FORFEITING LEGAL FEES WITH PROCEEDS OF CRIME: 
THE ABILITY OF ACCUSED PERSONS TO PAY 'REASONABLE LEGAL FEES' 
OUT OF ALLEGED PROCEEDS OF CRIME 

by 

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The Canadian proceeds of crime provisions, Part XII.2 of the *Criminal Code*, are targeted at enterprises that are motivated by the desire to generate profit and accumulate wealth from criminal activity. The main purpose of Part XII.2 is to provide the police and prosecution with powerful new tools to attach the proceeds of crime, and the courts with the power to forfeit such proceeds.

This thesis will examine how, in recognition of the procedural and substantive problems with this legislation and in contrast to American legislation, Parliament included numerous provisions to balance such extensive powers. The balancing mechanisms included a provision that allows reasonable legal fees to be paid out of seized or restrained property that is alleged to be proceeds and another that requires an *in camera* session to be held without the presence of the Attorney General, to determine the reasonableness of such fees. The Parliamentary record explicitly demonstrates that the balancing provisions were meant to ensure that the pre-trial restraint and potential forfeiture of property would withstand *Charter* challenges, especially with regard to an accused's rights to counsel, fair trial and full answer and defence. In this thesis I will analyze the complexities of proceeds litigation and demonstrate how this necessitates adequate legal representation to ensure that an accused's *Charter* rights are protected.

This thesis explores in depth how Parliament recognized the need for balancing mechanisms that permit funds to be released for an accused to retain private counsel. However, these mechanisms have been significantly narrowed by subsequent judicial interpretation. A result of this line of authority is that defence work in the proceeds area has become very difficult. If reasonable legal fees are not taken from seized proceeds, provincial legal aid plans will have to provide for appropriate counsel. This may not be a realistic option given the funding of these plans and their stated objection to funding proceeds cases. Therefore, in this thesis I will argue that if private counsel must be retained the right to counsel could be effectively forfeited, unless a portion of the seized or restrained assets are released for reasonable legal fees.
This thesis will attempt to provide a coherent basis for future interpretation of the Part XII.2 provisions that affect legal fees. The approach taken will incorporate the competing interests of accused persons and the State without undermining the objectives of the legislation. This thesis will focus on Canadian legislation and jurisprudence, but will also have a comparative component that examines how these issues have been dealt with in Australia, England and the United States.
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DEDICATION

This thesis is dedicated to those who believe in and uphold one of the most important fundamental rights of our society, the presumption of innocence, unfortunately a right that many do not appreciate until they find a need to rely on it.
INTRODUCTION

Many people argue that legal fees should never be paid out of proceeds of crime. However, the reality of this issue pervading all areas of the legal profession means that there are few practicing lawyers who have never received, in some form, proceeds of crime as payment of legal fees. Canada’s new Criminal Code provisions that deal with proceeds of crime must be analysed with this reality in mind. Part XII.2 makes any dealing with the proceeds of crime, even accepting such proceeds as payment for legal fees, a criminal offence. However, in certain circumstances the legislation also recognizes that persons who have been charged, but not convicted of a crime, have the right to use the alleged proceeds of crime to pay reasonable legal fees. This provision effectively authorizes their association.

This thesis will examine the ability and the propriety of accused persons to pay for reasonable legal fees out of alleged proceeds of crime. An attempt will be made to provide a

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1 See B.C. Law Society, Benchers Bulletin No. 7 (November 1989); and Nova Scotia Barristers’ Society, “A Special Report to Members: The Impact of Proceeds of Crime Legislation on the Practice of Law” (1991) 17 NSL News 45. Note: Mr. A.D. Gold wrote the first, and only, book on proceeds of crime in Canada when there was no jurisprudence concerning Canadian legislation. See Gold, A.D., Proceeds of Crime: A Manual with Commentary on Bill C-61 (Toronto: Carswell, 1989). At 2 - 3, Mr. Gold warned of the breadth of this area. “It is hard to overestimate the importance of this legislation. ... [T]he provisions ... are expressed in language so broad that anyone dealing with any form of property or proceeds thereof, from anywhere in the world, that may be viewed as derived from acts that would arguably be criminal under Canadian law with knowledge or even merely suspicions concerning these suspect origins is a potential accused for violation of the provisions. Accountants, bankers, brokers, and lawyers, ignore these new provisions at your peril.”


3 See ibid. s. 462.3 [hereinafter proceeds of crime].

4 Ibid. s. 462.31 [hereinafter laundering proceeds of crime].

5 Ibid. s. 462.34(4)(c)(ii) [hereinafter legal fees exemption].
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cohrent basis for future interpretation of the Part XII.2 provisions that affect legal fees in a manner that will incorporate the competing interests of society and accused persons without undermining the objectives of the legislation. The approach taken will focus on Canadian legislation and case law but will also have a comparative component that examines how these issues have been dealt with in other jurisdictions. The comparative analysis will focus on the historical relationship\textsuperscript{6} of criminal forfeiture laws in Australia, Canada, England and the United States. In addition the socio-political factors that led to the adoption of each of these country’s system with regard to allowing legal fees to be paid out of seized proceeds will be examined. The prevailing preconceptions of our society and the judiciary towards alleged offenders will be challenged in this thesis. However, the main goal of this thesis is not to repudiate the past treatment of these provisions but instead to elaborate the implications for accused persons’ rights if the present course is maintained and to recommend a strategy for defence counsel working in this area. Thus an approach that utilizes prescriptive policy analysis will be adopted. While it is important to attempt to understand the values of the policy makers, it must be remembered that political considerations can override policy analysis.\textsuperscript{7} Therefore, a forfeiture law in relation to proceeds of crime may be stated as a means to facilitate the war on drugs, to ensure that crime does not pay, to ensure crime control, or to protect the economic, political and social institutions of society, all legitimate goals. In reality it may be used as a tool to support the political aspirations of a government at the end of its term seeking to draw from the ‘get tough on crime’ attitude desired by many citizens.

I wrote this thesis with a defence oriented agenda whereby my goal was to articulate a method of practice for lawyers in proceeds of crime area that would enable them to work in this area and be properly compensated for their efforts. A prominent basis for this thesis is a belief in


protecting the rights of accused persons. In particular, I firmly believe that all accused should receive the full protection of the law, until they have been proven guilty according to the legislative standard. In writing this thesis I have attempted to maintain an unbiased perspective and where possible provide the prosecution's view of the issues. Besides interviewing members of the bar who practice in this area, I have communicated with various members of the prosecution. The prosecution team includes officials of the Attorney General's office and the Justice Department, Crown prosecutors, and R.C.M.P. officers associated with the Anti-Drug Profiteering and Proceeds of Crime Task Force. In the end, the goal of the analysis of the legislation, the case law and my recommendations is that they will be appraised with the underlying consideration that I have attempted to balance the competing interests of all the parties throughout this thesis.

In writing this thesis I have adopted Sir James Fitzjames Stephen's framework that "[a] COMPLETE account of any branch of law ought to consist of three parts, ... (1) [i]ts history (2)[a] statement of it as an existing system [and] (3) [a] critical discussion of its component parts with a view to its improvement." This thesis will deal with each of these areas in turn. Stephen's framework was useful to help understand the context of the problems that are raised by the legal fees issue and the nature of the current Criminal Code provisions. The historical perspective was also helpful for determining legitimate solutions to the problems that are raised.

To derive legitimate solutions it was necessary to begin by conducting a historical analysis of the law of forfeiture. Therefore, the first chapter of this thesis examines forfeiture and proceeds of crime issues through a historical perspective. To accomplish this objective, a literature review was conducted, with much of the work coming from writers who wrote in the 1700 - 1800's, before what is now Canada had a law in relation to forfeiture. More recent interpretations of these writers' viewpoints were also considered. A limitation of this analysis is

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that these works are accepted without much debate. A socio-political analysis of the rational for forfeiture laws, beyond what these sources have identified, was not considered.

The concept of forfeiture dates to Biblical times and has changed very little over the centuries. Blackstone noted that the common law providing for forfeiture to the English Crown could be traced to the ancient Saxon law.9 His thorough historical analysis, along with the work of Sir James Fitzjames Stephen, forms the bulk of the historical discussion. The thesis then moves from the development of the English laws to what occurred prior to confederation in Canada, which basically adopted the laws of England.

Hay identified the proliferation of capital offences for crimes related to property in the eighteenth century10 and he noted that “the voices of money and power declared the sacredness of property in terms hitherto reserved for human life.”11 It was also noted that “[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property ...”.12 Therefore, the stature given to property in society at that time, provides a powerful indication as to how the population must have regarded the laws of forfeiture. There are also areas of civil law where forfeiture was used as a remedy,13 however, in civil law forfeiture is conducted in rem against the property. This thesis will concentrate on the area of criminal law.

Canada's criminal codes and other statutes have always had forfeiture provisions, but they were somewhat limited. These provisions were seriously defective because they only related to

11 Ibid. at 19.
12 Blackstone, supra note 9 vol. II at 2.
tangible property that could be brought before the Court and did not allow for the tracing of assets. Thus, the main flaw in the legislation was that there was no comprehensive legislation targeted at the proceeds of crime.

In addition to the recognition of this flaw in the Canadian legislation, there was impetus for change coming from outside Canadian borders. The international pressures will be discussed as well as how the United States, England and Australia developed forfeiture laws. In the 1970's the government of Canada began a long process aimed at dealing with the proceeds of crime. This history will be explored in-depth, including how the Canadian government was compelled to enact Part XII.2 of the Code in 1989 due to the combination of the need for a comprehensive legislative enactment to deal with the 'perceived' growing problem of proceeds of crime and the pressures from international obligations. The proceeds of crime provisions that were implemented are targeted at enterprises motivated by the desire to accumulate wealth and generate profit from criminal activity. The main weapon this legislation gave the courts was the power to confiscate those assets that were derived from specified crimes associated with organized criminal enterprises and eventually forfeit them to the Crown. It was felt that without destroying the financial capacity of criminal organizations, the deterrent effect of the criminal law would be weak and the organization itself would continue even if certain individuals were imprisoned.

Given the infancy of this legislation it was not difficult to trace its legislative history, including the Parliamentary debates and committee hearings that analysed the legislation when it was first proposed. These documents have been indispensable when analyzing why the Progressive Conservative government chose to enact this legislation and why it was brought forward when it was. This analysis will also be of assistance when attempting to interpret the provisions of Part XII.2 and when answering procedural questions where the legislation has failed
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to provide guidance. Bale has provided an excellent comment on the emerging Canadian view for the use of legislative history in statutory interpretation. He has documented how the Mischief Rule has re-emerged as more appropriate than the Literal (exclusionary) Rule when interpreting statutory language in certain circumstances.

