal to the amount of the returned funds spent by R on his legal fees as requested by the Crown under s. 462.37(3) of the *Criminal Code*. The Crown appealed. The Court of Appeal varied the sentencing order, adding a fine instead of forfeiture of \$41,976.39, equal to the amount of the returned funds, and 12 months' imprisonment should R not pay his fine.

Held (Wagner C.J. and Moldaver and Côté JJ. dissenting in part): The appeal should be allowed and the Court of Appeal's order set aside.

Per Abella, Karakatsanis, Gascon, Brown, Rowe and **Martin JJ.**: Generally speaking, sentencing judges should not impose a fine instead of forfeiture in relation to funds that have been judicially returned for the payment of reasonable legal expenses associated with an accused's criminal defence. The statutory discretion to impose a fine instead of forfeiture under s. 462.37(3) of the *Criminal Code* must be exercised in accordance with the purposes of the proceeds of crime regime. This regime as a whole seeks to ensure that crime does not pay or benefit the offender; however, by enacting the legal expenses return provision at s. 462.34(4)(c)(ii) of the *Criminal Code*, Parliament not only foresaw the possibility that seized funds may be needed to mount a defence, but explicitly allowed individuals to spend returned funds for this purpose. The return provision pursues two secondary purposes: providing access to counsel and giving meaningful weight to the presumption of innocence. These secondary objectives ensure fairness to the accused in criminal prosecutions. Clawing back reasonable legal expenses as a fine instead of forfeiture would, in most cases, undermine these purposes. If it turns out that the offender did not have a real financial need or the funds were not used to alleviate that need, it would be appropriate to impose a fine instead of forfeiture, as this would align with Parliament's intent. This might occur where there is wrongdoing in the return of funds application or in the administration of the return order or if the accused experiences an unexpected change in circumstances after the funds have been

returned. In the context of this case, ordering a fine undermines Parliament's intent in enacting the return provision. There is no evidence that R misrepresented his financial position, misused returned funds, or experienced any change in circumstances. Therefore, the sentencing judge's exercise of discretion was appropriate and should not be interfered with.

As the *Criminal Code* does not expressly indicate whether judicially returned funds ought to be subject to a fine instead of forfeiture, the resolution of this issue requires recourse to the rules of statutory interpretation. This analysis is guided by the words that Parliament has chosen to use, the way it intended to achieve its objectives, and the scheme it has put in place. Where the dispute involves multiple legislative objectives and the inter-relationship between two or more statutory provisions, the scheme of the Act and the objectives underlying each of the relevant provisions are particularly significant. Parliament had several objectives in mind when it enacted the proceeds of crime regime. Parliament's primary goal was to ensure that crime does not pay and that it does not benefit the offender. Forfeiture is intended to deprive offenders of the proceeds of their crime. Seizure allows the state to take control of property believed to be proceeds of crime before trial and sentencing, to ensure it remains available for possible forfeiture. The fine instead of forfeiture provision ensures that, if accused persons are able to keep proceeds of crime throughout criminal proceedings, they must in the end pay a fine equivalent to the value of the property that is not available to be forfeited.

The legal expenses return provision shows that Parliament intended that the secondary objectives underpinning it — providing access to counsel and giving meaningful weight to the presumption of innocence — must be balanced against the primary objective of ensuring that crime does not pay. The wording and the elaborate and detailed nature of the return provision indicates that Parliament clearly and deliberately sought to address an accused's need for legal counsel, in the limited and narrow circumstances where the accused has no other assets or means and no other person appears to be the lawful owner of or lawfully entitled to possession of the property. The secondary objectives reflect an underlying intention to promote fairness in criminal prosecutions that runs through the proceeds of crime scheme. They constrain the pursuit of the primary objective. The return provision was intended to respect the principle of fairness in criminal prosecutions, including concepts of fair notice and reliance. It can be expected that accused people will rely on a court order authorized by a specific statutory scheme and those accused persons cannot reasonably know that doing so will lead to additional punishment. Also, accused persons who understand that judicially returned funds will be clawed back later may not apply for the return of funds and represent themselves instead. When an accused person cannot access legal counsel, the presumption of innocence suffers because it is difficult for lay persons to effectively navigate the complexity of criminal cases. Imposing retroactive penalties on accused persons who rely on the presumption of innocence undermines the presumption and the protections it affords.

The judicial return of funds to pay for a lawyer is not the type of benefit that Parliament sought to take away by way of a fine. It is a tightly controlled benefit Parliament expressly intended for a narrow category of accused persons in need. In the instant case, the return provision allowed R, who had no other assets or means to pay for his defence, an opportunity to access seized funds under close judicial scrutiny and tight conditions. It is undeniable that there is less money available to be forfeited to the Crown but a fundamental purpose of the criminal justice system is to provide a fair process to achieve just results, not to extract maximum retribution at any cost. Seized property returned pursuant to a judicial order is not thematically analogous to the reasons listed in s. 462.37(3) of the *Criminal Code* for ordering a fine instead of forfeiture. All of the circumstances listed reflect Parliament's concern that an accused person might hide, dissipate or distribute property that may later be determined to be proceeds of crime. The accused's lawyer is not some unknown person receiving funds by way of an uncontrolled, private transaction. They have been specifically authorized by a judge to be paid in aid of the accused's defence. Further, Parliament has set out its desired statutory requirements for the judicial return of seized funds. Nothing indicates any intention to require the accused to demonstrate, in order to avoid the imposition of a fine instead of forfeiture, that the nature of the proceedings are such that it is essential to have counsel. Accordingly, not imposing a fine instead of forfeiture in relation to funds that have been judicially returned for the payment of reasonable legal expenses associated with an accused's criminal defence will generally be most faithful to Parliament's intent.

Per Wagner C.J. and **Moldaver** and Côté JJ. (dissenting in part):

Imposing a fine in lieu of forfeiture where an offender has used proceeds of crime to pay for his or her own defence achieves the forfeiture regime's primary objective of ensuring crime does not pay; and it does not undermine the utility of the legal expenses restoration provision, which facilitates access to counsel in a manner that is both fair and consistent with the presumption of innocence. There is nothing inconsistent about allowing accused persons, who are presumed innocent, to access seized funds to pay for legal counsel but requiring offenders, who are proven guilty, to pay them back in the event that they are determined to be proceeds of crime. However, there is an important exception to this general rule: where a sentencing judge is satisfied that representation by counsel was essential to the offender's constitutional right to a fair trial, the judge should exercise his or her limited discretion not to impose a fine in lieu of forfeiture. This interpretation gives proper effect to Parliament's objective of ensuring an effective forfeiture regime while still vindicating the constitutionally protected right to counsel, and more particularly, the constitutional right to state-funded counsel in limited circumstances.

Part XII.2 of the *Criminal Code*, which governs the seizure, restraint, and forfeiture of proceeds of crime, seeks to ensure that crime does not pay. To further this objective, it permits the state to seize and detain property believed on reasonable grounds to be proceeds of crime, thereby preserving it and facilitating the enforcement of any future forfeiture order. At the same time, Parliament recognized that the seizure and detention of property that is reasonably believed, though not yet

proven, to be proceeds of crime may have a significant financial impact on accused persons, including by limiting their ability to access counsel. To address this concern, s. 462.34 of the *Criminal Code* permits accused persons to apply for a restoration order authorizing the release of seized property to pay for various expenses — one being reasonable legal expenses — where they have no other means available and no other person appears to be the lawful owner of or lawfully entitled to possession of the seized property. In creating this provision, Parliament struck a balance between ensuring an effective forfeiture regime and permitting otherwise impecunious accused persons to access funds for certain legitimate purposes. However, a court must, when sentencing an offender for an indictable offence, order the forfeiture of property determined to be proceeds of crime. Alternatively, where a court is satisfied that a forfeiture order should be made in respect of any “property of an offender”, but the property cannot be made subject to such an order, the court “may” order a fine in lieu under s. 462.37(3) of the *Criminal Code*.

Offenders who have used proceeds of crime to pay for their own defence derive a benefit from their crime and should generally be required to repay that benefit through a fine in lieu of forfeiture. This follows from a straightforward application of the primary objective of the proceeds of crime regime — namely, ensuring that crime does not pay. The proper interpretation of s. 462.37(3) of the *Criminal Code* reveals that where seized funds are released to an offender and then transferred to a lawyer, both prerequisites to imposing a fine in lieu are met. First, these funds are captured in the broad definition of “property of an offender”, which

includes property originally in the possession or under the control of any person. Second, a transfer of released funds to a lawyer cannot be made subject to a forfeiture order. Section 462.37(3) sets out a non-exhaustive list of example circumstances where this criterion is met, one of which is where property has been “transferred to a third party”. Parliament could have limited this class of transfers but did not. In the absence of any limiting language, the grammatical and ordinary sense of “transfer” — to move a thing from one place to another — must prevail. A judicially authorized transfer of released funds to a lawyer is therefore a “transfer to a third party”. This also fits comfortably within the consistent theme running through the examples listed in s. 462.37(3), which is simply that the property cannot be made subject to a forfeiture order.

There is an exception to the general rule that a fine in lieu should be imposed where an offender has used proceeds of crime to pay for his or her own defence. Where a sentencing judge is satisfied, applying the test set out in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), that representation by counsel was essential to the offender’s constitutional right to a fair trial under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, the judge should exercise his or her limited discretion not to impose a fine in lieu in respect of the released funds. The language of s. 462.37(3) is permissive and confers a limited discretion not to impose a fine. This limited discretion must be exercised in a manner consistent with the spirit of Part XII.2 as a whole. Part XII.2 seeks to balance the need to ensure an effective forfeiture regime and the constitutionally protected right to counsel. To properly

understand this balance, however, it is first necessary to examine what the constitutionally protected right to counsel does — and does not — entail. Neither s. 10(b) nor any other *Charter* right postulates a general right to legal assistance. The right to state-funded legal counsel in criminal proceedings grounded in ss. 7 and 11(d) of the *Charter* is limited to circumstances where legal aid has been denied, the accused lacks other means, and representation by counsel is essential to the accused's constitutional right to a fair trial. Thus, where an offender can show that he or she was constitutionally entitled to state-funded legal counsel, it would be inconsistent to order the offender to pay back his or her legal expenses through a fine in lieu. This approach gives proper effect to Parliament's objective of ensuring an effective forfeiture regime while still vindicating the constitutionally protected right to counsel. To go further would not only upset the careful balance struck by Parliament, it would effectively grant a constitutional entitlement where none exists.

Contrary to the majority's approach, the primary objective of the proceeds of crime regime need not be sacrificed to achieve the restoration provision's "secondary purposes" of providing access to counsel, giving meaningful weight to the presumption of innocence, and giving effect to the underlying intention to ensure fairness in criminal prosecutions. Once the respective roles of the restoration provision and the fine in lieu provision are properly understood, it becomes clear that all of the statutory scheme's objectives can be achieved. The restoration provision facilitates access to counsel in a manner that is both fair and consistent with the presumption of innocence. But where a restoration order is followed by a conviction,

an “accused” becomes an “offender”, and a fine in lieu should be ordered because the primary objective of ensuring that crime does not pay takes centre stage. While Parliament intended to give accused persons the benefit of having access to seized funds to pay for reasonable legal expenses, it did not intend to give offenders the benefit of never having to pay them back. Had that been Parliament’s intent, it could easily have enacted such a provision.

In this instance, the funds transferred to R’s lawyer qualified as R’s property and were determined to be proceeds of crime. They could not be made subject to a forfeiture order. Consequently, the authority to order a fine in lieu was engaged. In exercising her limited discretion not to invoke this authority, the sentencing judge did not consider whether representation by counsel was essential to R’s constitutional right to a fair trial and the record is insufficient to decide this issue. The Court of Appeal’s order should therefore be set aside and the case remitted to the sentencing judge for determination.

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By Martin J.

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R. v. Wu, 2003 SCC 73, [2003] 3 S.C.R. 530; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *R. v. Davidson*, 2016 ONSC 7440; *R. v. Alves*, 2015 ONSC 4489; *R. v. Borean*, 2007 NBQB 335, 321 N.B.R. (2d) 309; *R. v. Gagnon* (1993), 80 C.C.C. (3d) 508; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Hodgson*, [1998] 2 S.C.R. 449; *Greenshields v. The Queen*, [1958] S.C.R. 216; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495; *R. v. Keating* (1997), 159 N.S.R. (2d) 357; *R. v. Hobeika*, 2014 ONSC 5453; *R. v. Kizir*, 2014 ONSC 1676, 304 C.R.R. (2d) 287; *R. v. Ro*, [2006] O.J. No. 3347.

By Moldaver J. (dissenting in part)

R. v. Lavigne, 2006 SCC 10, [2006] 1 S.C.R. 392; *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *United States v. Monsanto*, 491 U.S. 600 (1989); *R. v. Dieckmann*, 2017 ONCA 575, 355 C.C.C. (3d) 216; *R. v. Angelis*, 2016 ONCA 675, 133 O.R. (3d) 575; *R. v. Khatchatourov*, 2014 ONCA 464, 313 C.C.C. (3d) 94; *R. v. Bourque* (2005), 193

C.C.C. (3d) 485; *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530; *R. v. Appleby*, 2009 NLCA 6, 282 Nfld. & P.E.I.R. 134; *R. v. Dwyer*, 2013 ONCA 34, 296 C.C.C. (3d) 193; *R. v. Wilson* (1993), 15 O.R. (3d) 645; *R. v. MacLean* (1996), 184 N.B.R. (2d) 26; *R. v. Smith*, 2008 SKCA 20, 307 Sask. R. 45; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; *R. v. Manninen*, [1987] 1 S.C.R. 1233; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. MacDougall*, [1982] 2 S.C.R. 605; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520.

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Criminal Code, R.S.C. 1985, c. C-46, ss. 2, 354(1), Part XII.2 [ad. c. 42 (4th Supp.), s. 2], 462.3(1), 462.32, 462.33, 462.34, 462.37(1), (2), (3), (4), 730.

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APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Hourigan and Pardu JJ.A.) 2017 ONCA 634, 137 O.R. (3d) 81, 353 C.C.C. (3d) 293, [2017] O.J. No. 4064 (QL), 2017 CarswellOnt 11968 (WL Can.), varying a

sentencing decision of Croll J., 2013 ONSC 7293, [2013] O.J. No. 5421 (QL), 2013 CarswellOnt 16580 (WL Can.). Appeal allowed, Wagner C.J. and Moldaver and Côté JJ. dissenting in part.

