S.C.C. FILE NO. 37791

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

BETWEEN:

YULIK RAFILOVICH

APPELLANT
(Respondent on C58056)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant on C58056)

- and -

ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I: OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. This appeal concerns whether, properly interpreted, s. 462.37(3) of the *Criminal Code*[1] requires a fine (and a consecutive term of imprisonment if the fine cannot be paid) in lieu of forfeiture of seized funds paid to counsel by virtue of a court order. In other words, whether the scheme removes a sentencing judge's discretion to impose what would otherwise be a fit sentence of imprisonment upon an impecunious offender.

2. If the interpretation of the Ontario Court of Appeal is correct, then the result is that an impecunious accused who receives the assistance of counsel through s. 462.34(4) funding faces the jeopardy of a longer term of imprisonment as compared to a wealthier person.

3. The legislation in question, as with all legislation, must be interpreted in accordance with the modern approach to statutory interpretation. Where there is ambiguity, other principles of interpretation, such as that the legislation must be interpreted according to the *"Charter*[2] values*"* engaged by the legislation may be applied.

4. The position of the BCCLA is, that properly interpreted in light of these *Charter* values:

a. The release of reasonable legal fees to counsel through operation of a court order does not constitute a "transfer" nor are those services "property" (s. 462.37(3)) as those words are used within the forfeiture scheme.

b. A judge presiding over a criminal proceeding must ensure that the proceeding fair. The scheme of the *Code*, and in particular specific provisions in Parts XII.2 and XXIII, ensures that fairness is protected. The inclusion of s. 462.34(4)(b)(ii) in Part XX.2 provides a judge with a mechanism for ensuring that criminal trials will not be unfair by virtue of a an accused person requiring, but being otherwise unable to retain counsel. Through this provision, judges are able to ensure that the Part XII.2 forfeiture scheme operates along with, rather than antithetically to

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[1] *Criminal Code*, RSC 1985, c C-46 [***Code***]

the right to a fair hearing and to make full answer and defence through the assistance of counsel.

c. Parliament's purpose in enacting that Part XII.2 of the *Criminal Code*, and the specific objective of s. 462.37(3), was not to punish the offender for committing a particular offence, but to deprive the offender and any criminal organization of the proceeds of their crime and deter future crimes.

d. Receiving the advice and assistance of counsel whose fees are being paid through a judicially authorized release of seized money does not constitute a benefit contemplated by Parliament. To impose forfeiture, a fine in lieu of forfeiture, and a period of jail as mandated by the *Criminal Code* for the non-payment of the fine (even in circumstances of inability to pay the fine), upon money that has been released by a judicial order for the payment of reasonable legal fees does not advance the objectives of deterring future crime and denying benefits to a criminal organization.

e. The order of forfeiture, the fine and the imposition of jail in these circumstances undermine the *Charter* values which are clearly at play. An accused person who requires counsel, and who is otherwise unable to afford counsel, should not be required to choose between being self-represented on the one hand, and potentially being subject to a disproportionate sentence on the other (based on consecutive imprisonment in addition to what is fit having regard to the circumstances of the offence and the accused person), for having applied for and received a court order permitting fees to be released under judicial supervision.

PART II: STATEMENT OF QUESTIONS IN ISSUE

5. The BCCLA agrees with the Appellant's statement of the questions in issue on this appeal.

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[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [***Charter***]

PART III: STATEMENT OF ARGUMENT

A. Overview

6. The appellant argues that the weight of jurisprudence, and the deference owed to a sentencing judge, support the exercise of discretion in this case to impose a fine in lieu of forfeiture and payment of legal fees was not a "benefit" that frustrates the objectives of the legislation.

7. Without repeating those submissions, the BCCLA focusses its submissions on the modern approach to statutory interpretation and the *Charter* values that should inform that analysis, to address what the BCCLA says is ambiguity in key components of s. 462.37(3).

B. Modern Approach to Statutory Interpretation

8. There is only one approach to statutory interpretation, namely, that 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 Parliament.[3] Other principles of interpretation, such as the *"Charter values"* presumption, only receive application where there is *ambiguity* as to the meaning of a provision.[4] The asserted *ambiguity* must be real in that the words of the provision must be "reasonably capable of more than one meaning".[5] Ambiguity does not arise from the mere fact that several courts have come to different conclusions on the interpretation of a given provision, although that is the case here.

i. Grammatical and Ordinary Sense

9. Subsection 462.37(3) of the *Code* makes no explicit reference to whether "*any property of the offender*" includes monies originally seized from an offender but judicially ordered, prior to conviction, to be made available to pay legal expenses, nor is it explicit as to whether payment of such legal expenses in those circumstances constitutes a *"transfer to a third party*".