He noted how the House of Lords, in Pepper v. Hart, found that debates can be used as an aid to statutory construction. Bale set out the various reasons for the demise of the exclusionary rule in Britain. These included: the move to a purposive approach to statutory interpretation; the volume and complexity of modern statutes, which has required the judiciary to seek greater knowledge of the legislative context in order to construe them properly; the growing realization that the canons of interpretation are simply a grab bag of conflicting presumptions that offer little guidance to the proper interpretation of statutes; the powerful European influence, which has reinforced the advantage of a purposive approach to legislation; the modification to the exclusionary rule by statute in Australia; the judicial modification of the rule in New Zealand; the large debate in the U.S. over the past decade with regard to the appropriate use of legislative history; the reality that in spite of the exclusionary rules many judges often look to the debates for

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14 See T. Brettel-Dawson, “Legal Research in a Social Science Setting: The Problem of Method” (1992) 14 Dalhousie L.J. 445 at 449. “[L]aw is a social phenomenon which cannot be studied in isolation from its social, economic and political context.”


16 Ibid. at 5. Judges are required "to determine the pre-existing common law, the defect in the common law, the parliamentary remedy and the true reason for the remedy. Having done this then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, ... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act. ... Under the mischief rule one seeks to ascertain the subjective intent of the legislators and therefore parliamentary proceedings leading up to the enactment of the statute are relevant.”

17 Ibid. Judges are required to determine "the objective legislative intent to be inferred primarily from the four corners of the statute and thus legislative history is regarded as irrelevant.”

guidance; and since courts do look to extrinsic aids such as Reports of Royal Commissions, Law Commission Reports and White Papers, excluding sometimes more relevant parliamentary debates became logically indefensible. In addition Bale noted that "[s]ince a person's ability to understand what is written is enhanced by context, a rule forbidding recourse to Hansard diminishes such competence and is therefore undesirable."^{19}

Driedger noted in the 1980's that "[i]t is well-established that debates or materials before Parliament are not admissible to show Parliamentary intent."^{20} Despite this claim there has been movement away from the adherence to the Literal (Exclusionary) Rule.

The more pragmatic and evolving Canadian approach is exemplified by Sopinka J. in \textit{R. v. Morgentaler} ... he stated: until recently the courts have balked at admitting evidence of legislative debates and speeches.... Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of the legislation.^{21}

There has also been wide acceptance that "when the constitutional validity of a statute is challenged, legislative history, including debates, is admissible."^{22} Bale contends that we should expect a spill-over into other areas where assistance might be needed. This has already occurred in the area of criminal law.^{23} "Parker has suggested that the reference to Hansard might be rationalised on the ground that the \textit{Criminal Code} is a basic document analogous to a constitution, or alternatively, that courts are entitled to look at the speeches of the Ministerial

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20 \textit{Ibid}. at 20.
See also E.A. Driedger, \textit{Construction of Statutes}, 2d ed. (Toronto: Butterworths, 1983) at 156.
22 \textit{Ibid}. at 21.
sponsor of the bill but not remarks of back-benchers.”

For example, one could argue, by implementing the reasonable legal fees exemption provision, Parliament attempted to ensure that the pre-trial restraint and potential forfeiture of property would withstand Charter challenges, especially with regard to an accused’s right to counsel and full answer and defence. This evidence, and more that will be discussed in detail, could be very useful when arguing for a liberal interpretation of the provisions that allow a lawyer to be paid reasonable legal fees out of alleged proceeds of crime.

However, to be able to formulate a stronger argument it was necessary to step back and examine the history of the right to counsel, so that later on in the thesis the ramifications of the potentiality of forfeiting legal fees could be understood. Chapter Two provides a brief analysis of the history of the right to counsel. It begins by examining the origins of this right and how it has been expanded over time. The richer American experience is examined first. This discussion will be of benefit when comparing the effect of forfeiture laws. Then the law as it developed in Canada is discussed, beginning with statutory protections and jurisprudential interpretation of this


26 See especially the evidence of Mr. Allan D. Gold, who testified on behalf of the Canadian Lawyers’ Association at the Parliamentary Committee hearings on Bill C-61. His testimony can be found in Canada Parliament, House of Commons Legislative Committee on Bill C-61 Minutes of Proceedings and Evidence (Ottawa: Queen’s Printer, 1988) (Chair: Fred King) at 3:5 - 27 [hereinafter C-61 Committee Hearings]. Further evidence of this can be seen from the statement of Mr. Ramon Hnatyshyn (Canada’s Minister of Justice and Attorney General at that time), in C-61 Committee Hearings, ibid. at 5:9, where he said: “The provision of allowing an application for reasonable legal fees is in fact a noble improvement to the present law, and one I think we have to acknowledge will ensure the constitutional right to retain and instruct counsel.” [emphasis added]
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right. This is followed by a discussion of the advent of the Bill of Rights and how it affected the right to counsel. The most important developments in this area have come from the enactment of the Charter. The analysis will show that the Charter not only guarantees the right to counsel but it also protects other fundamental freedoms that can be adversely affected where the right to counsel is not protected. It will include a discussion of how the right to counsel has come to be recognized as being essential to the proper functioning of our adversary system in certain circumstances.

Building on the historical foundation of forfeiture and right to counsel that was established in the first two chapters, Chapter Three analyzes the issue of legal fees and forfeiture. It will be shown how forfeiting legal fees has the potential for acting as the 'engine of destruction' of the integrity of our judicial system. The treatment of legal fees is traced through the international arena and the United States, England and Australia, before undertaking an in-depth analysis of the Canadian situation. The comparative analysis in this area is essential to later arguments in relation to how and why the Canadian provisions are unique and why they should be given a liberal interpretation. Despite this potential argument, it will be shown how and why the jurisprudence to date has narrowly interpreted the legal fees provision by failing to appreciate the context and ramifications of not reading it as Parliament had intended. Bearing in mind that the Supreme Court of Canada has not ruled on any of the Part XII.2 legal fees provisions it is essential to consider the jurisdiction of any decision to determine its precedential value for a particular jurisdiction. However, since many of these provisions have only been considered a few times, if at all, for analytical purposes it was necessary to ignore jurisdictional boundaries in many instances. Given the dearth of case law in this area, perhaps 'the better' decisions of certain jurisdictions will transcend boundaries although they may lack the requisite precedential value. Part of my analysis of the case law will include a critique of the strategy taken by defence counsel and also the evident 'conceptual baggage' of some judges. The Chapter will end with a discussion of the Manuel Noriega case from the United States. This case demonstrates how difficult and potentially
Introduction

dangerous it could be if the American forfeiture mentality is followed in Canada.

Chapter Four will explore, in-depth, the role that defence counsel can play in the area of proceeds of crime. First, the strategy of defence counsel in relation to non-Part XII.2 warrants, the availability of other resources and then Charter argument will be discussed. The cost of defending against a possible forfeiture order will be quite high, due to the complexity of the litigation involved. Accused persons under this legislation not only have to deal with the triggering substantive offence, but also a forfeiture application, an application for release of funds for legal representation and numerous Charter issues. The problems of not compensating defence counsel, or putting their fees at risk will be discussed. Then the response of the legal aid system will be analysed. This latter issue raises the question of the State's ability to provide an adequate defence in this highly complex area, where State funded defence systems' resources are already being pushed to the limit. Ethical issues that arise for defence counsel working in this area will be canvassed, as well as a proposed argument to be made in favour of the court exercising its discretion not to impose a fine in lieu of forfeiture where reasonable legal fees have been paid out of seized or restrained property. Finally, the legal fees' application procedure will be briefly discussed to highlight the steps and precautions that must be taken.

Chapter Five contains the conclusion and recommendations as to what the courts should consider when determining whether to pay reasonable legal fees out of seized or restrained property. Finally, a call to action on the part of the Supreme Court of Canada is made. This plea simply recommends that an appropriate balance be struck. One that will ensure that an accused's right to counsel can be protected at the same time as society's interest in preserving alleged proceeds of crime for a possible forfeiture order so that crime does not pay.

Obviously this work does not intend to be the final answer on the issue of legal fees and proceeds of crime. Instead it is hoped that it will nourish further debate, which may eventually lead to a fairer balance being struck before the end of the turn of the century. The area of
proceeds of crime is a fascinating field. It has an enormous potential for growth in Canada once all Attorneys General begin to proceed seriously with such cases. However, an indispensable player in this growth is the criminal defence lawyer who is competent in the area of proceeds of crime. Once the proper balance is struck between legal fees and proceeds of crime, this area can be laid to rest and the proceeds jurisprudence can focus on other more interesting proceeds of crime issues.
Proceeds of Crime: A Historical Perspective

Chapter 1

Proceeds of Crime: A Historical Perspective

I. Introduction

Until 1989 there were no *Criminal Code* provisions in Canada allowing for the forfeiture of proceeds of crime as a dispositional alternative. Because of this, proceeds seized as evidence were returned to accused persons, regardless of the outcome of the trial, unless they were used to purchase the narcotic that was the subject of the trial.¹ The need for some form of legislation was, and is, indisputable when one considers the estimated $10 billion annual trade in illicit drugs in Canada.² Forfeiture provisions are necessary to stem the social, political and economic problems that would develop if this area went unchecked. However, problems arise when the rights of individuals charged with crimes in this area are not afforded the same fundamental protections that every citizen is guaranteed.

II. Early Forfeiture Law

Throughout legal history certain laws have been enacted to protect society from criminal or uncivilized behaviour. One response to a violation of the law was to deprive the offender of any right they held in certain property. This penalty is known as forfeiture. Forfeiture is an ancient doctrine that has been defined as “the loss of some right or property as a penalty for some


Note: It is recognized that 'enterprise offences' includes many offences, however drug related offences dominate the attention of the police and prosecution.
illegal act.” In old English law “[f]orfeiture [was] a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments, whereby he los[t] all his interest therein, …” Where forfeiture occurs automatically upon conviction of a criminal offence it is said to be in personam, as the action is taken against the person.