Gregory Lafontaine and Carly Eastwood, for the appellant.

Bradley Reitz and Sarah Egan, for the respondent.

Brett Cohen and Melissa Adams, for the intervener the Attorney General of Ontario.

Michael W. Lacy and Bryan Badali, for the intervener the Canadian Civil Liberties Association.

Alan D. Gold and Deepa Negandhi, for the intervener the Criminal Lawyers' Association of Ontario.

Gregory DelBigio, Q.C., and *Alison M. Latimer*, for the intervener the British Columbia Civil Liberties Association.

The judgment of Abella, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. was delivered by

MARTIN J. —

I. Introduction

[1] Do the proceeds of crime provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 (“Code”), require courts to give with one hand, only to take away with the other? The appellant, Yulik Rafilovich, applied for and was returned funds that the state had initially seized from him as potential proceeds of crime, because he needed the funds to pay for his legal defence to charges related to drug trafficking. After he pled guilty, the Crown asked the sentencing judge to impose a fine on Mr. Rafilovich under the forfeiture provisions of the *Code*, on the basis that by using his returned funds for his defence, he had thereby benefitted from the proceeds of crime. In my view, Parliament did not intend these provisions to operate in such an inconsistent manner.

[2] In 1988, Parliament enacted a comprehensive and distinct legal regime to address proceeds of crime, which now forms Part XII.2 of the *Code*. The overall goal of this complex and multi-factored regime was to ensure that “crime does not pay”, and to deter offenders by depriving them of their ill-gotten gains.

[3] Under this regime, the state may seize property from accused persons where the property is believed, on reasonable and probable grounds, to be proceeds of crime.¹ The seized property is then held for possible forfeiture to the Crown at a

¹ The *Code* provides two mechanisms by which the state can take control of property believed to be the proceeds of crime. The mechanism at issue in this appeal — seizure — is authorized by warrant issued under s. 462.32 of the *Code*. The second mechanism is a restraint order issued under s. 462.33 of the *Code*, which prohibits “any person from disposing of, or otherwise dealing with any interest in, the property specified in the order otherwise than in the manner that may be specified in the

future sentencing hearing (ss. 462.32(1), 462.33(1), 462.33(2) and 462.33(3)).² This initial seizure means that accused persons, who are presumed innocent and have not been found guilty of any crime, may nevertheless have their property taken away and held by the state prior to and throughout trial. If their property had not been seized, these accused persons would have had unfettered access to their property to finance their defence. But, when some or all of their assets have been seized, many accused persons will not be able to afford to hire lawyers to answer the charges against them. Parliament was alive to the serious problems created by such a situation and recognized the need to alleviate them.

[4] In response, Parliament created a specific procedure within the *Code*'s proceeds of crime regime that allows accused persons to seek the return of some or all of the seized property for certain designated purposes if the accused has "no other assets or means available" (s. 462.34(4)).³ Parliament's list of approved purposes expressly includes reasonable legal expenses (s. 462.34(4)(c)(ii)). Under this procedure, which occurs early in a criminal proceeding, an accused applies to a judge to ask for the return of seized property to pay for a lawyer (s. 462.34(1)). Thereafter,

order" (s. 462.33(3)). For simplicity, these reasons will use the term "seized" to mean "seized or restrained."

² As discussed in para. 27, forfeiture can occur even if the accused is not convicted, if the Crown can prove beyond a reasonable doubt that property is the proceeds of crime. In this case, there will be a "forfeiture hearing" rather than a "sentencing hearing." These reasons will use the term "sentencing hearing" to mean "sentencing or forfeiture hearing".

³ Section 462.34(4) of the *Code* allows a judge to order the return of property that was seized under a warrant issued pursuant to s. 462.32. Where property was the subject of a restraint order made under s. 462.33(3), the judge may "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". For simplicity, these reasons will use the term "return" to refer to both situations. When referring specifically to the return provision for reasonable legal expenses under s. 462.34(4)(c)(ii), these reasons will use the term "legal expenses return provision".

two separate hearings are held, evidence is tendered, and the judge determines: (1) whether the accused actually needs any of the seized property to pay for reasonable legal fees (ss. 462.34(4) and 462.34(5)); (2) what amount may be returned; and (3) the appropriate terms related to the return of the funds (s. 462.34(4)). The return of any seized funds is, therefore, done under the authority of a judicial order. Returned funds are normally held in trust by legal counsel, to be used only for the defence of the accused, and such funds are no longer considered to be seized property held by the state.

[5] The criminal process will then proceed. If the accused person is convicted or pleads guilty, there will be a sentencing hearing to impose a fit and proportionate criminal penalty. The sentencing judge will also determine what, if any, of the offender's property (including property previously seized) has been proven to be proceeds of crime. As a general rule, property proven to be proceeds of crime must be forfeited to the Crown (s. 462.37(1)).

[6] Parliament has also addressed the situation in which property proven to be proceeds of crime at sentencing is not available for forfeiture to the Crown, such as situations where the money has been spent or given to a third person. In such a case, the sentencing judge *may* order a "fine instead of forfeiture" equal to the amount

proven to be proceeds of crime (s. 462.37(3)).⁴ The offender's failure to pay the fine may result in imprisonment (s. 462.37(4)).

[7] This case concerns the legal relationship between a judicial order returning funds to pay for reasonable legal fees and the sentencing judge's discretion to order a fine instead of forfeiture. This Court is, for the first time, being asked to address when, if ever, a sentencing judge should use the statutory discretion to order a fine instead of forfeiture in respect of property that was used, with prior judicial authorization, to pay for the reasonable costs of an accused's legal defence. Parliament has provided no express response to this question. The courts below have reached opposing conclusions and the limited jurisprudence across the country on these two provisions is similarly divided (*R. v. Appleby*, 2009 NLCA 6, 282 Nfld. & P.E.I.R. 134; *R. v. Wilson* (1993), 15 O.R. (3d) 645 (C.A.); *R. v. Smith*, 2008 SKCA 20, 307 Sask. R. 45; *R. v. MacLean* (1996), 184 N.B.R. (2d) 26 (C.A.)).

[8] In my view, the application of the principles of statutory interpretation leads to the conclusion that, generally speaking, sentencing judges should not impose a fine instead of forfeiture in relation to funds that have been judicially returned for the payment of reasonable legal fees associated with an accused's criminal defence. This approach is most faithful to Parliament's intent.

⁴ Some of the jurisprudence refers to this as a "fine in lieu of forfeiture". For clarity, these reasons use the word "instead", which is consistent with the language of s. 462.37(3) of the *Code*.

[9] The statutory discretion afforded to sentencing judges to impose a fine must be exercised in accordance with the purposes of the provisions in the proceeds of crime regime (*R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392, at para. 28). Those purposes can be found by examining the *Code* to discern Parliament's intent about how the legal expenses return provision and the fine instead of forfeiture provision should operate together. By enacting the return provision, Parliament not only foresaw the possibility that seized funds may be needed to mount a defence, but explicitly allowed individuals to spend returned funds for this purpose. While it is true that the proceeds of crime regime as a whole seeks to ensure that crime does not pay or benefit the offender, the legal expenses return provision pursues secondary purposes, namely: (1) providing access to counsel and (2) giving meaningful weight to the presumption of innocence. Underlying both of these objectives is a desire to ensure fairness to the accused in criminal prosecutions. Clawing back reasonable legal fees as a fine instead of forfeiture would, in most cases, undermine these equally valid purposes.

[10] At the same time, where it turns out that the offender did not have a real financial need or the funds were not used to alleviate that need, it would be appropriate for a judge to impose a fine instead of forfeiture, as this would align with Parliament's intent. For example, this might occur where there is wrongdoing in the return of funds application, such as the misrepresentation of the accused's financial position. It might also occur where there is wrongdoing in the administration of the return order, such as funds not being applied in the manner contemplated,

expenditures for purposes outside the scope of the return order, or fees in excess of judicially-authorized limits. Further, it might occur where the accused experiences an unexpected change in circumstances after the funds have been returned but before sentencing, such that recourse to returned funds is no longer necessary after the accused became aware of the changed circumstances. These are examples of the kinds of situations that undermine the basis of the return order such that Parliament would have intended to recover the returned monies by way of a fine.

[11] In the context of this case, because ordering a fine would undermine Parliament's intent in enacting the legal expenses return provision, I would allow the appeal and set aside the Court of Appeal's order, which imposed a fine and imprisonment in default of payment.

II. Facts and Judicial History

[12] The appellant, Mr. Rafilovich, was arrested for possession of cocaine for the purpose of trafficking twice in fourteen months. The police searched Mr. Rafilovich's car and two apartments, and seized, among other things, a fake Social Insurance Number identification card, about \$47,000 worth of cocaine, and about \$42,000 in cash. The cash was seized by the Crown as potential proceeds of crime.

[13] In 2009, before his trial, Mr. Rafilovich's counsel brought an application under s. 462.34 of the *Code* for the return of some of the seized funds to pay for

reasonable legal fees associated with the case. Justice MacDonald of the Ontario Superior Court of Justice granted the application pursuant to s. 462.34(4)(c)(ii). He was satisfied that Mr. Rafilovich met the financial need requirement in s. 462.34(4) of the *Code* (A.R., vol. II, at p. 1). He ordered that the returned funds be held by Mr. Rafilovich's counsel in an interest-bearing trust account and imposed the following conditions: the returned funds were to be used only for the payment of legal fees and, before any fees could be paid, Mr. Rafilovich's counsel had to provide "an itemized account justifying such fees to Mr. Rafilovich and he [had to] sign that account acknowledging his agreement as to the reasonableness of the fees and his consent to payment" (A.R., vol. II, at p. 2). Justice MacDonald also determined the hourly rate and maximum court hours that could be billed up to the conclusion of the preliminary inquiry.

[14] At trial, Mr. Rafilovich pled guilty to: possession of a counterfeit mark (a Social Insurance Number card); two counts of possession of cocaine for the purpose of trafficking; and two counts of possession of property exceeding \$5,000, knowing that it was obtained or derived directly or indirectly as a result of the commission in Canada of an offence punishable by indictment. The sentencing judge sentenced Mr. Rafilovich to 36 months in custody, which was reduced by 13 months for pretrial custody and by another 9 months to account for the terms of his interim release. In addition to this sentence, Mr. Rafilovich was required to forfeit to the Crown his 50 percent interest in an apartment that was "offence-related property" as defined in s. 2 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19

(“*CDSA*”). Mr. Rafilovich’s term of imprisonment and the forfeiture of the interest in the apartment are not at issue in this appeal. While the interest in the apartment was forfeited under the *CDSA*, the parties agree that the forfeiture provisions applicable to the funds at issue in this case are those found in the *Code*. For the purposes of this appeal I accept, without deciding, that the governing provisions are those in the *Code*, not the *CDSA*.

[15] At the sentencing hearing, the Crown also sought a fine instead of forfeiture under s. 462.37(3), equal to the amount seized and then returned to Mr. Rafilovich to pay for his legal counsel. The sentencing judge declined to impose the discretionary fine for four reasons. First, as the application judge found, Mr. Rafilovich did not have any funds to pay for legal representation and did not qualify for legal aid. Therefore, “[i]t was necessary for the seized funds to be released” (2013 ONSC 7293, at p. 20 (CanLII)). Second, Mr. Rafilovich did not obtain a benefit from the returned funds except to have legal representation. This was not a situation where an offender profited from criminal conduct. Third, Mr. Rafilovich did not squander or divert any of his other assets. Fourth, the non-payment of the fine would lead to the imposition of a further sentence of imprisonment of 12 to 18 months — an outcome that offenders who have access to funds or legal aid would not have to face.

[16] The Crown appealed. The Court of Appeal for Ontario unanimously held that the sentencing judge’s exercise of discretion in this case was inappropriate.

While it recognized that sentencing judges have a statutory discretion to not impose a fine, the exercise of this discretion, according to *Lavigne*, cannot hinder the achievement of the objectives that the proceeds of crime regime seeks to achieve. One of these objectives is that offenders cannot profit from their criminal conduct, and the Court of Appeal considered Mr. Rafilovich to be profiting from his criminal conduct by having access to seized funds to pay for his legal fees. It viewed the fact that the *Code* allows judges to return seized funds for payment of reasonable legal fees as compatible with the imposition of a fine instead of forfeiture at a later stage in the criminal proceedings.

[17] The Court of Appeal also held that the sentencing judge erred in considering the possibility of imprisonment for non-payment of a fine. It considered that, according to this Court's decision in *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, an offender cannot be imprisoned for failing to pay a fine if the offender has a reasonable excuse. Since inability to pay constitutes a reasonable excuse, Mr. Rafilovich would not face any risk of additional imprisonment if he were ultimately unable to pay the fine.

[18] On the basis of the above analysis, the Court of Appeal imposed a fine instead of forfeiture of \$41,976.39, equal to the amount of the seized and returned funds. It further ordered that, in the event that Mr. Rafilovich did not pay the fine and did not have a reasonable excuse, he would be sentenced to an additional 12 months

of imprisonment over and above the 14 months that remained in his prison sentence. Mr. Rafilovich now appeals to this Court by leave.

III. Issue

[19] The issue before this Court is: how should a sentencing judge, who has discretion whether to impose a fine instead of forfeiture under s. 462.37(3) for property proven to be proceeds of crime, treat property that has been judicially returned for the payment of reasonable legal expenses under s. 462.34(4)(c)(ii)? Stated otherwise, what is the intended relationship between the return provision and the fine instead of forfeiture provision in the context of reasonable legal fees?

IV. Analysis

[20] As the *Code* does not expressly indicate whether judicially returned funds ought to be subject to a fine instead of forfeiture, the resolution of this issue requires recourse to well-established rules of statutory interpretation. This analysis, which is concerned with legislative intent, is guided by the words that Parliament has chosen to use, the way it intended to achieve its objectives, and the scheme it has put in place (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). Under the modern approach to statutory interpretation, the meaning of words and phrases are interpreted in their context and within the scheme of the Act in which they are found (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Parliament also is presumed to intend for its provisions to

be read harmoniously, and to be interpreted and applied so they fit together in a way that respects Parliament's multiple objectives and gives purpose and meaning to each provision. In the present case, where the dispute involves multiple legislative objectives and the inter-relationship between two or more statutory provisions, the scheme of the Act and the objectives underlying each of the relevant provisions are particularly significant.