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[3] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 [***Bell ExpressVu***], ¶26; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, ¶21

[4] *Bell ExpressVu*, ¶27

10. The term *property* is defined very broadly in s. 2 of the *Code* to include "real and personal property of every description". It includes "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". (emphasis added)

11. Property *of the offender*, then, includes currency originally in the possession or under the control of an accused person, and any *property* into which that currency has been converted or exchanged, and *anything* acquired at any time by the conversion or exchange.

12. Legal services are not *property* into which currency can be converted or for which currency has been exchanged. Legal services are not a "thing acquired". But s. 462.37(3) authorizes a court to order a fine in an amount equal to the value of the property if the property "has been transferred to a third party". *Transfer* is not defined in this section however *"transfer"* generally refers to the act of moving something from one place to another. A judicial order releasing seized money for the payment of reasonable legal fees is not a "transfer" within this meaning.

ii. The Scheme of the Act

13. Subsection 462.37(3) of the *Code* is situated within Part XII.2 entitled "Proceeds of Crime" and closely related to ss. 462.3(1)(a), 462.32(1), 462.34(4) and (5.2), 462.37(1), (4) and (5) and 734-36.

14. Subsection 462.3(1)(a) of the *Code* defines "proceeds of crime" broadly as any "property, benefit or advantage" obtained or derived, directly or indirectly as a result of the commission of a designated offence. Subsection 462.32(1), on application of the Attorney General, authorizes a judge to issue a special search warrant authorizing a person to search and seize any property in respect of which there are reasonable grounds to believe an order of forfeiture may be made.

15. Subsection 462.34(4) authorizes a judge to order that the property or a part of it be returned to an applicant, subject to reasonable conditions, including for the purpose of (c)(ii)

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[5] *Bell ExpressVu*, ¶28; see also *R. v. Clarke*, 2014 SCC 28, ¶¶13-16; *R. v. Rodgers*, 2006 SCC 15, ¶¶18-19; *R. v. Mabior*, 2012 SCC 47, ¶44

meeting the reasonable business and legal expenses of a person, if the judge is satisfied that the applicant has no other assets or means available for those purposes and that no other person appears to be the lawful owner of or lawfully entitled to possession of the property. In practice, such applications may be accompanied by evidence that the accused person has applied for and been denied legal aid because of the existence of the property.[6]

16. Once a judge orders the return of an amount sufficient to cover legal expenses, pursuant to s. 462.34(4), and the order is implemented, the accused is no longer entitled to recover possession of the amount authorized and paid for legal expenses. They no longer have a property interest in that portion of the seized funds. The persons to whom it is paid, or even committed, pursuant to the judicial order, is lawfully entitled to it.[7]

17. Subsection 462.34(5.2) provides an oversight and accountability mechanism and authorizes the judge who made an order under s. 462.34(4) to tax the legal fees forming part of the legal expenses.

18. Subsection 462.37(1) provides for a mandatory order of forfeiture of property that is proceeds of crime where the designated offence was committed in relation to that property, to Her Majesty.[8]

19. Subsection 462.37(3) confers on the court discretion to impose a fine in lieu of forfeiture if the conditions are met for an order for forfeiture of property, but the property cannot be made subject to a forfeiture order, for example because it has been transferred to a third party.[9] However, in the exercise of its discretion, the court may not take the offender's ability to pay into consideration as a basis for deciding either to impose no fine or to reduce the amount of the fine.[10] It is also an error to decline to order a fine in lieu of forfeiture out of concern for the accused's rehabilitative prospects and his ability to satisfy restitution orders made against him.[11]

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[6] See e.g. *R. v. Appleby*, 2009 NLCA 6 [***Appleby***], ¶¶6, 34, 37, 47, 61
[7] *Appleby*, ¶40
[8] *Appleby*, ¶2
[9] *Appleby*, ¶2
[10] *R. v. Lavigne*, 2006 SCC 10 [***Lavigne***], ¶35
[11] *R. v. Angelis* 2016 ONCA 675

20. Subsection 462.37(4) mandates a term of imprisonment in default of payment of the fine in lieu of forfeiture, based on the amount of the fine. It also mandates directing that it "be served consecutively to any other term of imprisonment imposed on the offender".