The Bible recognised the penalty of forfeiture by noting that “if an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten.” To atone for the wrong the offensive property was forfeited and destroyed. This form of forfeiture remained the same for centuries, until

under Alfred the Great in the ninth century, it had developed into the notion of “noxal surrender” by means of which one kin would surrender the instrument of accidental death to the aggrieved kin in order to prevent any action by the latter against the former.

By the time it was incorporated into the laws of England, the concept had become known as “deodand”, from the latin [sic]“deo dandum” meaning “given to god”, which proves at least an etymological relationship to the goring ox of biblical times. The philosophical relationship, however, was less clear. No longer was the surrender of the offending chattel to God or to the next of kin, but rather to the King. As the Crown increasingly supplanted the Church as the ultimate authority in the land, deodand adopted an increasingly secular posture, becoming over the years an important source of guarantee of revenue, yet at the same time, maintaining some element of its original expiatory function.

Blackstone noted that the common law providing for forfeiture to the English crown could be traced to the ancient Saxon law. He set out the law of forfeiture applicable when a person was sentenced to death for high treason and attainder was pronounced. When found guilty, the person’s civil rights and capacities were extinguished, and as a result that person:

6 Porter, ibid. at 256 - 7.
7 Blackstone, supra note 4 vol. IV at 384.
forfeit[ed] to the king all his lands and tenements of inheritance, whether fee-simple or fee tail, and all his rights of entry on lands or tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown: and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed so as to avoid all intermediate sales and incumberances, but not those before the fact ....8

Thus, under the common law not only was the property forfeited, but family members of the accused person lost all inheritable rights. Further, third parties holding an interest in the land before the crime was committed had their interests protected from forfeiture, but anyone who established a claim after the commission of the offence was not so fortunate.9 As Blackstone noted, the rational for not protecting those who acquired an interest after the crime had been committed was that "the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has knowingly and dishonestly involved others in his own calamities."10 The forfeiture of goods and chattels would occur upon the conviction of any of a number of 'the higher kinds of offences'. The important difference between the forfeiture of land and goods and chattels, was that, with respect to the latter, the triggering event was conviction, so that only what a person held at the time of conviction was forfeited.11 Thus, "a traitor or felon may bona fide sell any of his chattels ... between the fact and conviction."12 However, "if they be collusively and not bona fide parted with, merely to defraud the crown, the law ... will reach them ...."13 Thus, in order to be valid, pre-conviction transfers had to be made in good faith.14 Also, whether

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8 Ibid. at 381.
9 Note: It will be argued that the Canadian Parliament's inclusion of the provision for varying a Special Search Warrant or Restraint Order, including the legal fees exemption s. 462.34(4)((c)ii) of the Criminal Code, was an explicit move away from the common law and prior statutory law.
10 Blackstone, supra note 4 vol. IV at 386.
11 Note: it is important to know that the forfeiture provisions of Part XII.2 are conviction based.
12 Blackstone, supra note 4 vol. IV at 387.
13 13 Eliz. c. 5, in Blackstone, ibid. at 388.
14 It is arguable that payment of fees for legal representation would be such a transfer.
it was land or goods and chattels, the provisions did not distinguish between 'clean' assets and those that were the proceeds of criminal activity; all of the property was forfeitable and taken by the Crown.

In the nineteenth century, Sir James Fitzjames Stephen published his view on most areas of the criminal law including the area of forfeiture. This work explained the provisions in his Digest, in which he had attempted to codify the common law relating to criminal offences. Canada's first criminal code was in part based on Stephen's Digest. Accordingly, his opinions were important to the formation of our laws. He objected to the use of forfeiture as a penalty and noted that it had its "source in the feudal theory that property, especially landed property, was held of a superior lord upon the condition of discharging duties attached to it, and was forfeited by the breach of those conditions. They have no history at all, but prevailed from the earliest time ..."  

"With respect to its complete ineffectiveness as a remedy for accidental death, the institution of the deodand was finally abolished in 1846 by the adoption of Lord Campbell's Act." The penalty of forfeiture continued until forfeitures for felony were abolished in England by the Forfeitures Abolition Act of 1870. Stephen also objected to some of the provisions within the Forfeitures Abolition Act replacing the abolished legislation, and he called for them to

16 Criminal Code, 1892, 55 - 56 Vict., c. 29 [hereinafter Criminal Code, 1892].
17 The Canadian Criminal Code was also in part based upon the work of G.W. Burbidge, who drew largely from Stephens' Digest; in fact Burbidge often used Stephen's exact words. See G.W. Burbidge Digest of the Criminal Law of Canada (Montreal: Carswell & Co., 1890).
19 Porter, supra note 5 at 257. See An Act to Abolish Deodands, 1846, 9 & 10 Vict., c. 62.
20 An Act to Abolish Forfeitures For Treason and Felony, and to Otherwise Amend The Law Relating Thereto, 1870, 33 & 44 Vict., c. 23, s. 1.
be repealed as well.\(^{21}\)

Given that forfeiture was part of the common law doctrine, Canada also applied the penalty of forfeiture as a part of the punishment for a person convicted of a felony. However, the general common law power of forfeiture was eliminated by Canada's first *Criminal Code*, which adopted the laws of England, including those in relation to forfeiture.\(^{22}\) "In spite of this the Code always contained a variety of forfeiture provisions directed at the instrumentalities of crime, but not at the profit from crime."\(^{23}\) These forfeiture provisions applied to property that was illegal on its own\(^ {24}\) or became illegal because it was used in the commission of an offence.\(^ {25}\)

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Note: Ms. Longo also notes that this lacuna was remedied in 1989 with the adoption of proceeds of crime legislation in Canada.

\(^{23}\) *Ibid.* [emphasis added]

\(^{24}\) For example see: s. 102(3) prohibited weapon; s. 164(4) crime comic or obscene matter; s. 192 interception device; ss. 199 and 206(5) lottery or gaming material; ss. 319 and 320 hate propaganda; s. 462 counterfeit money, token or equipment.

Note: J.M. Clark, "Civil and Criminal Penalties and Forfeitures: A Framework of Constitutional Analysis" (1976) 60 Minn. L. Rev. 379 notes at 479 that "[t]he states [sic] interest in keeping dangerous items out of the hands of the public is properly fulfilled by forbidding their use by all persons whether or not these persons have committed offences and whether or not the forbidden items have been used to commit offences.” Therefore, there is no deprivation of property as such goods are never legally owned by the person.

\(^{25}\) For example see: s. 327(2) device to obtain telecommunication service without payment; ss. 394 and 395 fraud in relation to mineral or precious metal; s. 401(2) goods unlawfully carried; s. 412 offences re trade-marked goods; s. 491 weapon or ammunition used in an offence; s. 492(2) explosives intended to be used for an unlawful purpose.
III. Modern Forfeiture Law

A. International Developments Overview

This section will examine the more 'modern' developments in the area of proceeds of crime and forfeiture, grew largely out of the desire to control the perceived problems related to the illicit drug industry.27 The current structure of the international community's mechanisms to control the problems caused by organized crime, and in particular the drug trade, is the result of an evolutionary process, in that "[e]ach Narcotic Convention benefited from the experience of its predecessor and filled certain gaps while improving previously existing devices."28 Cherif Bassiouni has set out the 15 international instruments that were entered into from 1912 to 1972.29 The instrument that established international cooperation, in an attempt to control narcotic drugs, was the International Opium Convention.30 This convention condemned drug trafficking and it "dealt with opium because of its perceived dangers in the Western societies of

26 This section draws largely from G.J. Rose, "Attempts To Combat Money Laundering: An International Perspective" (LL.M. Candidate, Faculty of Law, University of British Columbia, 1995) [unpublished].
27 By 'modern' I am referring to the twentieth century.
See also Bassiouni, International Narcotics, ibid. at 512 - 24, where these instruments are discussed further.
the United States and Europe." The attempts at international control culminated in the *U.N. Drug Convention* of 1988, which is the latest in the evolution of the United Nations attempts to

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Note: Professor N. Boyd, “Bill C-7 and The Control of Drugs” (Address for the Green College Criminal Law Lecture Series, University of British Columbia, 15 March 1995) [unpublished], argued that the drug problem is a health problem not a criminal law problem and the first step toward criminalisation of narcotics in Canada had more to do with a perceived problem with excess Asian labourers and nothing to do with public health. He supported this interpretation with the fact that the legislation was initiated by W.L. Mackenzie King, then the Minister of Labour of Canada.

Note also: E. Nadelmann, “Alternate Drug Policies” (Address for the International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 1994) [unpublished], where he argued that the origins of the first drug laws were based on racist principles.

Proceeds of Crime: A Historical Perspective

win the worldwide war on drugs. The Drug Convention "mark[ed] a significant step by the world community towards bringing effective law enforcement measures to bear against international narcotics traffickers." "The object of [the Convention was] to establish a strong, relatively uniform application of criminal justice in respect of drug-related offences that would enhance the effectiveness of the international co-operation in this field." Therefore, the Drug

33 S. Stovern, a 37 year veteran of the R.C.M.P., is quoted in the 16 November 1994 Minutes of a Meeting of The CBA - Criminal Justice Section of Vancouver, as saying "the war on drugs is poppycock ... [it] was lost years ago. ... [it is like] the 'finger in the dike routine' and ... the dike burst long ago."

See Nadelmann, supra note 31. Professor Nadelmann stated that the United State's campaign to persuade other countries to adopt their 'war on drugs' policies brought President Ronald Reagan to visit Prime Minister Brian Mulroney in Ottawa. The next day, much to many people's surprise, Prime Minister Mulroney announced that Canada now had a drug epidemic, and with those words the 'war' had begun in Canada.

Note: while Mr. Nadelmann's statement may appear to be accurate given the timing of the Reagan visit with the current legislation, the fact is that Canada's strategic 'pre-war' maneuvering to combat this problem began in the 1970s, as will be discussed below.

See B.K. Alexander, Peaceful Measures: Canada's Way Out of the War on Drugs (Toronto: University of Toronto Press, 1990) at 1 - 51, where he details the realities of the 'war' and why it has received so much government approval.

Note: Despite Professor Alexander's prescriptive title, his prediction of a possible end to the 'war' is highly guarded.

Note: Inspector Bruce Bowie Officer In Charge Anti-Drug Profiteering Section - R.C.M.P., as interviewed by Market Place, CBC Television (January 17, 1995) "We have to take the profit out of crime. If you take the profit out of crime you remove the desire to commit crime."