[21] To engage in that analysis, I will therefore proceed as follows. First, I summarize the overall framework in which this narrow issue arises and highlight the two provisions at the heart of the controversy. Second, I review the multiple objectives of the proceeds of crime regime, the return process, and the fine instead of forfeiture provision, and discuss how courts should interpret schemes with multiple purposes. Third, I consider whether interpreting the return provision as something akin to a loan to the accused person would honour and uphold those objectives. Fourth, I examine whether returned property constitutes the kind of benefit targeted by the regime. Fifth, I consider whether judicially-returned funds are analogous to the examples listed in the fine instead of forfeiture provision. Sixth, I suggest when the discretion to impose a fine instead of forfeiture should be exercised. Finally, I respond to the suggestion that this Court should impose the criteria for providing state-funded counsel set out in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) on judges' discretion to order a fine instead of forfeiture for reasonable legal expenses, over and above Parliament's requirements for the return of funds for reasonable legal expenses.

A. *The Statutory Scheme, the Return Process and the Fine Instead of Forfeiture Provision.*

[22] Under the scheme of the proceeds of crime regime in the *Code*, the issue before this Court only arises in limited circumstances when five pre-conditions are met.

[23] First, the accused is charged with a “designated offence”, as defined under s. 462.3(1).

[24] Second, property is seized. Parliament has allowed the state to take property from an accused on the basis of reasonable and probable grounds that the property may eventually be proven to be proceeds of crime (ss. 462.32(1) and 462.33(1)). This seizure occurs at a time when the accused is presumed innocent and, in law, remains the legal owner of the seized property unless and until the property is forfeited at sentencing. The seizure of property from persons still presumed to be innocent was quite extraordinary at the time the proceeds of crime regime was enacted in 1988 (G. J. Rose, “Non-Part XII.2 Warrants and Proceeds of Crime” (1996), 38 *Crim. L.Q.* 206, at pp. 210-11).

[25] Third, the accused makes an application for the return of the seized property to pay for reasonable legal fees under s. 462.34(4) to (6). For our purposes, the relevant portions of the section read:

(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,

...

(c) for the purpose of

...

(ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph

...

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.

[26] In these return provisions, Parliament has allowed for tight judicial control over if, when, and how seized property may be returned to pay for reasonable legal expenses. Seized property can only be returned “if the judge is satisfied that the applicant has no other assets or means available” to pay for legal expenses (s. 462.34(4)(c)(ii)). These return provisions and process, as well as Parliament’s purpose in enacting them, will be explored in further detail in a subsequent section.

[27] Fourth, the Crown proves that certain property meets the statutory definition of proceeds of crime under ss. 462.37(1) or 462.37(2). Only property determined to be “proceeds of crime” at the end of the process, whether at sentencing or a forfeiture hearing, is subject to forfeiture or a fine instead of forfeiture.

[28] Fifth, some or all of the property proven to be proceeds of crime at sentencing is no longer available for forfeiture to the Crown. In such cases, the sentencing judge may order a “fine instead of forfeiture” according to s. 462.37(3) and (4). The imposition of a fine is a discretionary decision and s. 462.37(3) sets out a non-exhaustive list of circumstances when a fine may be imposed instead of forfeiture, including where property “has been transferred to a third party” (s. 462.37(3)(b)). Subsection 462.37(3) reads:

(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

- (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.

When imposed, the fine must be equal to the amount proven to be proceeds of crime. An offender who fails to pay the fine is liable to an additional term of imprisonment (s. 462.37(4)).

B. *The Multiple Purposes of the Proceeds of Crime Regime*

(1) General Principles

[29] I accept that Parliament had several objectives in mind when it enacted this comprehensive proceeds of crime regime: what Professor Sullivan refers to as “the desired mix of goals” (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 409).

[30] When interpreting a complex scheme such as this one, it is necessary to avoid fixating on one objective to the exclusion of others. As Professor Sullivan explains, secondary purposes must be given an active role in the statutory interpretation analysis:

While legislation may be enacted to promote a primary policy or principle, the primary goals of legislation are almost never pursued single-mindedly or whole-heartedly; various secondary principles and policies are inevitably included in a way that qualifies or modifies the pursuit of the primary goals. Observing the principles of fairness or natural justice, for example, may preclude adopting the most efficient and cost-effective means of pursuing a policy like national security . . .

Secondary purposes are not often mentioned in the preamble to legislation or in formal purpose statements. It is through analysis of the legislative scheme, and more particularly through analysis of the relation of each provision to the others in the Act, that these secondary purposes are revealed. [Footnotes omitted; p. 271.]

Likewise, in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013]

1 S.C.R. 271, Cromwell J. cautioned that primary legislative purposes, however

important, “are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme” (para. 174). In other words, the overarching purpose of a legislative *scheme* informs, but need not be the decisive factor in the interpretation of a particular *provision* within that scheme.

[31] Keeping these principles in mind, it is necessary to: address both the decision of this Court in *Lavigne* and how it does not provide the answer to the issue in this case; assess how the return process was intended to work given that a sentencing judge subsequently has a discretion to impose a fine instead of forfeiture; and canvass the particular purposes animating the return provisions.

(2) The *Lavigne* decision

[32] This Court addressed the general objectives of the proceeds of crime regime and the fine instead of forfeiture provision in *Lavigne*. The legal issue in *Lavigne* was whether sentencing judges could take an offender’s ability to pay into account when determining whether to impose a fine instead of forfeiture, and the amount of the fine. Mr. Lavigne admitted he had received \$150,000 from his criminal enterprise, but argued that he did not benefit from the money because it was spent “on his friends and family” (para. 3). This Court held that Parliament had not intended for Mr. Lavigne’s inability to pay a fine to be a factor considered by the sentencing judge when deciding whether to impose a fine instead of forfeiture. To allow him to claim impecuniosity, and to reduce the amount of that fine by what he chose to spend on

gifts and other purchases for his friends and family, would effectively allow Mr. Lavigne to benefit from his crimes in a manner that would defeat the purposes underlying the proceeds of crime regime.

[33] In *Lavigne*, this Court found that sentencing judges should exercise their discretion to order a fine instead of forfeiture in a way that does not undermine the objectives of the proceeds of crime regime. This Court held that Parliament's primary, or overall, goal in the proceeds of crime regime was to ensure that profit-generating offences do not "benefit the offender", and "to ensure that crime does not pay" (para. 10). The forfeiture provision was intended "to deprive the offender and the criminal organization of the proceeds of their crime and to deter them from committing crimes in the future" (*Lavigne*, at para. 16; also see para. 23). In order to accomplish this, it was necessary to prevent accused persons from avoiding forfeiture by hiding or dissipating property. Thus, the seizure provisions allow the state to take control of property believed to be proceeds of crime before trial and sentencing, to ensure it remains available for possible forfeiture. Likewise, the fine instead of forfeiture provision ensures that, if accused persons were able to keep proceeds of crime from the state throughout the criminal proceedings, they must in the end pay a fine equivalent to the value of the property that is not available to be forfeited. As observed in *Lavigne*, this ensures "that the proceeds of a crime do not indirectly benefit those who committed it" (para. 18).

[34] However, *Lavigne* did not involve the return provision at all. Thus, for our purposes, *Lavigne* addressed some of Parliament's objectives, and did not consider the separate purposes underpinning the return provision. This appeal, in contrast, turns on the return provision and its interaction with the other parts of the proceeds of crime regime; especially its relationship with the fine instead of forfeiture provision. It is therefore necessary in this case for the Court to determine how a judge's discretion should be exercised in order to balance the objectives underlying the proceeds of crime regime as a whole and the specific additional objectives of the legal expenses return provision. The return provision shows that Parliament intended that other secondary objectives would have to be balanced against the primary objective of ensuring that "crime does not pay". As a result, the purposes behind the express and distinct return provision are now of crucial significance as they will inform how the return provision can be read harmoniously with the fine instead of forfeiture provision.

(3) The Return Process for Reasonable Legal Expenses

[35] Through the return provision, Parliament created a distinct and special process that allows an accused to reclaim seized property for specific purposes listed in s. 462.34(4), which include reasonable legal expenses. Parliament prescribed a particular application procedure, which involves two hearings before a judge; required applicants to show that they had no other assets or means; prohibited the return of the funds where a third party appeared to be the lawful owner or lawfully

entitled to possession of the property; allowed a judge to decide what amount should be returned; ensured that any return is effected by judicial order that can specify amounts, number of counsel, etc.; and provided for a subsequent review of these amounts to ensure they were in fact reasonable.

[36] Often, a proposed budget is submitted to the court *in camera* (as in *R. v. Davidson*, 2016 ONSC 7440, at para. 21 (CanLII)), but where this is not done, the judge may fix the allowable hours and incidental fees (*R. v. Alves*, 2015 ONSC 4489, at paras. 46-51). Further, s. 462.34(5) requires the judge to “take into account the legal aid tariff of the province” and, under s. 462.34(5.2), the legal fees may be taxed (that is, reviewed or audited). The judge’s inquiry into the financial situation of the accused “must be more than cursory” and “[a] significant and in-depth review of the facts is required” (*R. v. Borean*, 2007 NBQB 335, 321 N.B.R. (2d) 309, at para. 8). The seized funds will then be returned in accordance with the terms of the judicial order.

[37] The wording of the relevant provisions and the elaborate and detailed nature of the return provision indicates that Parliament clearly and deliberately sought to address an accused’s need for legal counsel, but only in limited and narrow circumstances: (1) where the accused has “no other assets or means” and, therefore, access to the funds is truly necessary; and (2) where “no other person appears to be the lawful owner of or lawfully entitled to possession of the property” (s. 462.34(4)).

The return provision is thus intended to provide a safety net for those accused persons who are in financial need.

(4) The Purposes of the Return Provision

[38] A review of the Parliamentary debates during the enactment of the proceeds of crime regime reveals two objectives that underpin the legal expenses return provision under s. 462.34(4)(c)(ii): (1) providing access to counsel; and (2) giving meaningful weight to the presumption of innocence. These objectives reflect an underlying intention to promote fairness in criminal prosecutions that runs through the proceeds of crime scheme established by Parliament.

[39] In testimony before the legislative committee studying the bill that introduced the proceeds of crime regime in the *Code*, the Minister of Justice indicated that:

[T]hese measures guarantee the rights of innocent third parties and ensure safeguards for the accused person. ... There is nothing in the bill to change the guarantees of the presumption of innocence or the requirement that guilt be established beyond a reasonable doubt at the time of trial.

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-61: An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Act*, No. 1, 2nd Sess., 33rd Parl., November 5, 1987, at p. 1:8)

In later testimony, the Minister underscored the goal of fairness:

[T]his proposal is intended to be a tough and effective tool against enterprise crime. I would, however, remind everyone of my continued intention to create a fair procedure in relation to accused persons as well as to innocent third parties who become involved with crime proceeds.

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-61: An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Act*, No. 5, 2nd Sess., 33rd Parl., May 10, 1988, at p. 5:5)

[40] The Minister went on to explain the legal expenses return provision:

I believe that this provision does strike a reasonable balance between the right to counsel of choice and the interest of state and forfeiture of the illicit proceeds of crime. ... The provision of allowing an application for reasonable legal fees is in fact a notable improvement to the present law, and one which I think we have to acknowledge will ensure the constitutional right to retain and instruct counsel.

(House of Commons, *Minutes*, May 10, 1988, at p. 5:9)

[41] At third reading, the Minister of Justice explained how these objectives underpinned the return and fine instead of forfeiture provisions:

A process of immediate judicial review of these powers [of seizure and restraint], upon application by the persons concerned, has been provided for and includes an opportunity for an accused person to claim the payments of reasonable living, business, and legal expenses out of the seized or restrained property.

I must point out that these types of safeguards are unprecedented in Canadian law. In addition, the rights of third parties are recognized throughout the entire process of seizure, restraint, and forfeiture. The legislation has balanced an effective forfeiture mechanism with the constitutionally protected right to counsel in a manner that is characteristic of the Government's approach to criminal matters and avoids the criticisms that have been levied at similar American legislation in this area.

(House of Commons, *Debates*, vol. 14, 2nd Sess., 33rd Parl., July 7, 1988, at p. 17258)

[42] The “criticisms levied at similar American legislation” referred to provisions that retroactively vested proceeds of crime in the state with no exception for legal fees. As Justice Veit observed in *R. v. Gagnon* (1993), 80 C.C.C. (3d) 508 (Alta. Q.B.), at p. 512:

It is noteworthy that Parliament, presumably knowing of the American model using blanket seizures and the American case-law, modified the American approach by allowing moneys to be spent by an accused person for such expenses as reasonable living expenses, reasonable business expenses, lawyers’ fees and recognizances.

[43] The Minister’s statements indicate that ensuring an accused’s ability to access legal counsel is a main objective of the legal expenses return provision. While seizing funds helps protect the state’s contingent interest in the property, Parliament has signalled that this contingent interest should take a back seat where it imperils an accused’s ability to access counsel.

[44] Parliament’s chosen safeguard builds upon the fact that the ability of accused persons to hire a lawyer to defend themselves in criminal proceedings has been a part of English law since 1836 (*An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney* (U.K.), 1836, 6 & 7 Will. 4, c. 114, s. 1), although it existed in a more limited form for treason and some other serious

crimes much earlier (J. H. Langbein, *The Origins of Adversary Criminal Trial* (2003), at pp. 101-2). It is undoubtedly a fundamental tenet of the criminal justice system.

[45] The Minister's statements indicate that Parliament was also concerned with the presumption of innocence, "the cornerstone of our criminal justice system" (*R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1368). The return provision reflects the fact that, in Canada, property can be seized based only on a reasonable belief it may be proceeds of crime, and it presumptively belongs to a person who is presumed to be innocent (B. A. MacFarlane, R. J. Frater and C. Michaelson, *Drug Offences in Canada* (4th ed. (loose-leaf), § 14:180.40.120). Indeed, the accused may never be convicted, or the property may never be proven to be proceeds of crime. Thus, when accused persons spend returned funds on reasonable legal fees, they are spending their own money on their legal defence. Parliament was clearly concerned with the harshness of a scheme that seized the property of persons still presumed to be innocent, and took steps to protect their interests.