21. The provisions relating to the proceeds of crime are in addition to the other provisions of the *Criminal Code*.[12] Where the general rules set out in the *Criminal Code* are compatible with the specific provisions, they are applicable as well. However, specific provisions, prevail over the general provisions.[13] Subsection 462.37(5) precludes application of s. 736 to a s. 462.37(3) fine in lieu of forfeiture.[14] Either the express provisions or the context of ss. 734 to 735 also suggest inapplicability of those sections to a s. 462.37(3) fine in lieu of forfeiture.[15]

iii. Object of the Act and Intention of Parliament

22. Parliament's purpose in enacting that Part XII.2 of the *Criminal Code*, and the specific objective of s. 462.37(3) were considered in detail in *Lavigne.* In honouring an obligation as a signatory to the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Canada put in place legislation "to neutralize criminal organizations by depriving them of the profits of their activities".[16] In doing so, Parliament established special rules for sentencing that went beyond the offender him or herself and target the proceeds of crime.[17] Parliament's intention was not only to punish the criminal act, but also ensure it does not benefit the offender or any criminal organization, and thereby ensure that crime does not pay and deter future crime.[18]

iv. Summary on Entire Context

23. On a plain reading, s. 462.37(3) encompasses monies, which are proceeds, originally seized from an offender, but it is ambiguous whether it continues to apply if that money is released, by judicial order and under judicial supervision, in order to pay legal expenses.

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[12] *Lavigne*, ¶39
[13] *Lavigne*, ¶¶39, 42
[14] *Appleby*, ¶60
[15] *Appleby*, ¶60
[16] *Lavigne*, ¶¶8-9
[17] *Lavigne*, ¶8
[18] *Lavigne*, ¶¶10, 16

24. The scheme of the *Code* cuts both in favour and against the interpretation adopted by the ONCA herein. The definition of proceeds of crime makes clear that the scope of Part XII.2 is broad. However, Part XII.2 balances the breadth of its scope with a safety valve so that applicants with legitimate need of seized funds can access those funds under judicial supervision. The scheme of the *Code* protects those who receive such funds from criminal forfeiture and also ensures that accused individuals do not maintain any benefit of their unlawful activity by wasting, concealing or refusing to pay. It supports judicial control over criminal trials, and the ability of the judiciary to ensure that the right to a fair hearing and to make full answer and defence with the assistance of counsel are not hindered by the forfeiture scheme.

25. Considerations weighing against interpreting the scheme of the Act as the ONCA did are that such an interpretation could:

a. Put defence counsel in a conflict of interest. If the court makes an order in favour of the lawyer, then the accused/client is liable to have a fine (and jail in default) imposed in the equivalent amount. On the other hand, the ONCA has held that it would be inappropriate for the lawyer to wait until after sentencing and then make a claim under s. 462.42 in an effort to circumvent the scheme of the legislation;[19]

b. Require accused individuals to choose between the constitutional entitlements to counsel's assistance in making full answer and defence and securing a fair trial, on the one hand, and having a sentence that meets the principle of proportionality, on the other (and this is developed in greater detail below); and

c. Require judges to impose a total sentence that is harsher than what is fit for the circumstances of the offence and circumstances of the offender, as a result of having granted the application, and having controlled the trial process by ensuring that an accused person received a fair trial with the assistance of counsel.

[19] *Wilson v. R.* (1993), 86 C.C.C. (3d) 464 (ONCA)

26. Excluding funds paid to legal counsel under judicial supervision from forfeiture is consistent with Parliament's intent. Acquiring legal services is not a benefit to an accused person over and above what any accused person might otherwise be entitled to through legal aid. If the accused had received legal aid, the seized funds would still be forfeited at the end of the sentencing hearing, but the accused individual would not have to pay a fine to recoup the value of the publicly funded legal aid. The accused individual can only access the money in question upon satisfying the judge that he or she has no other assets or means available for the purpose of acquiring legal services. This case and *Appleby*, show that accused individuals may be denied legal aid *because of* the existence of the seized funds at a time when they are presumed innocent.[20] It is the terms of the order of the court and the decisions of responsible counsel, and not the accused person, that will determine the precise manner in which the funds will be allocated to fees. The determination is limited to what the provisions allow and subject to judicial approval and supervision.[21]

C. *Charter* Values

27. As noted above, principles of interpretation, such as the *"Charter values"* presumption, only receive application where there is *ambiguity* as to the meaning of a provision.[22]

28. In contrast to the ONCA in this case, in *Appleby*, the NLCA determined it had discretion as to whether to impose a fine in lieu of forfeiture under s. 462.37(3) where money seized had been returned to an accused to pay legal expenses. It held that funds paid out for legal expenses pursuant to an order made under s. 462.34(4) are not to be considered "property of an offender" under s. 462.37(3). The phrase "property of the offender… transferred to a third party" was not ambiguous, the Court held, and means property which an offender is, subject to the provisions of the *Code*, otherwise lawfully entitled to claim possession. This would exclude monies in respect of which lawful entitlement has been transferred to a third party on the basis of a court order provided for in the *Code*.[23] However, the Court incorporated *Charter* values into its