Note: also "Big Deal" vol. 329 no. 7841 The Economist (Dec. 11 - 17, 1995) at 45, "Millions of dollars and many lives were spent to wipe out the drug lord [Escobar]. But as long as America and Europe multiply the value of drugs by keeping them illegal, others will emerge."

34 D.P. Stewart, "Internationalizing The War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (1990) 18:3 Den. J. Int'l L. & Pol'y 387 at 387. Contra see D. Ewing, a 32 year veteran of the R.C.M.P., where he is quoted in the 16 November 1994 Minutes of a Meeting of The CBA - Criminal Justice Section of Vancouver, as saying "today law enforcement cannot do much against major drug traffickers."

Convention was part of an international movement to combat international crime. In particular there has been a perceived crisis with respect to drugs in many countries for a number of years:

Indeed the problem of drug abuse and the concomitant problem of drug trafficking currently forms an integral component of several states’ economies, threatens to undermine political and judicial systems, has become a leading cause of domestic crime, and is an increasing burden on states’ health and welfare systems. As importantly, the issue of drug trafficking has become a friction point in relations among states, most notably those between the United States and a number of Latin American countries.

Bassiouni noted that "[g]overnments have recognized ... that in order to be effective, penalties imposed on traffickers must have a deterring effect whereby the penalty outweighs in the eyes of the potential offender the benefits of the prohibited activity." In particular, the

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36 Note: as will be discussed later, at the time of the Drug Convention the United States and the United Kingdom already had legislation in place to deal with organized crime, however, this was the first effort on an international scale.

37 Sproule, supra note 35 at 264. However, see Boyd, supra note 31. Professor Boyd argued that the drug laws, which helped create the problem, are a product of the twentieth century and that the drug supplying nations did not have a ‘drug problem’.

38 Bassiouni, International Narcotics, supra note 28 at 522. Note: For an economical critique of the ‘war on drugs’ see D. Fraser, “Lawyers Guns and Money” in Fisse, B., D. Fraser & G. Coss, eds., The Money trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting (Sydney: Law Book Co., 1992) c. 4. Professor Fraser argues that the State can eliminate the profit margin of crime and if they would do so criminals, who are wealth rationalizing individuals, would not engage in the activity. However, because the State chooses not to take the profit out of crime and instead rely on asset forfeiture legislation as a control mechanism, such legislation is simply another form of market regulation by the State.
United States Government took an active role in attempting to combat money laundering. The government asserted “that international currency transactions ... which involve the proceeds of narcotics trafficking, [were] ... a threat to the national security of the U.S.” Further “[t]he main objective of [the earlier] conventions [was] to restrict the supply of narcotics to medical and scientific needs.” This effort was seen as insufficient to combat the growing problems related to drug trafficking: “Awakened to the need for concerted and more effective action to harness the traffickers, the international community began work in 1984....” At that time:

- the General Assembly of the United Nations, ... requested the Economic and Social Council of the United Nations to request the Commission on Narcotic Drugs to initiate, ... as a matter of priority, the preparation of a draft convention against illicit traffic in narcotic drugs that considered the various aspects of the problem as a whole and, in particular, those not envisaged in existing international instruments.

Stewart, supra note 34 at 388, wrote that “[t]he U.S. participated actively in the negotiation of the [Drug] Convention, and many of its provisions reflect the legal approaches and devices already found in U.S. law.”

Note this fact demonstrates the power that the United States holds within the United Nations, because despite the U.N. being made up of a diverse group of states, the United States was able to deliver a convention that largely reflected its norms.

In contrast to this contention B. Zagaris, “Protecting the Rule of Law from Assault in the War Against Drugs and Narco-Terrorism” (1991) Nova L. Rev. 703 at 704 [hereinafter Zagaris, Rule of Law] has noted that “most professionals in the U.S. believe that international policy comes from the pronouncements of the U.S. Government .... However, the international drug policy set by the United Nations is the international policy within which national governments must adopt and fund their own policy so that the international policy can become operational and effective.

Note however, what Zagaris fails to recognise is the fact that ‘most professionals’, as he calls them, are essentially correct because the United States plays such a dominant role in the formulation of the international policy.


Stewart, supra note 34.

Zagaris, International Judicial Assistance, supra note 40. [emphasis added]

This request led to a draft convention and then a consolidated working document that was circulated to all participating governments in April 1987. The document was then refined by two inter-governmental expert groups, which then put forward the Drug Convention that was adopted in 1988.

In order to comply with the Drug Convention the signatories are obligated to implement a number of provisions “including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.” Article 3 defines the offences and sanctions set out in the Convention. Signatories are obligated to establish offences under their domestic laws in relation to most dealings with narcotics, including “[t]he organization, management or financing” of such offences. Article 5 obligates the signatories to adopt measures that will enable the confiscation of proceeds derived from offences established in accordance with Article 3, paragraph 1, including the money laundering offences. It also obligates the establishment of provisions that will allow the authorities to identify, trace, and freeze or seize proceeds and that bank secrecy cannot be a reason for not acting.

44 See Drug Convention, supra note 32 art. 2(1).
See also M.C. Bassiouni, “Characteristics of International Criminal Law Conventions” in M.C. Bassiouni, ed., International Criminal Law, Vol. I: Crimes (New York: Transnational, 1986) 1 at 3 [hereinafter Bassiouni, ICL Conventions]. “[A]n International Criminal Law convention which explicitly or implicitly recognizes certain conduct as an international crime establishes the duty upon signatory states to criminalize the prohibited conduct, to prosecute the accused violators or to extradite accused violators to other states desirous of prosecuting them, and to cooperate with other states in the prevention and suppression of such conduct.”

45 See Drug Convention, ibid. art. 3(1)(a)(i) - (iv).
Note: Stewart, supra note 34 at 393 stated that “[t]hese ‘core’ ... offences ... constitute the cornerstone of the Convention, and are specially focused on those drug trafficking and money laundering activities that have the greatest international impact. Many of the other provisions in the Convention, for example those relating to confiscation, extradition, and mutual legal assistance, are keyed to these particular offences.”

46 See Drug Convention, ibid. art. 3(1)(a)(v).
47 See ibid. art. 5(1)(a).
48 See ibid. art. 5(2).
49 See ibid. art. 5(3).
A goal of money laundering is to transfer 'illegal funds into legitimate channels so that its original source cannot be traced'. In order to reach the 'tainted' assets, article 5(6) obligates signatories to make such property liable to be seized, frozen and confiscated. The decision to make paragraph 6 mandatory was important because of the skill and speed with which large-scale traffickers are able to launder their profits. It should be noted that the confiscation provisions are not to be construed so as to prejudice the rights of bona fide third parties. The confiscation provisions were designed to provide a powerful weapon in the war against money laundering and drug trafficking, as they strike at the heart of organized criminal activity - profits.

The Drug Convention also obligates the signatories to engage in a number of other activities related to proceeds of crime control including, extradition, mutual legal assistance, transfer of proceedings and other forms of co-operation and training. Following its obligations as a signatory, Canada introduced legislation dealing with proceeds of crime, mutual legal assistance, and money laundering. The latter effort was created "to establish

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50 See ibid. art. 5(6).
51 Sproule, supra note 35 at 284.
52 See Drug Convention, supra note 32 art. 5(8).
53 Note: this interpretation may be of benefit to defence counsel seeking payment of legal fees out of seized proceeds.
54 See Drug Convention, supra note 32 art. 6.
55 See ibid. art. 7.
56 See ibid. art. 8.
57 See ibid. art. 9.
58 Note: there are numerous other obligations listed in Articles 10 - 20.
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record-keeping requirements in the financial field in order to facilitate the investigation and prosecution of offences ...."61

B. Survey of National Developments

1. United States

The American revolution resulted in the separation of the English and American legal systems. The harshness of a criminal forfeiture penalty was recognised and it was banned by the United States Constitution;62 "From that time, until 1970, there was virtually no use made of criminal forfeiture laws in the United States."63 The United States relied on in rem civil proceedings against the property itself, rather than having to depend on the conviction of a person. The civil forfeiture powers worked well;64 however, the need to battle organized crime in the United States was recognized as early as 1891 by a Grand Jury. Despite this recognition, a District Attorney stated in the 1960s that the Mafia was a myth.65 Regardless of the mythical belief of some, "[d]ecades of commission hearings into organized crime in the United States in the 1950's and 60's led the Americans to seek more effective legislative tools to deal with the

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61 Ibid. s. 2.
62 U.S. Const. art III, §3 cl. 2. "[N]o Attainder or Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained."
64 Civil forfeiture continues to play an important role in the enforcement program of the state and federal governments. Snider, ibid. at 2, notes that there are now over 200 civil forfeiture statutes in the laws of the United States. See C.M. Morrow, The Use of Civil Remedies In Organized Crime Control, rev'd ed. (Raleigh, N.C.: National Association of Attorneys General, 1977) at 5 - 14, for the advantages of civil remedies.
problems they were facing in attempting to restrict its growth and economic power.\textsuperscript{66} Although there was increased attention paid to the problem and more resources devoted to its control, the commission hearings are said to have made little impact on organized crime. This result was largely due to the political structure at that time.\textsuperscript{67} However, despite the political problems, the commissions made an important step in exposing the previously mythical understandings of organized crime. Within a decade, the political attitude began to change and there was a desire to eliminate the infiltration of organized crime into ‘legitimate’ businesses.