[46] Finally, the Minister's statements reflect an underlying concern for fairness to the accused in criminal prosecutions. The principle of fairness in criminal trials is foundational to our justice system (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 121; *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 15; *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 18). The Minister emphasized the importance of the "fair procedure" that was being created via the "safeguard" of access to counsel. Further, the Minister stated that "[t]his Bill is a balanced and fair piece of legislation which does not contain

some of the excesses seen in previous legislation We want to make sure, when we are attacking the proceeds of crime, that we do so in a fair way” (*Debates*, at p. 17259).

[47] As Justice Doherty put it, the return provision “recognizes that the state should not be allowed to beggar a person who will often need to retain the assistance of counsel in order to defend himself or herself against state action directed at depriving that person of their property and liberty” (*Wilson*, at p. 659). The return provision was intended to respect the principle of fairness in criminal prosecutions: an individual should not be left unable to hire legal representation because the state seized the funds with which they could have paid counsel.

[48] Parliament’s intention was to create a “fair procedure” to allow for accused people to apply for the judicially authorized return of seized funds for specific purposes. This principle of fairness, including concepts of fair notice and reliance, should therefore inform the interpretation of the return provision, especially recognizing its designated role in the larger proceeds of crime regime.

[49] This review illustrates that, while Parliament was clearly motivated by the desire to remove the financial incentive from certain crimes, it also wanted to ensure that accused persons would have access to legal representation and that the presumption of innocence would be protected, in order to maintain a procedure that is fair to the accused. These purposes constrain the pursuit of the primary objective. Judicial interpretation should foster, not frustrate, the balance of rights and interests in

this part of the *Code*. In my view, the correct interpretation does not ignore or minimize the secondary purposes in order to achieve the primary goal of ensuring crime does not pay. Rather, all parts of Parliament's scheme and its multiple objectives must be read together, "construed as a whole, each portion throwing light, if need be, on the rest" (*Greenshields v. The Queen*, [1958] S.C.R. 216, at p. 225).

[50] Although the appellant and two interveners, the British Columbia Civil Liberties Association and Criminal Lawyers' Association of Ontario, made arguments in constitutional terms, it is unnecessary to delineate the parameters of a constitutional right of accused persons to spend their own money on legal counsel in order to decide this appeal. This Court has stated that access to effective legal representation is anchored in the presumption of innocence, the principle of fair criminal prosecutions, and the principles of fundamental justice (*R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at paras. 24-5). It suffices to say that Parliament crafted its proceeds of crime regime to establish fair safeguards for the accused, notably the opportunity to pay legal expenses out of seized or restrained property when necessary.

[51] With these purposes in mind, I turn now to the fine instead of forfeiture provision itself.

C. *Imposing a Fine Instead of Forfeiture on Judicially Returned Funds Would Undermine the Purposes of the Return Provision*

[52] The appellant, Mr. Rafilovich, argues that the fine instead of forfeiture provision does not apply to funds returned under a court order by a judge for the payment of reasonable legal fees. The respondent Crown says that unless the judge imposes a fine instead of forfeiture for amounts returned for legal fees, the accused benefits in a manner that undermines the goals of forfeiture. The Crown advanced the theory that the return provision was meant to provide only interim relief to an accused person, to be recouped later as a fine instead of forfeiture. On this reasoning, the return of seized funds is a temporary advance of funds, to be recovered as a fine at a subsequent sentencing hearing. At the hearing the respondent Crown characterized a return order as “something akin to a loan, the source of the loan being the tainted funds” (Transcript, at p. 78).

[53] Overall, I agree with Mr. Rafilovich. The judge’s exercise of discretion to impose a fine instead of forfeiture should be “consistent with the spirit” and “compatible with the objectives” of the scheme as a whole (*Lavigne*, at paras. 28 and 52). The objectives of the legal expenses return provision are to ensure access to counsel and uphold the presumption of innocence and such must be balanced with the primary objective of the proceeds of crime regime, which is to ensure that crime does not pay. Applying these objectives to this exercise of judicial discretion results in the conclusion that, generally, judges should not impose a fine for amounts returned under judicial authorization for the payment of reasonable legal fees.

[54] Conversely, the Crown's interpretation undermines the objectives of the return provision for reasonable legal expenses — providing access to counsel and giving meaningful weight to the presumption of innocence — and fails to promote Parliament's intention of establishing a "fair procedure". In so doing, it fails to properly balance the rights and interests in this part of the *Code* and should not, therefore, be adopted. For this reason, and to respect the multiplicity of Parliament's objectives, generally speaking, sentencing judges should not impose a fine instead of forfeiture in relation to funds that have been judicially returned for the payment of reasonable legal fees associated with an accused's criminal defence.

[55] Access to legal counsel is a main objective of the legal expenses return provision. If the return order is viewed as a loan, and a fine instead of forfeiture is imposed on judicially returned funds as a matter of course, then the accused's ability to access legal counsel is largely illusory. Fearing a fine or additional imprisonment, accused persons may choose not to apply for the return of funds at all and to represent themselves instead. Thus, instead of facilitating an accused person's access to legal counsel, the provision would do precisely the opposite: it would dissuade accused persons from accessing legal representation. The return provision was intended to ensure that individuals whose funds have been seized by the state will not be left unable to hire legal counsel. However, accused persons who understand that the judicially returned funds will be clawed back later, through the imposition of a fine, and possibly imprisonment, will likely choose to represent themselves. As a result,

individuals whose funds have been seized by the state *will* often be without the benefit of legal counsel.

[56] When an accused person cannot access legal counsel, the presumption of innocence suffers. This is because, in facilitating the accused's right to make full answer and defence, defence counsel help to ensure that the case remains the Crown's to prove. It is difficult for lay persons accused of criminal offences to effectively navigate "the increased complexity of criminal cases" that this Court has described as affecting "most cases" in our criminal justice system (*R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at paras. 53 and 83).

[57] Nor is the importance of the presumption of innocence, "spent" once an accused person is found guilty (at para. 71). The criminal justice system does not, and should not, retroactively dilute the presumption of innocence after an accused is found guilty, nor does it attach preconditions or penalties to reliance on the presumption. Imposing retroactive penalties on accused persons who rely on the presumption of innocence can have no effect but to undermine the presumption and the protections it affords to accused persons. For example, the presumption of innocence underlies the concept of bail (*R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, at para. 1). The time spent free on bail is not added back at sentencing; to the contrary, restrictive bail conditions can be a mitigating factor at sentencing.

[58] Just as there is no statutory mechanism to "recover" time spent free on bail in the judicial interim release regime because such a mechanism would be at

cross-purposes with the regime's entrenchment of the presumption of innocence, the fine instead of forfeiture provision cannot represent, as a matter of course, a retroactive dilution of the presumption of innocence in respect of property that has been judicially returned for the payment of reasonable legal expenses. Although there is a statutory mechanism to recover spent proceeds of crime through the fine instead of forfeiture regime, this analogy to bail emphasizes that offenders generally are not punished for reliance on the presumption of innocence. By enacting the legal expenses return provision, Parliament sought to give meaningful weight to the fundamental principle of the presumption of innocence, in part by ensuring that accused persons could access counsel. Interpreting the return provision as merely temporary, thereby dissuading accused persons from retaining and instructing counsel, undermines the very objective that Parliament sought to achieve.

[59] Further, imposing a fine on judicially returned funds raises concerns of notice and reliance that are rooted in the principle of fairness to the accused in criminal prosecutions. It can be expected that accused people will rely on a court order authorized by a specific statutory scheme. Those accused persons cannot reasonably know that doing so will lead to additional punishment. Yet “[t]he rule of law requires that laws provide in advance what can and cannot be done” (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 14; *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204, at para. 3). The general imposition of a fine instead of forfeiture on judicially-returned funds would not respect principles of fair notice, further

undermining Parliament’s intent to create a fair procedure that enables access to counsel and ensures the presumption of innocence.

[60] My colleague minimizes these concerns by stating that while the “choice” to retain counsel in the face of having a fine imposed on the judicially returned funds “may not be an easy one, our criminal justice system does not promise an experience free of difficult choices” (para. 142). With respect, there is a difference between a difficult choice and no real choice at all. The “choice” faced by an accused person in this instance is a Hobson’s choice — an apparently free choice in which there is effectively only one option. In this case, that option is to go without legal representation. This Court has cautioned against creating a Hobson’s choice like this in the criminal law context (*R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 40).

[61] For all of the above reasons, interpreting the judicially authorized return of funds as a loan from the state to the accused of the accused’s own money — effectively turning it into a baited trap — would dissuade its use and ultimately frustrate Parliament’s objectives in enacting the legal expenses return provision.

D. *Is the Return of Funds for Reasonable Legal Expenses a Benefit?*

[62] The Crown also argues that Mr. Rafilovich received a “benefit” — the payment of his legal fees — that he must be deprived of through the imposition of a

fine instead of forfeiture in order to uphold the purpose of the proceeds of crime regime (R.F. at para. 49). I disagree.

[63] Although this Court in *Lavigne* found that the primary purpose of the proceeds of crime regime and the fine instead of forfeiture provision is to prevent offenders from directly or indirectly benefitting from crime (paras. 10, 18), this purpose is not undermined by allowing for accused persons to use seized funds to pay for reasonable legal expenses.

[64] In one limited sense, an accused person with access to funds for legal counsel has a benefit that other accused persons may not have. In my view, however, the judicial return of funds to pay for a lawyer is not the type of benefit that Parliament sought to take away from offenders by way of a fine. Rather, it is a benefit that Parliament expressly intended them to have, which is evident from the very existence of the return provision. As discussed above, the alternative, which would amount to a temporary loan of the seized funds, would tilt the balance sharply towards the state and marginalize Parliament's important secondary purposes behind the protections and principles of the legal expenses return provision.

[65] Instead of a temporary loan, Parliament balanced the multiple objectives by tightly controlling the extent of any benefit. The *Code* requires applicants to show that they have no other means to pay a lawyer before a judge returns funds for that purpose. "Other means" has been interpreted broadly to include support entitlements or other sources of financial assistance (*R. v. Keating* (1997), 159 N.S.R. (2d) 357

(C.A.), at para. 28), help from family members (*R. v. Hobeika*, 2014 ONSC 5453, at para. 24 (CanLII); *R. v. Kizir*, 2014 ONSC 1676, 304 C.R.R. (2d) 287, at paras. 16-18), as well as the accused's access to credit, so long as that credit is capable of being serviced (*R. v. Ro*, [2006] O.J. No. 3347 (Sup. Ct.), at paras. 35-39). Even if an accused has no other means, funds cannot be returned unless the judge is satisfied that “no other person appears to be the lawful owner of or lawfully entitled to possession of the property”. As well, accused persons often cannot receive legal aid because the seized property is attributed to them and effectively disqualifies them from receiving assistance, even though they cannot actually access their seized property.⁵ This occurred with Mr. Rafilovich. The legal expenses return provision, therefore, achieves a balance by providing a safety valve for a narrow category of accused persons in need while still depriving offenders from accessing the proceeds of crime in most other cases.

[66] This conclusion is consistent with *Lavigne's* statements on how a sentencing judge should exercise discretion to impose a fine. In *Lavigne*, imposing a fine instead of forfeiture advanced the purpose of the proceeds of crime regime; in Mr. Rafilovich's case, imposing a fine would undermine the purpose of the legal expenses return provision that Parliament included in that same regime.

[67] In my view, the Court of Appeal over-emphasized the broad objective of the fine instead of forfeiture provision to prevent indirect benefit to the accused and

⁵ There is debate in the jurisprudence about whether an accused must apply for legal aid before obtaining a return order. This issue was not argued on this appeal and I do not intend to resolve it here.

gave inadequate attention to the important objectives in the detailed return process enacted by Parliament. The legal expenses return provision allowed Mr. Rafilovich, who had no other assets or means to pay for his defence, an opportunity to access seized funds (which remained his property) under close judicial scrutiny and tight conditions. This “benefit” is not the kind of benefit that the fine instead of forfeiture provision is aimed at preventing. As Veit J. observed in *Gagnon*,

...I do not agree with the Crown’s contention that lawyers’ fees are like hairdressers’ fees: that they represent the exercise by an accused of discretion in relation to disposable income. Although Parliament’s intention is to strip a convict of the right to exercise that general kind of discretion, it characterized lawyers’ fees as a special type of expenditure...[p. 512]

[68] It is undeniable that because Mr. Rafilovich used the returned funds to finance his legal defence, there is less money available to be forfeited to the Crown. But this by-product of accused persons exercising their rights is not unusual. A fundamental purpose of the criminal justice system is to provide a fair process to achieve just results, not to extract maximum retribution at any cost.

E. *The Payment of Reasonable Legal Fees Is Not the Kind of Transfer to a Third Party Contemplated in section 462.37(3)*

[69] The purposes of the fine instead of forfeiture provision further support the interpretation that judges are not to use their discretion to generally impose fines on funds returned by court order for reasonable legal expenses. Section 462.37(3) sets out two conditions before a fine may be imposed. First, there must be “property

or any part of or interest in the property [that] cannot be made subject to an order.” If this precondition is met, the analysis continues to the list of examples: :

In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property

(a) cannot, on the exercise of due diligence, be located;

(b) has been transferred to a third party;

(c) is located outside Canada;

(d) has been substantially diminished in value or rendered worthless; or

(e) has been commingled with other property that cannot be divided without difficulty.

The phrase “in particular” implies a non-exhaustive list of circumstances in which a fine may be appropriate.

[70] In *Lavigne*, Justice Deschamps acknowledged that the use of “in particular” in s. 462.37(3) suggests 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” (para. 24). This determination requires us to consider the unifying features behind the examples that Parliament has provided as situations that would attract the imposition of a fine instead of forfeiture.

[71] In this case, the Crown’s argument focussed on the notion that the property judicially returned to the accused for legal expenses had “been transferred to a third party” — Mr. Rafilovich’s lawyer — and thus fell within s. 462.37(3)(b). Even

if the judicial return of funds to pay legal fees constitutes a “transfer” to a third party, judges retain a discretion to nevertheless decline to order the fine where it would be contrary to the objectives of the return provision. In my view, the judicially authorized payment of reasonable legal fees is not the kind of “transfer” that Parliament intended to capture in this subsection.