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[20] See e.g. *Appleby*, ¶¶6, 34, 37, 47, 61
[21] *Appleby*, ¶33
[22] *Bell ExpressVu*, ¶27
[23] *Appleby*, ¶63

statutory interpretation analysis prior to reaching the conclusion that the provision was not ambiguous.[24] If that is the correct approach, then the BCCLA would incorporate the submissions that follow into the statutory interpretation that precedes this section.

29. If, however, an ambiguity must arise before consideration of *Charter* values, then the BCCLA submits that such an ambiguity does arise in the instant case. In light of that ambiguity, the *Charter* values that should inform the interpretation of the provision are (a) the constitutional right to retain counsel to make full answer and defence and secure a fair trial and (b) proportionality including parity in sentence.

i. Full Answer and Defence, Fair Trial, Right to Counsel

30. An accused person has a right to a fair trial, trial judges are under a duty to ensure that trials are fair and, in serious cases, a trial cannot be fair unless the accused person is represented by counsel.[25]

31. However, in cases where legal aid is denied to an accused person facing trial *because of* the existence of seized funds, and the trial judge is satisfied that the accused has no other assets or means available for the purpose of securing legal representation, the *Charter* values enshrined in ss. 7, 10(b) and 11(d) are best protected by an interpretation that permits an accused to access the seized funds for that purpose without fear of recourse to an additional penalty at the end of the proceeding if the money is used for that purpose.

ii. Proportionality and Parity

32. The principle of proportionality in punishment is one of long-standing and was codified in 1996. It requires criminal punishment to be proportional to the gravity of the offence and the degree of responsibility of the offender.[26] It is a principle already recognized as foundational to the integrity and moral authority of the criminal law: "It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a 'fit' sentence proportionate to the seriousness of the offence. Only if this is so can the public be

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[24] See e.g. *Appleby*, ¶¶33, 36, 44
[25] *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (ONCA), ¶¶158-59; *Charter*, ss. 7, 11(d), 10(b)
[26] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, ¶¶40-41 and 78-79, *R. v. Nasogaluak*, 2010 SCC 6, ¶¶39-45, *R. v. Ipeelee*, 2012 SCC 13 [***Ipeelee***], ¶¶36-37; *Code*, ss. 718.1, 718.2

satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of *the system*."[27] This Court has already held that it "could be aptly described as a principle of fundamental justice under s. 7."[28]

33. As the Alberta Court of Appeal observed in *Arcand*, "[p]roportionality is based on a simple, yet compelling, premise. The severity of sanction for a crime should reflect the overall degree of moral blameworthiness, that is the seriousness, of the criminal conduct".[29] Proportionality measures both the fitness of punishment in relation to a specific offence, and the fitness of punishment in relation to other punishments given to offenders of comparable blameworthiness. This latter aspect, we refer to as *parity*.

34. Parity requires that offenders committing acts of comparable blameworthiness receive sanctions of comparable severity.[30] Parity is integral to the principle of proportionality in punishment,[31] and has been codified both as part of that principle and as a specified secondary principle.[32] Parity has been recognized by the Ontario Superior Court of Justice both as a facet of the principle of proportionality in punishment and as an independent principle of fundamental justice under s. 7 of the *Charter*.[33]

35. An interpretation of these provisions that would subject indigent accused individuals to the choice of self-representation or to the risk of additional jail time, is inconsistent with the values of proportionality and parity.

PARTS IV AND V: COSTS SUBMISSION AND ORDER SOUGHT

36. The BCCLA seeks no order as to costs and asks that no costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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[27] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 [***Motor Vehicle Reference***] at 533 (Wilson J., concurring; emphasis added); *Ipeelee*, ¶37; *R. v. Arcand*, 2010 ABCA 363 [***Arcand***], ¶¶54-55
[28] *Ipeelee*, ¶36
[29] *Arcand*, ¶48
[30] *Arcand*, ¶50
[31] *Arcand*, ¶¶50, 59 and 62; von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005), pp 137-43
[32] *Code*, ss. 718.1 and 718.2(b); *Arcand*, ¶¶59 and 61
[33] *R. v. Johnson*, 2011 ONCJ 77, ¶¶141-42

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Per:

Dated: January 7, 2018

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PART VI: TABLE OF AUTHORITIES