In 1970, the United States Congress shot the first large cannon directed at the heads of organized criminal activity by enacting two pieces of criminal legislation, the \textit{Racketeering Influenced and Corrupt Organizations Act},\textsuperscript{68} and the \textit{Continuing Criminal Enterprise Act}.\textsuperscript{69} The purpose of \textit{RICO} “[was] to prevent and punish financial infiltration and corrupt operation of legitimate business operations affecting interstate commerce.”\textsuperscript{70} In 1984, Congress enacted the \textit{Comprehensive Forfeiture Act}\textsuperscript{71} which clarified and strengthened the forfeiture provisions of \textit{RICO} and \textit{CCE}.\textsuperscript{72}

\begin{itemize}
\item See also Moore, \textit{Kefauver Committee}, supra note 65 at 49, where he noted that this investigation began with the Kefauver Committee which proposed to conduct “a full and complete study and investigation of interstate gambling and racketeering activities and of the manner in which the facilities of interstate commerce are made vehicle of organized crime.”
\item \textsuperscript{67} See Moore, \textit{Kefauver Committee}, \textit{ibid.} at 135 - 71, and 206 - 42, where the report discusses how the political considerations dominated the actions and outcomes of the committee.
\item \textsuperscript{68} 18 U.S.C. §§ 1961 - 63 (1988) [hereinafter \textit{RICO}].
\item \textsuperscript{69} 21 U.S.C. §848 (1988) [hereinafter \textit{CCE}].
\item \textsuperscript{70} \textit{United States v. Sutton}, 605 F.2d 260 (1979).
\item \textsuperscript{71} 21 U.S.C. §853 (1988) [hereinafter \textit{CFA}].
\item See also S. Dettelbach, “Forfeiting The Right To Counsel” (1990) 25 Harvard Civil Rights - Civil Liberties L. Rev. 201 at 202 - 05.
\end{itemize}
In the battle against organized crime, the investigative powers of the U.S. government are constrained by the rights incorporated in the United States Constitution. \footnote{U.S. Const. amend. IV, (1791). “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”} Bearing this restriction in mind, the government is allowed to seize property through a warrant, if that property is subject to a forfeiture order. \footnote{21 U.S.C. §853(f).} The actual constraint that this precondition poses on a seizure is minimal given that “[t]he range and powers of [U.S. proceeds] statutes provide an unprecedented ability to take the profit out of crime … by allow[ing] anything to be seized and forfeited if it was used to facilitate the commission of a range of crimes or if the asset is shown to have been acquired through the proceeds of crime.” \footnote{J.L. Evans, “International Money Laundering: Enforcement Challenges and Opportunities” (Paper presented to Southwestern University School of Law’s Symposium on The Americas: Eradicating Transboundary Crime, 1995) at 3 [forthcoming in Southwestern University Law Journal]. \textit{Note:} the comprehensiveness of the American forfeiture provisions is evidenced by the United States Supreme Court in \textit{Calero-Toledo v. Pearson Yacht Leasing Co.}, 416 U.S. 663 at 668 (1974) as cited in \textit{Porter, supra} note 5 at 258, “contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.” [emphasis added]} The United States’ war on drugs has helped create over 200 civil forfeiture statutes and numerous criminal forfeiture statutes, although the civil provisions are used most often. \footnote{Baldwin & Munro, \textit{supra} note 2 vol. I, “United States: Forfeiture and Asset Freezes” at 6. See also E.C. MacAulay, “Canada’s Proceeds of Crime Legislation And Its Impact” (Address to The Society for the Reform of Criminal Law: 8th International Conference, The Corporation and The Criminal Law - Hong Kong, 4 - 8 December 1994) at 1 [unpublished].} The result of this effort is a legislative quagmire, which makes it difficult to find the relevant provisions, let alone understand them. Therefore, while initially deploring forfeiture as a draconian penalty, the United States has enacted a plethora
of forfeiture laws, which arguably have been successful in combatting crime and raising revenues for the state.77

2. England

The need for increased forfeiture powers in England was advocated by a committee on penal reform after the House of Lords narrowly interpreted the forfeiture provision of the Misuse of Drugs Act, and another decision held that the courts lacked the jurisdiction to trace and forfeit indirect proceeds.78 These incidents led to the passage of the Drug Trafficking Offences Act in 1986,79 which was amended and supported by other legislative changes over the years. This effort led to new legislation that became effective on 3 February 1995. The new comprehensive Drug Trafficking Act80 has repealed and consolidated the DTO, and certain provisions of the Criminal Justice (International Co-operation) Act,81 which relate to drug trafficking. The Act is divided into four parts. Part I deals with confiscation orders; Part II deals with drug trafficking money imported or exported in cash; Part III deals with offences in connection with proceeds of drug trafficking; and Part IV includes miscellaneous and supplemental provisions. The main features of this Act are set out in Appendix 2.

77 R.H. Davidson, “Search Warrants, Restraint Orders and Revenue Demands” in Proceeds of Crime (Vancouver: B.C. Continuing Legal Education, 1993) c. 3.2 at 3.2.26 has argued that the resultant increased revenues provide sufficient justification for forfeiture laws because “[s]ignificant forfeitures ... produce more revenue than they consume ....”

78 See Mosley, Seizing The Proceeds, supra note 66 at 6 - 7.


79 Drug Trafficking Offences Act (U.K.), 1986, c. 32 [hereinafter DTO].

80 Drug Trafficking Act (U.K.), 1994, c. 37 [hereinafter Drug Trafficking Act].


81 Criminal Justice (International Cooperation) Act (U.K.), 1990, c. 5.
3. Australia

The Australian government joined the trend of the 1980s and in 1985 a "[g]eneral agreement for confiscation action against those convicted of narcotics offences, was reached at the Special Premiers’ Conference on Drugs ...."\(^{82}\) Two years later the Proceeds of Crime Act was passed.\(^{83}\) This Act is one of the most ‘user friendly’ proceeds of crime statutes. The provisions are clearly set out under different ‘Divisions’ dealing with specific areas. The Act is one of the most extensive proceeds statutes with regard to establishing procedural guidelines. However, on occasion this can also make the legislation more cumbersome to work with and may make it easier for defence counsel to find loopholes.\(^{84}\)

4. Canada\(^{85}\)

As was noted above the Criminal Code of Canada contains many forfeiture provisions,\(^{86}\) and it also contains a general forfeiture section.\(^{87}\) However, in practice, these provisions were unsuitable for effectively dealing with the proceeds of crime.\(^{88}\) In the 1970s, Canadian legislators recognised that Canada was well situated to become a haven for money laundering as there were

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\(^{83}\) Proceeds of Crime Act (Aust.), 1987, No. 87.

\(^{84}\) For example, the Australian legislation contains twenty-three sections dealing with restraining orders, which cover twenty-two pages of legislation. In comparison, the English legislation on restraint orders is covered by two sections and it is covered by one section in both Canada and the United States. See: Appendix 2: Comparative Table of Selected Proceeds of Crime Legislation

\(^{85}\) The seminal work that sets out the development of proceeds of crime legislation in Canada is the unpublished paper of Mr. R.G. Mosley, Q.C., see Mosley, Seizing The Proceeds supra note 66.

\(^{86}\) See supra notes 23 - 25 and accompanying text.


\(^{88}\) See infra notes 98 - 106 and accompanying text.
no legislative provisions for attaching proceeds of crime. The attraction to Canada, among other factors, included an efficient banking system, the ease of entry into the country and the desire to elude the extensive net of forfeiture laws in the United States. In recognition of the potential problems that could develop because there were no effective statutory controls on the proceeds of crime, "[a] member of the Ontario legislature, James Renwick, introduced a private member’s bill in an effort to have provincial law respond to the problem he foresaw. ... [T]he matter was referred to the federal government for action under the criminal law power." 89 This impetus led to the enactment of s. 312 of the Criminal Code. 90 Despite the initial swift action on the part of the federal government, comprehensive proceeds of crime legislation would not be in force in Canada until 1989. The road to the 1989 legislation was long and well traveled.

(a) Section 312

Since the enactment Canada’s first criminal code there has been an offence dealing with the possession of property obtained by crime. 91 This section was designed to deal with property obtained by theft. For the most part, the provision remained the same for 83 years. 92 In the 1970s there was a sense that organized crime was on the verge of becoming powerful and that

89 Mosley, Seizing The Proceeds, supra note 66 at 9.
Note: this provision is now found in Criminal Code, supra note 87, s. 354.
91 Criminal Code, 1892, supra note 16, s. 314. Receiving Property Dishonestly Obtained: “Everyone is guilty of an indictable offence, ... who receives or retains in his possession anything obtained by any offence punishable on indictment.”
92 R.S.C. 1906, c. 146. S. 314 was re-enacted as s. 399 with only a slight modification and not affecting the text as set out in note 91.
R.S.C. 1953 - 54, c. 51. S. 399 was re-enacted as s. 296. Having In Possession Property Obtained By Crime “Every one commits an offence who has anything in his possession knowing that it was obtained [by the commission of an indictable offence].”
R.S.C. 1970, c. C-34. S. 296 was re-enacted unchanged as s. 312.
Canada was becoming a haven for money launderers. It was recognised that the *Criminal Code* failed to equip the police adequately for fighting this problem. The possession of stolen property provision of the time was only effective against the specific stolen property because it did not allow tracing to the proceeds of the theft. Therefore, an amended s. 312 contained the first Canadian legislative provision that attempted to deal with the proceeds of crime. It prohibited the possession of any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

"The express object of the amendment was to shut the door to organized crime profits from the U.S. ... [however] the expanded scope of the section was largely unknown, even to the police and prosecution who were expected to employ it." Despite the lofty claims as to what this

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93 Bill C-71 Debates, 1st. Sess., 30th Parl., 1974-75-76, vol. IX, at 9212 (18 November 1975), [hereinafter C-71 Debates]. Mr. J. Gilbert (Broadview) stated in reference to the problem of money laundering "[i]t is important to curtail the activities of persons who participate in this type of nefarious activity ...."

See also C-71 Debates, *ibid.* at 9257 (19 November 1975), where Mr. G. Marceau (Lapointe) recognised that the law needed to be changed so as "to strengthen law enforcement forces in their fight against international gangsterism."

94 See C-71 Debates, *ibid.* at 9203 (18 November 1975), Hon. Ron Basford (Minister of Justice) stated "[b]y enlarging the scope of this section ... to make it an offence knowingly to possess the fruits of crime ... we will be placing in the hands of law enforcement bodies a potent weapon against organized criminals. It will no longer be possible for Canada to be used as a laundering facility along organized crime’s cash flow process." [emphasis added]

See also C-71 Debates, *ibid.* vol. X at 10361 (27 January 1976), where Mr. F. Fox (Parliamentary Secretary to Minister of Justice) stated “this is an extremely important development in Canadian jurisprudence. This is an additional tool ... which will allow control over the underworld and Mafia's sprawling operations and activities.”

95 *Criminal Law Amendment Act, 1975, supra* note 90, s. 312.

96 Mosley, *Seizing The Proceeds, supra* note 66 at 9 - 10.
amendment would accomplish, it was soon evident that it was ineffective and that more powerful measures would be required to deal adequately with the problem.97

(b) British Columbia Attorney General

In 1980, the British Columbia Attorney General published a report, titled *The Business of Crime*, that stressed the need for comprehensive proceeds of crime legislation in Canada.98 The thesis of the report was that enterprise crime, crime committed by sophisticated and rational individuals for profit, is fundamentally different in kind and effect from street crime. A result of this conclusion was a recognition of the need for different methods of investigation and prosecution.99 The report also recognised that there was nothing in Canadian criminal law at the time that provided for the forfeiture of the profits of crime, even though criminal enterprises were amassing huge profits from illegal activity. Further, the report noted that the threat of imprisonment is minimal given the fact that criminal enterprises are able to flourish while waiting for an incarcerated person. It recommended the adoption of a statute similar in form and intent to the American RICO statute.100

The report came to four conclusions with regard to controlling the problem of organized crime.