[72] The key distinguishing feature here is judicial authorization. The returned funds are never held or transferred by the accused person: they are sent directly from the state – with judicial permission – to a designated person for permitted purposes under strict judicial supervision. The accused’s lawyer is not some unknown person receiving the funds by way of an entirely uncontrolled, private transaction, as was the case in *Lavigne*. Rather, they have been specifically authorized by a judge through a return order to be paid at a stipulated hourly rate for specified services in aid of the accused’s defence. As the Newfoundland and Labrador Court of Appeal held in *Appleby*, it is inappropriate “to treat the transfer of funds upon the order of a judge, specifically authorized to so order for a purpose and in the limited circumstances expressly authorized by the statute, as being activities of the same character as” funds that are transferred privately to third parties with no judicial oversight (para. 53).

[73] Nor is the judicially-authorized use of property for reasonable legal fees thematically analogous to any of the other listed reasons for ordering a fine instead of forfeiture. All of the circumstances listed in s. 462.37(3) reflect Parliament’s concern that an accused person – not a judge – might hide, dissipate or distribute property that

may later be determined to be proceeds of crime. Indeed, this was the prevailing interpretation at the time the provision was enacted. In his testimony before the legislative committee, the Minister of Justice explained the concern that underpins the fine instead of forfeiture provision:

To encourage offenders to deliver up their proceeds of crime, courts will be entitled to impose special fines with jail terms in default representing the value of illicit assets intentionally placed beyond the reach of the authorities.

(House of Commons, *Minutes*, November 5, 1987, at p. 1:8)

Later, in third reading debate, the Minister said:

The Bill also provides that a court may order the payment of a fine when forfeiture is impossible either because the offender has hidden his [or her] illicit gains or has removed them from the jurisdiction of Canadian courts.

(House of Commons, *Debates*, at p. 17258)

[74] Thus, in my view, the payment of judicially-returned funds to the accused's lawyer is not the kind of "transfer" that Parliament intended to capture with the fine instead of forfeiture provision. Therefore, even if the transfer of funds to a lawyer is technically a transfer to a third party, judges generally should not exercise their discretion to fine an accused for their use of returned funds to pay for their reasonable legal expenses.

F. *A Fine Instead of Forfeiture Can Be Imposed When the Rationale for the Return Provision Is Undermined*

[75] If, generally speaking, Parliament did not intend to impose a fine instead of forfeiture in respect of judicially-returned funds spent on reasonable legal expenses, how should the discretion provided in s. 462.37(3) be exercised? This Court in *Lavigne* held that the discretion must be exercised in a manner consistent with the objectives of the proceeds of crime regime. Justice Deschamps acknowledged in *Lavigne* that “a court may face circumstances in which the objectives of the provisions do not call for a fine to be imposed” (para. 28). For example, a fine would be inappropriate if “the offender did not profit from the crime and if it was an isolated crime committed by an offender acting alone” (para. 28). Based on the foregoing analysis, I add the further example: that the accused was authorized by court order to spend returned funds on reasonable legal expenses.

[76] The circumstances under which it is possible to impose a fine instead of forfeiture on funds returned for reasonable legal expenses must be anchored to Parliament’s intent, and sentencing judges must consider whether the offender’s use of funds advanced or undermined the purposes of the return provision. If it turns out that the financial need was not real, or the funds were not used to alleviate that need, the imposition of a fine instead of forfeiture might be appropriate. I can foresee three situations where this could occur, although there may be others.

[77] The first is some kind of wrongdoing in the return of funds application, such as the misrepresentation of the accused's financial position. The second is wrongdoing by the offender in the administration of the return order, such as funds not being applied in the manner contemplated, expenditures for purposes outside the scope of the return order, or fees in excess of judicially-authorized limits. The third is where the accused experiences an unexpected change in financial circumstances after the funds have been returned but before sentencing, such that recourse to returned funds is no longer necessary after the accused became aware of the changed circumstances. Indeed, counsel for Mr. Rafilovich conceded that judicial discretion to impose a fine should be exercised "if there had been an unforeseen enrichment in between the period of the making of the [return] order and the conclusion of the trial, [such as] the person wins the lottery" (Transcript, p. 24, lines 16-19).

[78] These are examples of situations where the accused has obtained something beyond what Parliament intended, and the sentencing judge may honour that intent by recovering the returned monies by way of a fine. By ordering a fine in such circumstances, courts will respect the balance between Parliament's objectives in ensuring access to counsel and protecting the presumption of innocence through the legal expenses return provision, and its objective of depriving offenders of proceeds of crime through the forfeiture provision.

G. *Rowbotham and Fines Instead of Forfeiture*

[79] My colleague holds that the discretion not to impose a fine instead of forfeiture can be exercised only if an offender was constitutionally entitled to state-funded legal counsel. This should be determined by “applying the test set out in *R. v. Rowbotham*” (para. 93). He says this approach gives “proper effect to Parliament’s objective of ensuring an effective forfeiture regime while still vindicating the constitutionally protected right to counsel” (para. 141). I disagree.

[80] *Rowbotham* is an exceptional constitutional regime that addresses when an accused can insist upon state-funded counsel because there would otherwise be a breach of the accused’s right to a fair trial. It operates only in very discrete circumstances, and leads to a stay of proceedings unless funding is provided by the state. Under *Rowbotham*, the right to a fair trial is not engaged unless three preconditions are met: (1) legal aid is denied, (2) the accused does not have other financial means, and (3) “representation of the accused by counsel is essential to a fair trial” (*Rowbotham*, at para. 156). To some extent, it might appear that the first and second elements of the *Rowbotham* test are conceptually similar to the s. 462.34(4) requirement that “the applicant has no other assets or means available”. However, the mere existence of seized funds will generally lead a court to find an accused person ineligible for a *Rowbotham* order because the seized funds are available through the return provision. Most obviously, it is the third element, that legal counsel be “essential to a fair trial”, that my colleague would effectively import, as an additional requirement, into the proceeds of crime regime.

[81] In my view, Parliament has set out its desired statutory requirements for the judicial return of seized funds. Returning the funds only where it is “essential to a fair trial” is not one of them. Moreover, the *Rowbotham* criteria are designed to respond to a very different set of circumstances than the legal expenses return provision. The legal expenses return provision does not involve a request for state-funded counsel; rather, it allows a court to return seized monies, which still belong to the accused, when necessary to pay for reasonable legal expenses. The return provision respects the accused’s access to, and choice of, legal representation, which is very different from the right to state-funded counsel. *Rowbotham*, conversely, is geared towards the right to a fair trial (see *Rowbotham*, at paras. 156, 158, 161 and 166-70). There is nothing in the proceeds of crime regime that indicates any intention to also require the accused to demonstrate that the nature of the proceedings are such that it is “essential” to have counsel.

[82] While both *Rowbotham* orders and the legal expenses return provision operate to ensure proper representation, they do so in different contexts. In *Rowbotham*, judges are required to assess the complexity of the case and consider whether proceeding without counsel would jeopardize the accused’s fair trial rights. This is the high bar that triggers the state’s obligation to fund legal representation. Conversely, in the legal expenses return provision, the judge is not directing the payment of public funds, but is ordering the return of presumptively *private* property to permit access to legal representation. This is a very different purpose, and if

Parliament intended these further criteria to be a precondition for the exercise of the discretion not to impose a fine, it would have said so explicitly.

[83] My colleague's approach would essentially limit the legal expenses return provision to those accused persons who can satisfy the stricter *Rowbotham* requirements. Because the determination of whether an accused would have qualified for a *Rowbotham* order is made at the sentencing stage, even an accused who believes that he or she could satisfy the *Rowbotham* criteria may shy away from applying for a return of the seized funds out of fear that the sentencing judge may ultimately disagree. This means that accused persons who cannot be certain that their *Rowbotham* application will be successful at some later time may act with even greater caution and represent themselves, even if legal counsel is in fact constitutionally "essential" to their fair trial rights.

H. *Summary*

[84] The discretion to order a fine must be exercised in a manner consistent with all of Parliament's objectives of the proceeds of crime regime including, where applicable, the return provision. The purposes of the legal expenses return provision include providing access to counsel and giving meaningful weight to the presumption of innocence. Underlying these two purposes is an intent of Parliament to create a fair procedure for the return of funds for reasonable legal expenses while also allowing for the seizure, return, and forfeiture of proceeds of crime. In most cases, clawing back reasonable legal fees as a fine instead of forfeiture would undermine these

purposes. Moreover, the payment of reasonable legal fees is neither the type of benefit at which the provisions are aimed nor the kind of “transfer” to a third party contemplated in the fine instead of forfeiture provision.

[85] For all of these reasons, generally speaking, a fine instead of forfeiture should not be imposed on funds that have been judicially returned for the payment of reasonable legal expenses. There remains, however, discretion to order a fine in cases where the offender did not have a real financial need for the returned funds, or the offender did not use the funds to alleviate that need. In this way, courts can give full effect to Parliament’s intended purposes.

V. Application

[86] In this case, the sentencing judge exercised her discretion not to impose a fine instead of forfeiture. There is no evidence that Mr. Rafilovich misrepresented his financial position, misused the returned funds, or experienced any change in circumstances. Therefore, the sentencing judge’s exercise of discretion was appropriate and should not be interfered with.

VI. Conclusion

[87] I would, therefore, allow the appeal and set aside the Court of Appeal’s variance of the sentencing judge’s order adding a fine instead of forfeiture and 12

months imprisonment in default of payment of this fine. The appellant did not seek costs and none are ordered.

The reasons of Wagner C.J. and Moldaver and Côté JJ. were delivered by

MOLDAVER J. —

I. Overview

[88] Part XII.2 of the *Criminal Code*, R.S.C. 1985, c. C-46,⁶ which governs the seizure, restraint, and forfeiture of proceeds of crime, seeks to ensure that crime does not pay (see *R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392, at para. 10; *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708, at para. 25). To further this objective, it permits the state to seize and detain property believed on reasonable grounds to be proceeds of crime, thereby preserving it and facilitating the enforcement of any future forfeiture order. It also provides that a court must, when sentencing an offender for an indictable offence, order the forfeiture of property determined to be proceeds of crime. Alternatively, where the property cannot be made subject to a forfeiture order, the court may order a fine in lieu of forfeiture (“fine in lieu”).

⁶ Unless otherwise indicated, all section number references are to the *Criminal Code*.

[89] Parliament recognized, however, that the seizure and detention of property that is reasonably believed, though not yet proven, to be proceeds of crime may have a significant financial impact on accused persons, including by limiting their ability to access counsel. To address this concern, Part XII.2 permits accused persons to apply to a judge for a “restoration order” authorizing the release of seized property to pay for various expenses — one being reasonable legal expenses — where they have no other means available. In this way, Parliament struck a balance between ensuring an effective forfeiture regime and permitting otherwise impecunious accused persons to access funds for certain purposes.

[90] But appellate courts have reached different conclusions about what this balance requires when seized funds that have been released to an accused to pay for reasonable legal expenses are later found to be proceeds of crime. Can a sentencing judge order a fine in lieu in respect of those funds? If so, under what circumstances should a judge decline to do so? These are the issues raised on appeal.

[91] My colleague Martin J. concludes that where a court has authorized the release of seized funds to pay for reasonable legal expenses, a fine in lieu should not “generally” be imposed, subject to two exceptions: “where it turns out that the offender did not have a real financial need or the funds were not used to alleviate that need” (paras. 8 and 10). She maintains that this conclusion flows from a combination of the two “secondary purposes” pursued by the restoration provision — providing access to counsel and giving meaningful weight to the presumption of innocence —

and Parliament's underlying intention to ensure fairness in criminal prosecutions (paras. 9 and 38). These purposes, she says, "constrain the pursuit of the primary objective" of ensuring that crime does not pay (para. 49).

[92] With respect, I reject this approach. Stripped of the legal niceties in which it is couched, the approach taken by my colleague sends a clear and unmistakable message — crime does indeed pay. For reasons that follow, I am of the view that the statutory regime's primary objective of ensuring that crime does not pay need not and should not be sacrificed on the altar of the "secondary purposes" relied on by my colleague. Imposing a fine in lieu where an offender has used proceeds of crime to pay for his or her own defence achieves the regime's primary objective of ensuring that crime does not pay; and it does not undermine the utility of the restoration provision, which facilitates access to counsel in a manner that is both fair and consistent with the presumption of innocence. In this way, *all* of the statutory scheme's objectives can be achieved.

[93] However, there is in my view an important exception to the general rule that a fine in lieu should be imposed where an offender has used proceeds of crime to pay for his or her own defence. Where a sentencing judge is satisfied, applying the test set out in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), that representation by counsel was essential to the offender's constitutional right to a fair trial under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, the judge should exercise his or her limited discretion not to impose a fine in lieu in respect of

the released funds. This interpretation gives proper effect to Parliament's objective of ensuring an effective forfeiture regime while still vindicating the constitutionally protected right to counsel, and more particularly, the constitutional right to state-funded counsel in limited circumstances.

[94] In this instance, the sentencing judge did not consider whether representation by counsel was essential to Mr. Rafilovich's constitutional right to a fair trial before exercising her limited discretion not to impose a fine in lieu. As the record before this Court is insufficient to decide this issue, I would remit the case to the sentencing judge for determination.

II. Background

[95] My colleague has set out the relevant facts and judicial history, and I see no need to duplicate her work.

III. Issue

[96] The issue on appeal centres on the relationship between the restoration provision and the fine in lieu provision in Part XII.2: under what circumstances, if any, should a fine in lieu be imposed in respect of seized funds that have been released to an accused to pay for reasonable legal expenses but later determined to be proceeds of crime?

IV. Analysis

A. *Statutory Interpretation — The Modern Approach*

[97] The issue on appeal is one of statutory interpretation. Accordingly, the analysis is to be guided by the modern approach to statutory interpretation: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

B. *Overview of the Part XII.2 Regime*

(1) Overall Objective

[98] As this Court stated in *Lavigne*, the overall objective of the proceeds of crime regime under Part XII.2 is two-fold: (1) to deprive offenders and criminal organizations of the proceeds of crime; and (2) to deter them from committing crimes in the future (see paras. 16, 28, and 36). Stated succinctly, this regime seeks to ensure that crime does not pay (see *Lavigne*, at para. 10; *Laroche*, at para. 25).

(2) “Property” and “Proceeds of Crime” — Sections 2 and 462.3(1)

[99] “[P]roceeds of crime” is defined in s. 462.3(1) as “any property, benefit or advantage” obtained or derived directly or indirectly as a result of the commission of a “designated offence”, which includes any federal indictable offence. “[P]roperty” is defined in s. 2 as including “real and personal property of every description”, as well as “property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange”. As these definitions demonstrate, the proceeds of crime provisions apply to “the widest possible range of property” (*Lavigne*, at para. 15).

(3) The Seizure Provision — Section 462.32

[100] Section 462.32(1) and (4) permit the state to seize and detain property believed on reasonable grounds to be proceeds of crime. Like a restraint order (see *Laroche*, at para. 55), a warrant authorizing seizure and detention preserves the property and facilitates the enforcement of any future forfeiture order. In doing so, it furthers the objective of depriving offenders and criminal organizations of the proceeds of crime.

(4) The Restoration Provision — Section 462.34(4)

[101] Parliament recognized, however, that the seizure and detention of property that is reasonably believed, though not yet proven, to be proceeds of crime may have a significant financial impact on accused persons, including by limiting

their ability to access counsel. To address this concern, s. 462.34 permits any person with an interest in the property, including accused persons, to apply for a “restoration order” authorizing the release of seized property to pay for various expenses — one being reasonable legal expenses — where they have no other means available and no other person appears to be the lawful owner of or lawfully entitled to possession of the property:

Application for review of special warrants and restraint orders

462.34 (1) Any person who has an interest in property that was seized under a warrant issued pursuant to section 462.32 or in respect of which a restraint order was made under subsection 462.33(3) may, at any time, apply to a judge

- (a) for an order under subsection (4); or
- (b) for permission to examine the property.

...

Order of restoration of property or revocation or variation of order

(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,

...

- (c) for the purpose of
 - (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,

(ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph (i), or

(iii) permitting the use of the property in order to enter into a recognizance under Part XVI,

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.

[102] In creating this provision, Parliament struck a balance between ensuring an effective forfeiture regime and permitting otherwise impecunious accused persons to access funds for certain purposes. More particularly, as the Minister of Justice explained when the bill that would later become Part XII.2 was introduced, “[t]he legislation has balanced an effective forfeiture mechanism with the constitutionally protected right to counsel in a manner that is characteristic of the Government’s approach to criminal matters and avoids the criticisms that have been levied at similar American legislation in this area” (House of Commons, *Debates*, vol. 14, 2nd Sess., 33rd Parl., July 7, 1988, at p. 17258). The “criticisms . . . levied at similar American legislation” refer to the fact that, at the time the bill was introduced, accused persons in the United States could not use seized funds to pay for legal fees under any circumstances (see R. W. Hubbard et al., *Money Laundering and Proceeds of Crime* (2004), at pp. 118-20; *United States v. Monsanto*, 491 U.S. 600 (1989)).

[103] Under s. 462.37(1), a court must, when sentencing⁷ an offender for a designated offence, order the forfeiture of property determined to be proceeds of crime obtained through the commission of the designated offence. Alternatively, if the court is not satisfied that the property was obtained through the commission of the designated offence, but it is satisfied beyond a reasonable doubt that the property is proceeds of crime, then the court may order its forfeiture pursuant to s. 462.37(2).

(6) The Fine in Lieu Provision — Section 462.37(3)

[104] Where a court is satisfied that a forfeiture order should be made under s. 462.37(1) in respect of any “property of an offender”, but the property (or any part of or interest in the property) cannot be made subject to such an order, the court “may” order a fine in lieu under s. 462.37(3):

Fine instead of forfeiture

(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

(a) cannot, on the exercise of due diligence, be located;

(b) has been transferred to a third party;

(c) is located outside Canada;

⁷ A conviction is not a prerequisite to a forfeiture order, as such an order may also follow a discharge under s. 730.

(d) has been substantially diminished in value or rendered worthless;
or

(e) has been commingled with other property that cannot be divided
without difficulty.

[105] This provision was considered in *Lavigne*, which examined whether an offender's inability to pay a fine could be used as a basis for declining to impose a fine in lieu. Justice Deschamps, writing for a unanimous Court, stated that a fine in lieu "is not regarded as punishment specifically for the designated offence"; rather, "its purpose is to replace the proceeds of crime" (para. 25; see also *R. v. Dieckmann*, 2017 ONCA 575, 355 C.C.C. (3d) 216, at para. 88; *R. v. Angelis*, 2016 ONCA 675, 133 O.R. (3d) 575, at para. 39).

[106] Justice Deschamps clarified that although s. 462.37(3) provides that the court "may" order a fine in lieu, this permissive language does not confer a broad discretion not to do so. Rather, the discretion is "limited" (paras. 1, 23, 27, 29, 34, and 44). In particular, it is limited by "the objective of the provision, the nature of the order and the circumstances in which the order is made" and must be exercised in a manner "consistent with the spirit of the whole of the provisions in question" (paras. 27-28).

[107] These considerations led Deschamps J. to conclude that an offender's inability to pay cannot be taken into account when deciding whether to impose a fine

(see paras. 1, 37, and 48).⁸ Further, the mere fact that property has been used cannot justify a refusal to impose a fine (see para. 32). Nor does the provision leave any room to reduce the value of a fine; rather, the quantum is fixed at the value of the property (or the part of or interest in the property, as applicable) (see paras. 34-35).

[108] That said, Deschamps J. acknowledged that there may be cases where the objectives of Part XII.2 do not call for the imposition of a fine. An example would be “if the offender did not profit from the crime and if it was an isolated crime committed by an offender acting alone” (para. 28). In that case, “none of the objectives [of Part XII.2] would be furthered or frustrated by a decision not to impose a fine instead of forfeiture” (*ibid.*). Justice Deschamps did not expressly consider whether the objectives of Part XII.2 would call for the imposition of a fine in lieu where seized funds that have been released to pay for reasonable legal expenses are later determined to be proceeds of crime.

(7) The Default Provision — Section 462.37(4)

[109] If a fine in lieu is imposed, but the offender defaults on payment, then the court must order a term of imprisonment, which varies based on the amount owing (s. 462.37(4)(a)). This term of imprisonment must be served consecutively to any other term of imprisonment imposed on the offender (s. 462.37(4)(b)).

⁸ It can, however, be taken into account when determining how much time an offender should be given to pay the fine (see paras. 47-48).

[110] A term of imprisonment imposed for defaulting on a fine in lieu is not regarded as a punishment for the designated offence, but rather as an enforcement mechanism to encourage payment by those who have the resources (see *Angelis*, at para. 50, citing *R. v. Khatchatourov*, 2014 ONCA 464, 313 C.C.C. (3d) 94, at paras. 55-56; *R. v. Bourque* (2005), 193 C.C.C. (3d) 485 (Ont. C.A.), at para. 20).

[111] Pursuant to this Court's decision in *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, a warrant of committal cannot be issued for a default on a fine if the offender has a genuine inability to pay (paras. 3 and 60-66; see also *Lavigne*, at para. 47). Thus, only an offender who has the means to pay, but refuses to do so in the time allotted (which is determined by reference to "what is reasonable in all the circumstances" (*Wu*, at para. 31)), can be imprisoned.

C. *The Relationship Between the Restoration Provision and the Fine in Lieu Provision*

[112] The parties take different views of the relationship between the restoration provision and the fine in lieu provision. Mr. Rafilovich submits that where the court has authorized the release of seized funds to pay for reasonable legal expenses, those funds are presumptively exempt from a fine in lieu. He further submits that this presumption can be rebutted only where there has been a material change in circumstances between the release of the funds and sentencing (e.g., an unforeseen enrichment or new evidence of a fraud on the court). The Crown, by contrast, submits that the release of funds is of no moment from a sentencing

perspective: the funds should generally be subject to a fine in lieu, subject only to a limited discretion.

[113] My colleague's conclusion aligns with Mr. Rafilovich's position. She concludes that where a court has authorized the release of seized funds to pay for reasonable legal expenses, a fine in lieu should not "generally" be imposed, subject to two exceptions: "where it turns out that the offender did not have a real financial need or the funds were not used to alleviate that need" (paras. 8 and 10).

[114] With respect, I would adopt a distinct approach. For reasons that follow, I conclude that offenders who have used proceeds of crime to pay for their own defence, thereby deriving a benefit from their crime, should generally be required to repay that benefit through a fine in lieu. This follows from a straightforward application of the primary objective of the proceeds of crime regime — namely, ensuring that crime does not pay. However, where a sentencing judge is satisfied that representation by counsel was essential to the offender's constitutional right to a fair trial under ss. 7 and 11(d) of the *Charter*, the judge should exercise his or her limited discretion not to impose a fine in lieu in respect of the released funds.

- (1) Released Funds Transferred to a Lawyer Are "Property of an Offender" Under Section 462.37(3)

[115] As indicated, s. 462.37(3) provides that a fine in lieu may be imposed in respect of any "property of an offender" that would ordinarily be made subject to a

forfeiture order but cannot. In *R. v. Appleby*, 2009 NLCA 6, 282 Nfld. & P.E.I.R. 134, the Newfoundland and Labrador Court of Appeal concluded that where seized funds are transferred to a lawyer pursuant to a restoration order, they lose their character as “property of an offender” and therefore cannot be subject to a fine in lieu (see para. 65).

[116] With respect, I cannot agree. The definition of “property” in s. 2 includes “property originally in the possession or under the control of any person”. By virtue of this broad definition, seized funds that have been released to an offender, but then subsequently transferred to a lawyer, are still “property of an offender” because they were “originally” in the offender’s possession or control.

[117] This conclusion finds support in the jurisprudence. Courts have interpreted “property of an offender” under s. 462.37(3) as requiring that, *at some point*, the offender must have had possession or control of the property (see P. M. German, *Proceeds of Crime and Money Laundering* (2nd ed. (loose-leaf)), at § 9.6(a.2); see, e.g., *R. v. Dwyer*, 2013 ONCA 34, 296 C.C.C. (3d) 193, at para. 24). It is also consistent with this Court’s observation in *Lavigne* that the proceeds of crime provisions apply to “the widest possible range of property” (para. 15).

[118] This conclusion also finds support in academic commentary. As the authors of *Drug Offences in Canada* write:

Property of an offender that has been seized or restrained is the offender's property until it is ordered forfeited. If an offender brings an application under s. 462.34, a judge may order that all or part of the seized property be "returned" to the applicant, or may vary or revoke the restraint order, for the purpose of paying his or her reasonable legal expenses (s. 462.34(4)(c)). The funds remain the property of the offender, even after they are released for that purpose.

(B. A. MacFarlane, R. J. Frater and C. Michaelson, *Drug Offences in Canada* (4th ed. (loose-leaf)), at § 14:180.40.120)

[119] Further, to accept that a transfer to a third party strips the property of its status as "property of an offender", thereby placing it beyond the reach of the proceeds of crime regime, would be to ignore that the act of transferring the property to a third party is the very rationale for imposing a fine in lieu in the first place (s. 462.37(3)(b)). This reasoning would transform a rationale for imposing a fine into a rationale for *not* imposing a fine, contrary to this Court's statement in *Lavigne* that courts "cannot transform circumstances in which a fine may be ordered instead of forfeiture into circumstances that justify not imposing a fine" (para. 24). More pointedly, it would make it impossible to impose a fine in lieu where the offender has transferred the property to a third party, thereby blowing a hole in the forfeiture regime and undermining its effectiveness.

[120] In addition, that proceeds of crime have been released to an offender pursuant to a court order does nothing to change the fact that the property was "obtained or derived directly or indirectly as a result of" the commission of a designated offence. As such, the property retains its character as "proceeds of crime" under s. 462.3(1).

[121] For these reasons, I conclude that seized funds that have been released to an offender and then transferred to a lawyer remain “property of an offender” for purposes of s. 462.37(3).

(2) A Transfer of Released Funds to a Lawyer Is a “Transfer to a Third Party” Under Section 462.37(3)(b)

[122] A further issue is whether a judicially authorized transfer of released funds to a lawyer is a “transfer to a third party” under s. 462.37(3)(b). As I will explain, it clearly is.

[123] Section 462.37(3) provides that where a court is satisfied that a forfeiture order should be made, but the property “cannot be made subject to an order [of forfeiture]”, it may impose a fine in lieu. This language, which is followed by a non-exhaustive list of example circumstances where property “cannot be made subject to an order [of forfeiture]” (see *Lavigne*, at para. 24), is broad. As one author points out, it “does not distinguish between innocent transfers and those intended to defeat forfeiture” (German, § 9.6(a.3) (footnote omitted)). In fact, two attempts were made to amend s. 462.37(3) during committee proceedings on Bill C-61, the legislation that introduced Part XII.2, to require that an offender must have wilfully attempted to avoid a forfeiture order before a fine in lieu may be imposed. But both proposed amendments were defeated (see House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-61: An Act to amend the Criminal*

Code, the Food and Drugs Act and the Narcotic Act, No. 1, 2nd Sess., 33rd Parl., June 1, 1988, at pp. 9:22-9:24; June 2, 1988, at pp. 10:17-10:18).

[124] Section 462.37(3)(b) contemplates the imposition of a fine in lieu where any property that would otherwise be subject to forfeiture “has been transferred to a third party”. Parliament could have limited the class of transfers caught by this provision. For example, it could have referred to situations in which the property “has been transferred to a third party, other than a lawyer” or to situations in which the property “has been transferred to a third party, except where authorized by court order under s. 462.34(4)(c)”, thereby creating a safe harbour for such transfers. But it did not. In the absence of any such limiting language, the grammatical and ordinary sense of “transfer” — to move a thing from one place to another — must prevail.

[125] The weight of appellate jurisprudence favours the conclusion that a judicially authorized transfer of released funds to a lawyer is a “transfer to a third party” under s. 462.37(3)(b) and may give rise to a fine in lieu (see, e.g., *R. v. Wilson* (1993), 15 O.R. (3d) 645 (C.A.); *R. v. MacLean* (1996), 184 N.B.R. (2d) 26 (C.A.); *R. v. Smith*, 2008 SKCA 20, 307 Sask. R. 45 “*Smith*”). The only outlier is *Appleby*, which, for reasons I have already explained, is undermined by an erroneous interpretation of the words “property of an offender” in s. 462.37(3)(b).