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97 Parliamentary Question Period, 1st. Sess., 30th Parl., 1984 - 86, vol. XII, at 12661 (9 April 1976). Mr. Edon M. Wooliams, of Calgary North, asked the Minister of Justice, the Honourable Ron Basford "whether there is any legislation available that would enable him to confiscate all of [the profits that hard drug traffickers are making]?"

Note: this question was posed despite the fact that s. 312 had already been amended. It therefore provides further evidence of its ineffectiveness.


99 See Executive Summary and Draft Amendments, ibid. at Executive Summary 1.

100 See ibid. at Executive Summary 4.
(1) Nothing in Canadian criminal law is expressly designed to provide for the forfeiture of illicit profits upon conviction.

(2) The limitations of s. 446 of the Code in respect of forfeiture are so great it is rarely employed, and even if a forfeiture may be possible it would likely be disposed of because the police are limited to seizing tangible property.

(3) The Narcotic Control Act provides a limited potential as a vehicle for forfeiture. Drug profits cannot be forfeited unless they are shown to have been used to purchase the very narcotic which is the subject of the proceedings before the court. Therefore, assets cannot be traced from their source.

(4) Despite being broadened in scope to be able to combat money laundering, s. 312 of the Criminal Code has been an ineffective provision. The limiting factors of the provision are, its dependence on "possession", the absence of legal presumptions and reverse onus provisions, and the fact that it lacks the capacity to order the property forfeited.

The Business of Crime report and an Ontario proposal to permit the seizure or freezing of

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101 See also Enterprise Crime Report, supra note 2 at 84, which sets out these conclusions in a slightly different manner.

102 See The Business of Crime, supra note 98 at 31.

103 See ibid. at 32 - 34.

Note: the forfeiture power in section 446, which is now section 490(9), only relates to seized property that is: (a) no longer required for evidentiary purposes; and (b) possession of it by the owner was unlawful or the owner is not known.

104 R.S.C. 1970, c. N-1, s. 10(8), only allowed the seizure of money if the money “was used for the purchase of that narcotic”. [emphasis added]


Note: today the provision is still limited, it provides for the forfeiture of drugs seized as well as any money that is used for the purchase of that drug, where application for restoration has not been made or refused [NCA s. 15(4)], or upon conviction [NCA s. 16(1)].

Note: S. 16(2) of the NCA also allows for the forfeiture of any conveyance which is used in any manner in connection with the offence. However, the NCA provisions were also limited as the forfeiture powers only applied to situations where the police conducted a search under s. 10 and seized property pursuant to s. 11 of the NCA.


Note: the report also found that the amended s. 312 has never been used in its intended manner, which was to combat money laundering by being able to attach to the proceeds of crime, see ibid. at 43.
criminal proceeds held on deposit in financial institutions were tabled at the 1981 Uniform Law Conference of Canada, Criminal Law Section. The work done at this conference led to an agreement by the Federal and Provincial Ministers responsible for Criminal Justice, to establish a joint study of the options available to deal more effectively with the problem of enterprise crime.\(^\text{107}\)

\textbf{(c) Federal - Provincial Study Group}

The Federal-Provincial study group, composed of representatives of the federal Department of Justice, the Ministry of the Solicitor General, and the provincial Attorneys General from Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario and Quebec, was established in December 1981 and published its report in June 1983.\(^\text{108}\) The group was set up to examine, \textit{inter alia}, existing legislation and to draft recommendations for possible legislative and enforcement initiatives directed toward the freezing, seizure and forfeiture of the proceeds and assets of enterprise crime in Canada.\(^\text{109}\) The report found that enterprise crime in Canada was highly profitable and it was a growing problem that needed to be addressed properly. However, once again an analysis of the Canadian criminal law at that time concluded that there were no provisions for freezing, seizing and forfeiting the profits of these enterprises and that the forfeiture provisions that were in place were ripe with problems. The problems included the fact that the \textit{Narcotic Control Act} did not allow for the tracing of assets, therefore, the property bought with the profits of the illegal drug trade could not be forfeited; and although s. 312 of the \textit{Criminal Code} prohibited the possession of the property, or the proceeds, of crime, it failed to allow for their forfeiture. These inadequacies were magnified by the fact that the \textit{Criminal Code} focused on individual offences so that, despite the fact that organizations might lose members to prison for an extended period of time, the organization survived and accumulated wealth.

\(^{107}\) Mosley, \textit{Seizing The Proceeds}, \textit{supra} note 66 at 10.
\(^{109}\) See \textit{ibid.} at vi and 5.
In recognition of the seriousness of the problem of enterprise crime in Canada, the group’s first recommendation was to continue and augment their study.\textsuperscript{110} The report also recognised that the effectiveness of a forfeiture provision requires there to be assets in place to access. Such access can only be assured by freezing both the tangible and intangible property of the defendant.\textsuperscript{111}

The study found that s. 312 was a “hollow remedy to the investigator and prosecutor seeking to strip a criminal of his gains.”\textsuperscript{112} The conclusion was inevitable given that the provision lacked investigative procedures for identifying and tracking the proceeds of crime. There was no freezing provision to prevent dissipation of an identifiable asset, and there was no power to order forfeiture once a case was completed. This resulted in a serious lack of enforcement of the proceeds of crime offence. The study group recognised that there were conflicting judicial decisions on the scope of ‘possession’ within s. 312.\textsuperscript{113} To resolve the conflict they called for the amendment of s. 312 to include the possession of illicit proceeds in a bank account, as was proposed by the Attorney General of Ontario.

This report reiterated the conclusions of the \textit{Business of Crime} report and suggested that the public policy behind the civil law maxim \textit{ex turpi causa non oritur actio}, out of an illegal consideration an action cannot arise, should apply to the stripping of assets in the possession of the offender that have been obtained through criminal activity.\textsuperscript{114} The report discussed the problems with the forfeiture provisions that were available. They found that the s. 490(9) forfeiture powers of the \textit{Criminal Code} were ineffectual in relation to attaching proceeds because

\textsuperscript{110} See \textit{ibid.} at xii.
\textsuperscript{111} See \textit{ibid.} at 73.
\textsuperscript{112} See \textit{ibid.} at 76.
\textsuperscript{113} See \textit{ibid.} at 76 - 81.
\textsuperscript{114} See \textit{Enterprise Crime Report, ibid.} at 84 - 85.
of its limited scope. Further, the forfeiture provisions contained in the *Narcotic Control Act* were narrowly interpreted by a number of cases that found seized money should be returned to the owner unless it was required as evidence or it was the money used to purchase the narcotics giving rise to the offence. This line of authority was changed in 1981 with the decision of the Manitoba Court of Appeal in *Aimonetti*. 

In *Aimonetti*, the Court of Appeal upheld the lower court's denial of Aimonetti's application for the return of $23,000 that was seized, although he argued that the money was gambling proceeds and not related to the drug venture. Justice Huband wrote that "[w]here the property in question is money, the claim for restoration of possession will not be allowed if the cash appears to be the fruits of illegal trade in narcotics." And in this case the Court of Appeal found that there was an "abundance of evidence to conclude that the money ... was

115 See supra note 103 and accompanying text.
Note: where an accused was acquitted monies seized would also be restored, see *Collins v. R.* (1987), 7 C.C.C. (3d) 377 (Que. C.A.), writing for the Court, McCarthy J. wrote, at 381: "In the absence of other claimants ... Collins was "entitled to possession" of the money, without having to examine in detail the circumstances of its acquisition." At 382 he added "[i]n the present case there is no question of returning to a criminal the fruits of his crime." This latter statement is true because the person was acquitted, therefore there was no crime in law.

Note: for a good example of this see *Hicks*, supra note 116 at 96 where the majority of the Court (4 - 1) ordered the property returned to the accused even though this may have resulted in the property being disposed of so as to make any future order of forfeiture unenforceable. The Court reasoned that the accused met the conditions of the Act, the property was not needed for evidence and he was entitled to its possession. It also noted that if a forfeiture order is made and it is unenforceable because property has been disposed, the sentence to be imposed on the offender may be affected, but it does not affect the return of the property once the statutory conditions are satisfied.

119 *Ibid.* at 172. [emphasis added]
associated with the illicit sale of drugs.”120 In addition to this more liberal interpretation of the forfeiture section, other courts refused restoration applications on the ground that it would be contrary to public policy to do so.121 Despite these pronouncements from the bench, it was recognised that the legislative forfeiture powers were lacking because they failed to allow for the removal of profits, providing the incentive for taking the risks involved in the drug trade.122

There were other limited attempts by innovative prosecutors and sympathetic judges to attach the profits of criminal activity indirectly through the use of restitution orders and fines.123 The Federal-Provincial report noted that the use of restitution orders was confined by the Supreme Court of Canada in Zelensky. The Supreme Court found that such orders should only be made if there was no serious dispute on the merits of the application, so that the amount of

120 Ibid.
Note: Aimonetti was adopted in R. v. Largie (1981), 63 C.C.C. (2d) 508 at 511 - 512, 25 C.R. (3d) 289 (Ont. C.A.), where that court upheld the lower court’s refusal to restore the proceeds to the accused. In addition to agreeing with Aimonetti the Appeal Court held that its decision was “strengthened by the provisions in s. 312(1) ... [b]y virtue of s. 312(1), it would be an offence for the appellant to be in possession of money derived from the sale of narcotics. The Court should not, therefore make an order of restoration if the money was obtained in this way.”

Note: the Court of appeal only decided the issue of possession in favour of the Crown. Aimonetti then took his case to the Federal Court to have the ownership issue decided. See Aimonetti v. R. (1983), 3 C.C.C. (3d) 273, rev’d 19 C.C.C. (3d) (Fed. C.A.), however the Federal Court of Appeal dismissed Aimonetti’s restoration application and found that he was estopped from recovering the goods in a subsequent civil action, because the issue had already been dealt with conclusively.

121 See R. v. Buxton (1981), 62 C.C.C. (2d) 278 at 281 (Alta. Q.B.). Madam Justice McCayden found that “[i]t is contrary to public policy and to the general scheme of the Narcotic Control Act for a court to direct the restoration of proceeds of crime to the person who committed the crime.”

See R. v. Medd (1983), 7 C.C.C. (3d) 158 at 160 (Man. C.A.), where Hall J. writing for a unanimous Court wrote, “that it would be contrary to public policy and against the public interest for the court to lend its process to grant an order for restoration, if to do so would place in the hands of the applicant money which, by his own admission was illegally obtained. ... [Even though] the money was not the fruits of illegal trade in narcotics but of [an illegal pyramid scheme].”

122 See Enterprise Crime Report, supra note 2 at 92.
123 See ibid. at 95 - 98.
Proceeds of Crime: A Historical Perspective

compensation could be established expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial. In *McNamara*, the Ontario Court of Appeal approved of a schedule of fines that took into account the profits the conspirators expected to obtain as a result of their illegal agreements rather than the actual figures achieved. In *Kotrbaty*, Berger J. stated that "[t]he purpose of imposing a fine [of $50,000 against a convicted trafficker was] to catch the profits won by the accused in the sale of heroin, not only in this instance, but in regard to his trafficking activities generally." Therefore, to adhere to the policy of taking the profit out of the drug trade, the court took into account not only the benefits obtained by the particular incidents before the court but also other transactions not before the court. Such a piecemeal approach to the proceeds problem was inadequate because in these circumstances fines are not used often enough by the courts and restitution is limited to where there is an identifiable victim and an ascertainable loss.

The report noted that despite the fact that there were approximately 100 federal statutes containing forfeiture provisions there was no general power that provided for the forfeiture of assets acquired by criminal activity. However, its recommended solution moved contrary to

125 See *R. v. McNamara* (No. 2) (1981), 56 C.C.C. (2d) 516 at 531 - 32.

Note: In *R. v. Jung* (1976), 1 C.R. (3d) S-1 at S-4 (B.C.C.A.) the majority of the court aff'd a lower court decision to impose a 15 year jail sentence and a $10,000 fine with 3 years in default, given that the accused was involved in two transactions totaling $53,000, even though there was no evidence submitted that demonstrated the accused had the ability to pay the fine, as McIntyre, J. in dissent, at S-7 argued was required.

Note: In *R. v. Dow* (1976), 1 C.R. (3d) S-9 (B.C.C.A.), a unanimous court upheld a sentence identical to what was appealed in *Jung*. The court found at S-14 -15, that "[e]ach person engaged in the drug traffic operates with the utmost secrecy possible ... if it is necessary to point to specific assets by means which a convicted trafficker will be able to pay before a fine can be imposed on him, it will in most cases be impossible to impose a fine."

128 See *ibid.* at 171.
the B.C. study, which had recommended that Canada adopt *R.I.C.O.* type legislation. However, the report did recognise that the U.S. experience would be helpful in framing appropriate legislation for Canada. 129 It then set out proposed legislation for Canada. 130

(d) Anti-Drug Profiteering Program

The R.C.M.P. established the Anti-Drug Profiteering Program in 1981 to train drug enforcement personnel in financial investigation. 131 The work done in this program confirmed the inadequacy of the legislative tools of that time. 132

The R.C.M.P.'s efforts validated the study group's concern that proceeds held as intangible assets could not be seized. To test their theory that the legislation was deficient, the R.C.M.P. executed a s. 443 search warrant [now s. 487] in an attempt to seize a bank account containing $400,000 U.S., held for the benefit of Luis Pinto. There was no dispute as to the fact that the funds were derived from illicit activities. The Quebec Superior Court held that the warrant could not issue to seize a bank credit because the money on deposit in the bank account was an intangible asset and, therefore, not included in the term "anything" from s. 312. 133 The Quebec decision confirmed the need for legislative change in Canada. Mr. Justice Boilard

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129 See *ibid.* at 173.
130 See *ibid.* at 176 - 80.
131 Inspector B.W. Bowie, Officer In Charge Anti-Drug Profiteering Section R.C.M.P., Interview with Gregory J. Rose (19 April 1995) Vancouver, stated that "the program was designed to fail, [but it was necessary to] demonstrate, to those responsible for pushing legislation, that this legislation was needed. We knew our legislation was deficient. Given the way legislative drafting and the political will works you can't just say we need [certain legislation], you have to demonstrate [that need] and having it fail miserably [is one way of doing that]. That's the way you prompt legislation." [hereinafter Bowie, Interview].

Note: *contra* see *R. v. Scallen* (1974), 15 C.C.C. (3d) 441 at 473 (B.C.C.A.) where the court held that "it would be verging on the ridiculous to hold that a credit or deposit in a banking institution falls outside the word 'anything' ...."
recognised the need to modernize our search and seizure laws\textsuperscript{134} and he highlighted a striking inconsistency in the law also noted in \textit{Mercia Constabulary}.\textsuperscript{135} Had the Pinto deposit been held as cash in the Bank’s vault it would have been subject to seizure because it would have been a tangible asset; however, because it took the form of a credit in an account, it was an intangible asset and, therefore, it could not be seized under the Canadian law.\textsuperscript{136} The Court of Appeal dismissed the Crown’s appeal; however, it quoted the work of the Law Reform Commission, which it found to have summarized the problems with the state of the law accurately:

Another anachronism is the restriction of most search and seizure powers to ‘things’, particularly in the case of those powers concerned with the recovery of the fruits of crime. The original common law search warrant developed by Hale was for stolen ‘goods’. This focus on tangible objects was carried into subsequent provisions for search and seizure covering crimes of theft, including the present subsection 443(1) [now 487(1)] of the \textit{Criminal Code}. This focus, however, excludes from coverage forms of property such as funds in financial accounts, or information from computers, which may also represent the fruits of a crime. This focus is explicable in large part by the historical concentration of theft and fraud offences on tangible goods; indeed, until 1975 the offence of possession of property obtained by crime currently set out in section 312 [now 354] was itself restricted to tangible things. The expansion of these offences under criminal law to include intangible forms of property demands a modernization of search and seizure law as well.\textsuperscript{137}

Despite recognizing that the present state of the law was unsatisfactory, Kaufman J. dismissed the appeal and held that any change must come from the legislators.\textsuperscript{138} This decision made it clear that intangibles could not be seized and, accordingly, could not be forfeited under the existing forfeiture provisions. This provided another clear signal to Parliament that new proceeds of crime provisions were needed.

\textsuperscript{134} See Bourque, \textit{ibid.} at 373 (Que. S.C.).
\textsuperscript{136} See Bourque, \textit{supra} note 133 at 372.
\textsuperscript{138} See Bourque, \textit{ibid.} at 391 (Que. C.A.).
(e) Sentencing Project

In 1981, a fundamental review of the criminal law was undertaken by the federal government and in late 1982 the Sentencing Project was launched. This project led to the publication of the federal government’s policy statement on sentencing.\textsuperscript{139} It concluded that there was a need to develop new sentencing strategies, which involved encouraging the use of non-carceral sanctions as credible and effective alternatives to imprisonment.\textsuperscript{140} The policy statement recognised the need to be able to attach the profits of crime and, because the current provisions were an inadequate means to this end,\textsuperscript{141} they endorsed the creation of “an entirely new, general forfeiture scheme ..., dealing with both the instruments of crime and the profits and proceeds of crime.”\textsuperscript{142}

(f) Bill C-19\textsuperscript{143}

The forfeiture recommendations of the Sentencing Project were incorporated into Bill C-19.\textsuperscript{144} Clauses 107 and 206 of the Bill dealt with proceeds of crime. This legislative attempt added new special search warrant provisions\textsuperscript{145} and a freezing order\textsuperscript{146} onto the ‘seizure of things not specified’ provision of the \textit{Criminal Code}. There was also a provision that provided for review of a special warrant or freezing order.\textsuperscript{147}

\textsuperscript{139} \textit{Sentencing} (Ottawa: Department of Justice, 1984).
\textsuperscript{140} \textit{Ibid.} at 34, 38, 44 and 50.
\textsuperscript{141} \textit{Ibid.} at 51, the policy statement concludes that “[t]he present inability of law enforcement officials to attach [proceeds of crime] can only bring the administration of justice into disrepute and derogate from one of the avowed purposes of sentencing: to protect the public by promoting respect for the law through the imposition of just punishment.”
\textsuperscript{142} \textit{Ibid.} at 50.
\textsuperscript{144} See Mosley, \textit{Seizing The Proceeds, supra} note 66 at 13.
\textsuperscript{145} Bill C-19, supra note 143 at cl. 107, s. 445.1.
\textsuperscript{146} \textit{Ibid.} s. 445.2.
\textsuperscript{147} \textit{Ibid.} s. 445.3(1).
The new investigatory tools were to be limited by the fact that they only applied to property that was subject to forfeiture under the new s. 668.2 proposed by clause 206. However, this would be an extremely wide power as the forfeiture provisions were to be effective against any offence. The extent of property that was forfeitable fell into two categories, indictable offences and any offence. The proposed amendment allowed that: 148

(1) Where an offender is convicted of an offence and the court is satisfied on a balance of probabilities, that any property in respect of which a freezing order under section 445.2 was made or that is before the court or that has been detained pursuant to this or any other Act of Parliament,

(a) where the offender was convicted of an indictable offence,

(i) was used directly in the commission of the offence or in taking steps after the offence was committed to avoid its detection or the apprehension of the offender, or
(ii) was in the possession of the offender or under his control at the time the offender was apprehended under circumstances that give rise to a reasonable inference that the property was intended to be used for the purpose of committing the offence or taking steps after the offence was committed to avoid its detection or the apprehension of the offender, or

(b) where the offender was convicted of any offence, was obtained, derived or realized directly or indirectly as a result of the commission of the offence.

The proposed forfeiture provisions were widely criticized for being extremely broad and far reaching. 149

Bill C-19 did not move beyond first reading and it died on the order paper when Parliament was dissolved in preparation for an election. Given the harshness of the Bill and its timing, one must ask whether there were political motivations behind proposing legislation that would be very tough on criminals.

148 Ibid. at cl. 206, s. 668.2. [emphasis added]
149 See Mosley, Seizing The Proceeds, supra note 66 at 13. “The perception was that the proposed solution ... was disproportionately harsh.”
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(g) *Criminal Law Amendment Act, 1985*\(^{150}\)

After the election, the government passed the *Criminal Law Amendment Act* of 1985. This Act consisted of a modified form of the pre-election proposals, but it did not contain any of the proceeds of crime initiatives that were contained in Bill C-19. This new Act did contain one section that attempted to widen the forfeiture powers of property that was before the court,\(^{151}\) however, it did not address the recognised inadequacies of the pre-existing legislation in relation to attaching proceeds of crime.