[126] As for my colleague’s insistence that a judicially authorized transfer of released funds to a lawyer is not “thematically analogous” to any of the examples listed in s. 462.37(3) because it bears the court’s stamp of approval (paras. 72-73),

this reasoning must be rejected. The consistent “theme” running through these examples is that the property cannot be made subject to a forfeiture order (see *Lavigne*, at paras. 23 and 32). It is that simple. A judicially authorized transfer of released funds to a lawyer — a third party — fits comfortably within this “theme”, as a court has no ability to reach into the pockets of a lawyer who lawfully came into possession of the funds. This is consistent with s. 462.34(7), which shields third parties who come into possession of released property from being charged with certain proceeds of crime offences.

[127] In my view, the mere fact that a court has given its blessing to the release of seized funds to pay for reasonable legal expenses does not offer a sound basis for declining to impose a fine in lieu. This view is shared by the authors of *Drug Offences in Canada*, who write: “It strains the meaning of ss. 462.34 and 462.37(3)(b) to suggest that, just because the transfer has occurred with the imprimatur of a judicial official, a fine in lieu of forfeiture cannot be ordered” (MacFarlane, Frater and Michaelson, at § 14:180.40.120).

[128] In sum, I conclude that a judicially authorized transfer of released funds to a lawyer is a “transfer to a third party” under s. 462.37(3)(b). As such, a sentencing judge may impose a fine in lieu in respect of such funds. But this conclusion does not end the analysis. While it opens the door to a fine in lieu, it will not always be appropriate for sentencing judges to walk through that door. In particular, as I will

develop, the constitutionally protected right to state-funded counsel in limited circumstances may require otherwise.

(3) The Limited Discretion Not to Impose a Fine in Lieu

(a) *The Discretion Not to Impose a Fine in Lieu Should Be Exercised Where Legal Representation Was Essential to the Offender's Right to a Fair Trial Under Sections 7 and 11(d) of the Charter*

[129] As indicated, s. 462.37(3) provides that where a sentencing judge is satisfied that a forfeiture order should be made in respect of any property of an offender, but the property cannot be made subject to such an order, the judge “may” order a fine in lieu. This language is permissive and confers a “limited” discretion not to impose a fine (see *Lavigne*, at paras. 1, 23, 27, 29, 34, and 44). This discretion must be exercised in a manner consistent with the spirit of Part XII.2 as a whole (see *ibid.*, at para. 28).

[130] As the debates leading up to the enactment of the proceeds of crime regime reveal, Part XII.2 seeks to balance the need to ensure an effective forfeiture regime and the “constitutionally protected right to counsel”. To properly understand this balance, however, it is first necessary to examine what the constitutionally protected right to counsel does — and *does not* — entail.

[131] Under s. 10(b) of the *Charter*, “[e]veryone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that

right”. The purpose of this right is to provide arrestees and detainees with the opportunity, upon arrest or detention, to access legal advice relevant to their situation (see *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at paras. 24-26; *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43).

[132] But as this Court noted in *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, neither s. 10(b) nor any other *Charter* right postulates “a general right to legal assistance” (paras. 24 and 25). To be clear, s. 10(b) does not contemplate a general entitlement to legal representation throughout a criminal proceeding, much less representation paid for by the state. This is reinforced by the fact that s. 10(b)’s focus is fixed squarely at the time of “arrest or detention”. As this Court explained in *Sinclair*, s. 10(b) has consistently been defined “in terms of the right to consult counsel to obtain information and advice immediately upon detention”, not as providing a right to ongoing legal assistance thereafter (para. 31 (emphasis added); see also *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429, at para. 28).

[133] My colleague hints at “a constitutional right of accused persons to spend their own money on legal counsel” (para. 50). Frankly, I have no idea what this means. For my part, the question is not whether accused persons can spend their own money on legal counsel — they clearly can, and they do not need a constitutional right to do so. Rather, the question is whether offenders who have secured the benefit of legal representation by using proceeds of crime — the unlawful possession of

which constitutes a criminal offence (s. 354(1)) — are excused from having to pay back that benefit through a fine in lieu. Much as my colleague might wish it were otherwise, neither s. 10(b) nor any other section of the *Charter* provides for a right to use proceeds of crime to pay for legal counsel without consequence.

[134] The right to state-funded legal counsel in criminal proceedings does exist, but it is limited in scope and grounded in ss. 7 and 11(d) of the *Charter*. In *Rowbotham*, the Ontario Court of Appeal recognized a limited right to state-funded counsel where legal aid has been denied, the accused lacks other means, and representation by counsel is essential to the accused’s constitutional right to a fair trial under ss. 7 and 11(d) of the *Charter* (see paras. 156, 167, and 170). Where the application judge is satisfied that all three criteria are met, he or she may, pursuant to s. 24(1) of the *Charter*, stay the proceeding against the accused until the necessary funding is provided (see para. 167). This leaves the Crown with a choice: fund the defence, or see the proceeding stayed. On the other hand, if any of the criteria are not met (e.g., the accused is capable of handling the matter without the assistance of counsel), then the accused will be left with no other option but to self-represent.

[135] Mr. Rafilovich submits that the *Rowbotham* requirements are implicit in the restoration provision. In particular, he suggests that the words “reasonable . . . legal expenses” in s. 462.34(4)(c)(ii) incorporate the requirement that representation by counsel be essential to a fair trial. Accordingly, he maintains that where a court

has authorized the release of seized funds to pay for reasonable legal expenses, that entails a finding that counsel was essential to a fair trial.

[136] Respectfully, for at least three reasons, I cannot agree.

[137] First, on its terms, s. 462.34(4)(c)(ii) authorizes accused persons to seek the release of seized funds to pay for “reasonable” legal expenses. The scope of what is “reasonable” is clearly broader than the scope of what is strictly “necessary” or “essential”. Accordingly, the provision permits the release of funds where representation by counsel may be *preferable*, but not *essential*. In such circumstances, the accused’s right to a fair trial under ss. 7 and 11(*d*) of the *Charter* would not be engaged.

[138] Second, to read a full *Rowbotham* analysis into the word “reasonable” in s. 462.34(4)(c)(ii) would be to stretch the meaning of that term beyond what it can reasonably bear. If the legislature had intended to embed a *Rowbotham* analysis in s. 462.34(4)(c)(ii), it would have done so expressly. The more plausible interpretation is that the word “reasonable” simply imports a requirement of proportionality. For example, it would not be “reasonable” to pay counsel an exorbitant hourly rate or to seek the return of hundreds of thousands of dollars to defend against straightforward drug trafficking charges. Releasing such disproportionate sums would unduly jeopardize the objectives of preserving potential proceeds of crime and facilitating the enforcement of any future forfeiture order. This interpretation finds support in s.

462.34(5), which requires courts to take into account legal aid tariffs when determining the “reasonableness” of legal expenses under s. 462.34(4)(c)(ii).

[139] Third, the word “reasonable” qualifies both “business” and “legal” expenses in s. 462.34(4)(c)(ii). Yet the *Rowbotham* test has no application to business expenses. It would defy logic, not to mention basic principles of statutory interpretation, to think that the same word in the same provision can mean two completely different things depending on whether the expenses are “business” expenses or “legal” expenses.

[140] Accordingly, I conclude that s. 462.34(4)(c)(ii) permits accused persons to access funds to pay for reasonable legal expenses even where representation by counsel is not essential to a fair trial under ss. 7 and 11(d) of the *Charter*. The question that remains, however, is whether sentencing judges should exercise their limited discretion not to impose a fine in lieu in respect of funds that have been released to pay for reasonable legal expenses where representation by counsel was essential to the offender’s right to a fair trial. In my view, the answer is “yes”.

[141] Where an offender can show that he or she was constitutionally entitled to state-funded legal counsel, it would in my view be inconsistent with that constitutional entitlement to order the offender to pay back his or her legal expenses through a fine in lieu. This approach to the limited discretion afforded by s. 462.37(3), which responds to situations in which the availability of the seized funds is the only thing standing between the offender and a *Rowbotham* order, gives proper

effect to Parliament's objective of ensuring an effective forfeiture regime while still vindicating the constitutionally protected right to counsel. It also recognizes that if legal representation was in fact essential to the offender's constitutional right to a fair trial, then he or she would have derived no net benefit from being able to use seized funds to pay for counsel, since such funds would simply be a substitute for state funds to which the person would otherwise have been entitled. But to go further as my colleague does and exempt *all* funds that have been released to pay for reasonable legal expenses from a fine in lieu, whether or not the offender was constitutionally entitled to state-funded counsel, would not only upset the careful balance struck by Parliament, it would effectively grant a constitutional entitlement where none exists.

[142] At the time an accused has to make a choice about whether to seek a release of seized funds to pay for reasonable legal expenses, it will not always be clear whether representation by counsel is essential to the accused's right to a fair trial, and a *Rowbotham* application would generally be denied due to the availability of the seized funds. This places the accused in the position of having to choose between: (a) seeking a release of funds to pay for counsel and, if convicted, potentially having to pay that money back through a fine in lieu; and (b) not seeking a release of funds and instead self-representing. But making difficult choices is not an uncommon feature of the criminal justice system. On the contrary, accused persons are often called upon to make difficult calls. For example, some may have to decide whether to plead guilty and receive a lighter sentence, or maintain their innocence and risk a more severe sentence if convicted. Others may have to decide whether to make

financial sacrifices at great personal hardship or represent themselves. Yet others may have no choice at all but to self-represent. One thing is certain. Accused persons with access to a pool of funds that may be used to pay for counsel are clearly in a more advantageous position than those who have no choice at all. While that choice may not be an easy one, our criminal justice system does not promise an experience free of difficult choices.

[143] My colleague notes that the statutory requirements for a restoration order do not require accused persons to demonstrate that legal representation is essential to their right to a fair trial (para. 81). To be clear, I do not suggest otherwise. As I have explained, the inquiry into whether legal representation was essential to ensure a fair trial is relevant to the question of whether a fine in lieu should be imposed, not whether a restoration order should have been granted.

[144] In sum, I conclude that where a sentencing judge is satisfied that representation by counsel was essential to the offender's constitutional right to a fair trial under ss. 7 and 11(d) of the *Charter*, the judge should exercise his or her limited discretion not to impose a fine in lieu in respect of the released funds. However, where no such right arises, it will generally be appropriate to impose a fine in lieu. This follows from a straightforward application of the primary objective of the proceeds of crime regime — namely, ensuring that crime does not pay. As my colleague acknowledges, accused persons who have access to seized funds to pay for legal counsel enjoy a benefit that others do not (see para. 64; see also *Smith*, at para.

106). Where this benefit was derived from proceeds of crime, offenders who were not constitutionally entitled to state-funded counsel should generally be required to repay that benefit through a fine in lieu. Otherwise, contrary to the overall purpose of the statutory regime, crime would indeed pay.

(b) *Issues Arising out of the Majority's Approach*

[145] Having set out my own analysis of how sentencing judges should exercise their limited discretion not to impose a fine in lieu in respect of funds that were released to pay for reasonable legal expenses, I wish to address three fundamental flaws in my colleague's approach to this issue. First, it sacrifices the statutory regime's primary objective of ensuring that crime does not pay in order to achieve the two "secondary purposes" of the restoration provision and to give effect to Parliament's underlying intention to ensure fairness in criminal prosecutions. Yet, as I will explain, *all* of the statutory scheme's objectives can be achieved, and imposing a fine in lieu where an offender has used proceeds of crime to pay for his or her own defence does not undermine the utility of the restoration provision. Second, the notion that Parliament was prepared to give offenders the benefit of using proceeds of crime to pay for their own defence without consequence, and that it was content to simply wave goodbye to any released funds even if they were later proven to be proceeds of crime, defies logic and common sense. Third, it turns the "limited discretion" not to impose a fine on its head. I will address these points in turn.

- (i) The Statutory Regime’s Primary Objective of Ensuring That Crime Does Not Pay Need Not and Should Not Be Sacrificed in Order to Achieve the “Secondary Purposes” of the Restoration Provision

[146] My colleague maintains that beyond the primary objective of the proceeds of crime regime as a whole — namely, depriving offenders and criminal organizations of the proceeds of crime and deterring them from committing crimes in the future (see *Lavigne*, at paras. 16, 28, and 36) — there are two “secondary purposes” that underpin the restoration provision in particular: providing access to counsel and giving meaningful weight to the presumption of innocence (paras. 9 and 38). She adds that underlying these “secondary purposes” is a “desire” or “intention” to ensure fairness to the accused in criminal prosecutions, and that this underlying intention “runs through the proceeds of crime scheme established by Parliament” (*ibid.*). She stresses that the Court in *Lavigne* did not address these separate purposes and that they “constrain the pursuit of the primary objective” (paras. 34 and 49). Ultimately, this leads her to conclude that, as a general rule, sentencing judges should not impose a fine in lieu in respect of funds that were released to pay for reasonable legal expenses.

[147] Much as my colleague purports to distinguish the two identified “secondary purposes” of the restoration provision from the underlying intention to ensure fairness to the accused that, in her view, “runs through the proceeds of crime scheme established by Parliament” (para. 38), all three of these appear to play exactly the same role in her interpretation of the restoration provision. Indeed, this underlying

intention might easily have been a third secondary purpose. Whatever the case, as I see it, the distinction my colleague purports to draw is a distinction without a difference. In the end, it does not affect the analysis I bring to bear on the issue before this Court.

[148] As I will demonstrate, the answer to my colleague's analysis is that the statutory regime's primary objective of ensuring that crime does not pay need not and should not be sacrificed either to achieve the "secondary purposes" of the restoration provision or to give effect the intention underlying them. Once the respective roles of the restoration provision and the fine in lieu provision are properly understood, it becomes clear that *all* of the statutory scheme's objectives can be achieved.

[149] The restoration provision facilitates access to counsel in a manner that is both fair and consistent with the presumption of innocence. The alternative — withholding seized funds from presumptively innocent accused persons who have no other means and thereby depriving them of their ability to access counsel — would do the opposite.

[150] But where a restoration order is followed by a conviction, the situation takes on a very different hue. Upon conviction, an "accused" becomes an "offender", and funds that were once presumed to be legitimate are now known to have been proceeds of crime all along. At this point, seeing that the offender has used proceeds of crime to pay for his or her own defence, the statutory regime's primary objective of ensuring that crime does not pay takes centre stage.

[151] Yet my colleague's approach turns this objective on its head and creates situations in which crime *does* pay. For cases where there is no constitutional right to state-funded counsel, it creates a clear inequality between accused persons who *do* have access to a pool of funds to pay for their defence and those who *do not*. Those who are fortunate enough to fall within the former category are permitted to draw upon this pool of resources to fund their own defence with almost no strings attached. This is no doubt a benefit, as my colleague acknowledges (para. 64). By comparison, those who have the misfortune of falling within the latter category — of whom there are many — may often be left with no choice but to represent themselves.

[152] Rewarding offenders for procuring proceeds of crime by allowing them to spend those funds on their own defence without consequence is hardly consistent with the two-fold purpose of the proceeds of crime regime. It does nothing to deprive offenders and criminal organizations of the benefits they derived from crime, nor does it deter them from committing crimes in the future. On this latter point, sending a strong and unequivocal message that crime does not pay is far more likely to achieve specific and general deterrence than sending the opposite message. More pointedly, from a common sense perspective, ordinary Canadians would no doubt find it troubling, if not wholly unacceptable, that someone could commit robbery and then use part of the stolen money to fund his or her own defence without ever having to pay it back.

[153] In short, my colleague’s approach undermines the overall purpose of the proceeds of crime regime. While she insists that courts must not “ignore or minimize the secondary purposes in order to achieve the primary goal of ensuring crime does not pay” (para. 49), her solution is to do precisely that, but in reverse: sacrificing the primary objective of ensuring that crime does not pay in order to achieve the “secondary purposes” of the restoration provision. But as I will explain, this zero-sum approach is unnecessary because it is possible to ensure that crime does not pay while still providing access to counsel, giving meaningful weight to the presumption of innocence, and giving effect to the underlying intention to ensure fairness to the accused in criminal prosecutions.

1. *Providing Access to Counsel*

[154] Beginning with the objective of providing access to counsel, my colleague’s main concern is that if funds that have been released to pay for reasonable legal expenses must generally be paid back upon conviction, then some accused persons, out of a fear of having to pay a fine in lieu on pain of imprisonment if convicted, may choose not to seek a restoration order and to represent themselves instead (para. 55). She maintains that imposing a fine in lieu in these circumstances would render the restoration provision “largely illusory” and leave accused persons with a “Hobson’s choice” in which the only real option is to proceed without legal representation (paras. 55 and 60).

[155] With respect, I cannot agree. The prospect that an accused may, if convicted, have to repay funds that have been released to pay for reasonable legal expenses does not render the restoration provision “largely illusory” or leave accused persons with no choice but to represent themselves. Accused persons who have access to seized funds to pay for reasonable legal expenses can either use those funds or leave them. At bottom, having this choice puts them in a better position than those who have no means whatsoever of accessing counsel. While some who have the option may decide not to seek a restoration order, others will.

[156] As for my colleague’s suggestion that the risk of imprisonment for non-payment of a fine in lieu may deter accused persons from invoking the restoration provision, this concern is mitigated by this Court’s decision in *Wu*, which makes clear that a warrant of committal cannot be issued for non-payment of a fine if the offender has a genuine inability to pay (paras. 3 and 60-66; see also *Lavigne*, at para. 47). Consequently, the risk of imprisonment arises only where an offender has the means to pay but refuses to do so.

[157] Finally, the case law recognizes that the objective of providing access to counsel need not come at the expense of the primary objective of the proceeds of crime regime. In *Wilson*, Doherty J.A. stated in *obiter* that imposing a fine in lieu in respect of funds that were released to pay for reasonable legal expenses would serve the “ultimate purpose” of the proceeds of crime regime “while at the same time allowing the accused access to the seized property for the purposes of paying

reasonable legal expenses” (p. 660). In short, the primary objective of the proceeds of crime regime is not incompatible with the goal of facilitating access to counsel.

2. *Giving Meaningful Weight to the Presumption of Innocence*

[158] Turning to the presumption of innocence, I respectfully do not share my colleague’s view that if offenders are generally required to pay back funds that they have used to pay for their own defence, then the presumption of innocence will suffer. The presumption of innocence prevents the state from requiring accused persons to immediately forfeit property that is reasonably believed, though not yet proven, to be proceeds of crime. This presumption also finds expression through the restoration provision, which allows accused persons to “receiv[e] the benefit of the presumption of innocence . . . in the most meaningful way — through ready access to the funds seized” (*Smith*, at para. 106).

[159] But the presumption of innocence does not exist in perpetuity. As this Court stated in *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, “the presumption of innocence does not survive [a] conviction” (para. 16). It is at this point, after both the released funds and the presumption of innocence have been spent, that the fine in lieu provision comes into play. There is nothing inconsistent about allowing *accused persons*, who are presumed innocent, to access seized funds to pay for legal counsel but requiring *offenders*, who are proven guilty, to pay back those funds once they are determined to be proceeds of crime. Doing so does not, contrary to my colleague’s contention, “retroactively dilute the presumption of innocence” (para. 57), as that

presumption remains in full force until the point of conviction. Stated succinctly, the presumption of innocence does not shield offenders from the consequences of a conviction, including the obligation to forfeit any proceeds of crime or pay a fine in lieu.

[160] My colleague also attempts to draw an analogy between the present context and the bail context. She suggests that “recover[ing]” time spent free on bail would “retroactively dilute” the presumption of innocence, and that “recover[ing]” proceeds of crime spent by an offender on his or her defence would have the same effect (paras. 57-58). With respect, the bail context is far removed from the present context, and the considerations at play are very different. Setting aside the simple fact that there is no statutory provision authorizing the “recovery” of time spent free on bail, one of the crucial differences that my colleague overlooks is that, unlike the ability to retain counsel using proceeds of crime, time spent free on bail is not a benefit derived from crime. Thus, while there is a rational basis for requiring offenders to “pay back” proceeds of crime spent on legal counsel, there is no rational basis whatsoever for requiring offenders to “pay back” time spent free on bail. Put simply, spending time free on bail is nothing like spending proceeds of crime on legal counsel. The analogy, with respect, is inapt.

3. *Intention to Ensure Fairness to the Accused in Criminal Prosecutions*

[161] Finally, concerns over the potential unfairness — procedural or otherwise — of withholding seized funds from presumptively innocent accused persons in a way that limits or removes their ability to access counsel are addressed through the restoration provision, and there is nothing unfair about requiring offenders who have used proceeds of crime to pay for their own defence to repay that benefit.

[162] My colleague claims that imposing a fine in lieu in respect of funds that have been released to pay for reasonable legal expenses would raise “concerns of notice and reliance that are rooted in the principle of fairness to the accused in criminal prosecutions” (para. 59). She maintains that accused persons “will rely on a court order authorized by a specific statutory scheme” and that “[t]hose accused persons cannot reasonably know that doing so will lead to additional punishment” (*ibid.*).

[163] Respectfully, I reject the suggestion that the relevant provisions of the *Criminal Code*, coupled with a decision of this Court explaining the proper effect of those provisions, would leave accused persons with no notice about the potential adverse consequences of using seized funds to pay for reasonable legal expenses in the event of a conviction. My colleague’s reasoning is fundamentally incompatible with the well-established maxim in criminal law that ignorance of the law is no excuse (*ignorantia juris non excusat*). As Chief Justice Lamer explained in *R. v. McIntosh*, [1995] 1 S.C.R. 686, “[o]ur criminal justice system presumes that everyone knows the law” (para. 38; see also *R. v. MacDougall*, [1982] 2 S.C.R. 605; *R. v. Nova*

Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 633). Unlike my colleague, I am not prepared to upend this well-established presumption.

[164] Lastly, I note my colleague’s reliance on *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, where this Court stated that “the right to effective assistance of counsel extends to all accused persons” and explained that this right is a principle of fundamental justice (para. 24). It is important to recognize, however, that the right to effective assistance of counsel does not equate to a right to counsel. The right to effective assistance of counsel protects against incompetent performance by counsel that results in a miscarriage of justice (*G.D.B.*, at para. 26); it does not, however, guarantee all accused persons the right to counsel. With respect, my colleague takes *G.D.B.* out of its proper context.

(ii) Parliament Did Not Intend to Give Offenders the Benefit of Using Proceeds of Crime to Pay For Their Defence Without Consequence

[165] My colleague acknowledges that accused persons who have access to funds to pay for legal counsel enjoy a benefit that others do not (para. 64; see also *Smith*, at para. 106). Yet she maintains that this “is not the type of benefit that Parliament sought to take away from offenders” and is instead “a benefit that Parliament expressly intended them to have” (*ibid.*).

[166] With respect, I disagree. My colleague conflates two distinct concepts:
(1) Parliament’s intention as to the circumstances in which accused persons may

access seized funds; and (2) Parliament's intention as to the circumstances in which offenders may be required to pay them back. Again, there is nothing inconsistent about allowing *accused persons* to access seized funds to pay for legal counsel but requiring *offenders* to pay them back in the event that they are determined to be proceeds of crime. While Parliament intended to give accused persons the benefit of having access to seized funds to pay for reasonable legal expenses, it did not, in my view, intend to give offenders the benefit of never having to pay them back.

[167] Had that been Parliament's intent, it could easily have enacted a provision stipulating that any funds released pursuant to a restoration order would be exempt from forfeiture or a fine in lieu, or that such funds would be exempt unless "it turns out that the [offender's] financial need was not real, or the funds were not used to alleviate that need", as my colleague proposes (para. 76). But it did not. In the absence of any such provision, there is no compelling basis on which to conclude that Parliament was prepared to simply write off any funds released to pay for legal counsel — which may amount to hundreds of thousands of dollars (see *Smith*) — as a gift.

[168] Of course, if an accused is acquitted and the funds are not found to be proceeds of crime, then the accused has simply paid for his or her own defence using his or her own money. In that event, the state has not been deprived of any property that would otherwise have been forfeited. But where an accused is convicted and the funds are found to be proceeds of crime, every dollar that was spent on the offender's

defence using proceeds of crime is a dollar that would otherwise have been forfeited to the state — a fact which my colleague acknowledges is “undeniable” (para. 68). In those circumstances, it is unthinkable that Parliament would have been content to simply absorb the loss.

[169] While Parliament enacted statutory safeguards that control the amount of funds released, this cannot be taken as an indication that it was prepared to let those funds go for good. The purpose of controlling the amount of funds released to accused persons is to protect the state’s legitimate interest in preserving property that is reasonably believed to be proceeds of crime to the greatest extent possible, thereby facilitating the enforcement of any subsequent forfeiture order. Releasing the entirety of the seized funds, regardless of whether the accused actually needs the full amount, would create an unnecessary risk that the funds may be long gone by the time of any future sentencing hearing. Furthermore, while a fine in lieu may be imposed where some or all of the funds have been spent, an offender may take years to pay the fine and in some cases may never pay it, either because the offender refuses to pay or because the offender has a genuine inability to pay. Hence, the constraints placed on the amount released serve a legitimate purpose and cannot be taken as a signal that Parliament was prepared to let those funds go for good.

(iii) The Majority’s Approach Is Inconsistent with the “Limited Discretion” Described in *Lavigne*

[170] Finally, with respect, my colleague's approach to the exercise of a sentencing judge's limited discretion not to impose a fine in lieu is inconsistent with this Court's decision in *Lavigne*, which reiterated on a number of occasions that the discretion not to impose a fine in lieu is "limited" (see paras. 1, 23, 27, 29, 34, and 44). My colleague's approach turns this concept on its head by transforming this limited discretion not to impose a fine into a presumptive rule against imposing a fine, at least in respect of funds that have been released to pay for reasonable legal expenses.

[171] Having explained why I reject the approach taken by my colleague, I turn to the application of the relevant principles to the case at hand.

V. Application

[172] In this instance, the police seized funds that were later determined to be proceeds of crime upon Mr. Rafilovich's guilty pleas. These funds were released to him to pay for reasonable legal expenses pursuant to s. 462.34(4). Those funds, which qualified as "property of an offender", were subsequently transferred to a third party — Mr. Rafilovich's lawyer — such that they could not be made subject to a forfeiture order. Consequently, the authority to order a fine in lieu under s. 462.37(3) was engaged.

[173] But the sentencing judge exercised her limited discretion not to invoke this authority. She reasoned that Mr. Rafilovich "did not profit from his crime" (2013

ONSC 7293, at p. 20 (CanLII)). She stressed that he “obtained no benefit from these funds other than enabling him to pay for legal representation to which he [was] constitutionally entitled” (*ibid.*). She also expressed concern about exposing Mr. Rafilovich to a term of imprisonment in the event of default, which similarly situated offenders who had alternative means or who qualified for legal aid would not face.

[174] With respect, I am unable to agree with the learned sentencing judge’s analysis. Mr. Rafilovich did, in fact, receive a benefit from his crime: he retained an experienced lawyer of his choice through the use of about \$42,000 derived from the commission of criminal offences. Unlike many accused persons, Mr. Rafilovich had the benefit of a pool of resources to draw upon to fund his defence. Moreover, the sentencing judge’s concerns about the prospect of imprisonment were misplaced. Pursuant to this Court’s decision in *Wu*, a warrant of committal would be issued only if Mr. Rafilovich had the means to pay a fine in lieu but refused to do so within the time allotted.

[175] Finally, although the sentencing judge stated that Mr. Rafilovich used the released funds to obtain “legal representation to which he [was] constitutionally entitled” (p. 20), she did not consider whether representation by counsel was essential to his constitutional right to a fair trial. This inquiry was, as a matter of law, a prerequisite to a finding that Mr. Rafilovich was constitutionally entitled to state-funded legal counsel and, in turn, the proper exercise of the limited discretion not to impose a fine in lieu in this instance.

[176] As the record before this Court is insufficient to decide this issue, I would set aside the order of the Court of Appeal and remit the case to the sentencing judge for determination.

Appeal allowed, WAGNER C.J. and MOLDAVER and CÔTÉ JJ. dissenting in part.

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