(h) Constitutional Issues

(i) Pre-Charter of Rights

Mr. Justice Joyal of the Federal Court Trial Division noted in *Porter* that “[b]efore the advent of the [Charter] the legitimacy of forfeiture provisions was never put in serious doubt. The English practice of using forfeiture as an effective method of protecting the sovereign’s revenues found ready practice [in Canada].”\(^{152}\) In *Krakowec*,\(^{153}\) the Supreme Court of Canada upheld the forfeiture of a truck used to transport illicit liquor without the owner’s knowledge, because the proceedings were *in rem* against the truck itself.

(ii) *Constitution Act, 1867*

The current forfeiture provisions of the proceeds of crime legislation\(^{155}\) have been held to

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\(^{151}\) See *ibid* s. 74, which enacted s. 446.2 [now s. 491.1].

\(^{152}\) *Porter, supra* note 5 at 258.


\(^{154}\) *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

\(^{155}\) See Part XII.2, s. 462.37.
be intra vires the Federal Parliament. In Shah, Kitchen J. decided that while the forfeiture provision "does have some aspects which may affect property and civil rights in the province, and which bear some resemblance to civil proceedings, ... in pith and substance the provision is valid criminal law legislation." The court came to this conclusion because the quantum of the proceeds has to be proven beyond a reasonable doubt, the penalty of forfeiture satisfies valid sentencing objectives and as in Zelensky, the restoration of property and the redress of the victim are both valid criminal law objectives.

(iii) Charter of Rights

It has been argued that a penalty of forfeiture in addition to a jail term amounts to double punishment, contrary to s. 11(h) of the Charter. However, it has been held that "an accused is not finally punished until all possible penal consequences for the offence are exhausted. The law of Canada permits a variety of sanctions to be imposed in conjunction with other forms of punishment." Therefore, forfeiture of the thing is punishment, but it is not double punishment for the same offence as is contemplated by s. 11(h) of the Charter.

It could be argued that a forfeiture is cruel and unusual punishment under s. 12 of the Charter. However, this section has been narrowly interpreted: "The test as stated by the Supreme Court of Canada in R. v. Smith ... is that to bring into play s. 12 of the Charter, the punishment must not be merely excessive but also grossly disproportionate." The Federal

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157 Ibid.
158 See ibid.
160 Porter, supra note 5 at 262 - 63.
161 See ibid. at 263.
163 Porter, supra note 5 at 263.
Court in *Porter* found that "the forfeiture of the truck causes financial loss to the plaintiff but it cannot be said that such loss is so cruel and unusual as to give it the protection of the *Charter* [because] [forfeiture, ... is certainly not unusual and, in terms of our long and historical experience with it, cannot be said ... to be so excessive as to outrage standards of decency." 164 Mr. Justice Joyal added that despite the fact that the penalty of forfeiture is draconian "it has been good and necessary policy to retain it. ... [and therefore] I reiterate my reluctance to disturb the balance which Parliament has struck, notwithstanding that the measures appear harsh and excessive." 165 In addition the judge found strong support for this conclusion under a s. 1 analysis. However, his rational placed a heavy emphasis on the revenue factor of taxation, 166 which does not have much basis in the current 'stated' purposes of the proceeds of crime legislation. 

In many circumstances in order to attain access to property for its eventual forfeiture the property must be seized or restrained. However, there is disagreement as to whether the *Charter* would provide protection to someone who is affected by such an action. It has been held that s. 8 of the *Charter* "is designed primarily to protect the privacy interest of individuals and affords protection to property only where that is required to uphold the protection of privacy. In that sense, it might be said to be a "dependent" property right." 167 The view of Joyal J. was adopted by the Ontario Court General Division in *Serrano*. 168 In *Serrano*, Ewaschuk J. referred to the Supreme Court of Canada decision of *Hunter v. Southam* and concluded that "a restraint order in

164  *Ibid.* at 263 - 64.
166  See *ibid.* at 267, "forfeiture could easily be justified as a reasonable measure designed to frustrate further criminal enterprise, protect the public welfare and secure Crown revenue. While a less harsh penalty could be imagined ... Parliament may justifiably be given some latitude in determining the appropriate remedy to ensure compliance in matters relating to revenue ... where voluntary disclosure is the rule and inspection and enforcement by the state the exception."  [emphasis added]
no way interferes with the right of privacy which is the primary value served by s. 8 of the Charter.” However, in *Erickson* Hutcheon J.A, writing for the British Columbia Court of Appeal, found that *Hunter v. Southam* “decided that s. 8 was not restricted to the protection of property; it did not hold that the protection of property was not included in s. 8.” In *Clymore* the British Columbia Supreme Court also recognised that despite the fact that there is considerable authority “that property rights are not protected under the Charter ... [i]t is difficult to draw concrete principles in this area of the law because, as the cases themselves say, the law is in a state of development.” Wilkinson J. concluded that “the Charter is available to a person whose property is the subject of a [forfeiture] hearing under s. 462.38 in so far as they wish to raise s. 24(2) of the Charter concerning the admissibility of the fruits of an unreasonable search.”

Thus, the forfeiture provisions in and of themselves will likely withstand Charter challenges. However, difficulty may arise where the powers contained within the provisions are improperly used or not used as intended by Parliament, as will be discussed in Chapters 2 and 4.

(i) **Bill C-61**

In 1986, the federal government began a National Drug Strategy program. The program’s goal was to reduce the demand and supply of drugs in Canadian society, and it’s first initiative was a new proceeds of crime bill, Bill C-61. Thus, after more than a decade of study in Canada proceeds of crime provisions were enacted in 1989, as Part XII.2 of the *Criminal Code*, to deal

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Note: See Appendix 3: Part XII.2 Flowchart.
with the inadequacies of earlier legislation in combating organized crime and to meet international obligations.\textsuperscript{174} It was recognised that “it has been a serious anomaly of our law that criminals could be allowed to keep and even grow wealthy on their ill-gotten gains.”\textsuperscript{175} Despite the years of effort that went into its production, Part XII.2 remains a complex piece of legislation and it provides few procedural guidelines to those having to work with it.\textsuperscript{176}

(i) Definitions

Part XII.2 begins with s. 462.3 setting out new proceeds definitions to which the Part applies. These definitions include the term ‘designated drug offence’, which relates to the

\textsuperscript{174} See generally Donald, Commentary of C-61, \textit{supra} note 1.

\textsuperscript{175} See also Bill C-61, \textit{An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act}, 2d Sess., 33d Parl., 1987-88, vol. VII at 8888 (second reading 14 September 1987) for the speech given by Mr. Ramon Hnatyshyn introducing Bill C-61 into the House of Commons for second reading and debate.

\textsuperscript{176} See also \textit{R. v. Clymore} (1992), 74 C.C.C. (3d) 217 at 231 (B.C.S.C.);

\textit{R. v. Gagnon} (1993), 80 C.C.C. (3d) 508 at 509 and 511, 139 A.R. 264 (Q.B.);

\textit{R. v. Gaudreau} (1993), 115 Sask. R. 7 at 9 (Q.B.);


\textsuperscript{175} See also Donald, Commentary of C-61, \textit{supra} note 1 at 429. “[T]he problems arising from the implementation of the provisions of this legislation ... are problems of definition, procedure, onus and evidence as well as practical problems.”

\textsuperscript{176} See P. Germans, “Confiscating The Proceeds of Crime: The Amendments to Canada’s \textit{Criminal Code}, Their Force and Effect” (LL.M. Thesis, The University of British Columbia, 1990) [unpublished] at 84. “[The legislation’s] principal problem is ... its own lack of clarity. Many of its provisions will require years of litigation in order to define their breadth and extent ....”

See Bowie, Interview \textit{supra} note 131. “The proceeds legislation allows us to [seize intangibles], but it is complex, cumbersome and ... near unwieldy. ...”
Proceeds of Crime: A Historical Perspective

relevant provisions of the *NCA* and *FDA*, and 'enterprise crime offence',\textsuperscript{177} which now covers 26 *Criminal Code* offences and specified offences under the *Excise Act*\textsuperscript{178} and the *Customs Act*.\textsuperscript{179} The new 'laundering proceeds of crime' offence, found in s. 462.31 is included in the list of 26 *Code* offences.

**(ii) Investigative / Enforcement Tools**

In recognition of the faults of the earlier legislation, Bill C-61 gave the police and Crown powerful new tools to help them deal with the proceeds of crime. The new tools allow them to access such property prior to conviction by seizing, through the use of a special warrant that is set out in s. 462.32, and freezing, through the use of a restraining order that is set out in s. 462.33.

It is more onerous to obtain a special warrant under s. 462.32 than it is to obtain a regular

\textsuperscript{177} Note: On September 1, 1988 the Senate Standing Committee on Legal and Constitutional Affairs sought the addition of the criminal interest rate offence to the list of enterprise crime offences. In response to this request the then Minister of Justice R. Hnatyshyn, wrote that he agreed in principle with the suggestion and "subject to a closer examination … will proceed with a view to the inclusion of the amendment in the Criminal Code at an early date." [emphasis added] See Bill C-61, *An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, 2d Sess., 33d Parl., 1987-88, vol. IV at 4254 (Senate, report from committee 1 September 1988).

Note: 'enterprise crime offence' was finally amended by *Criminal Law Amendment Act, 1994*, S.C. 1995, c. 44, s. 29, which added to the list of offences, (xiii.1) s. 347 (criminal interest rate).

Note: the list of offences is much shorter than was recommended by *The Business of Crime and the Enterprise Crime Report*. The likely reason that the final list did not include all the earlier recommendations is that the offences that were not included could not be shown to have a clear enough nexus between the offence and the problem of proceeds of crime. D. Préfontaine, Q.C., Director The International Centre for Criminal Law Reform and Criminal Justice Policy at U.B.C., and Deputy Minister of Justice, Canada, Interview with Gregory J. Rose (24 April 1995) Vancouver.

\textsuperscript{178} R.S.C. 1985, c. E-14.

\textsuperscript{179} R.S.C. 1985, (2d Supp.) c. 1.
s. 487 warrant. Ss. 462.32(1) requires that an application for a special warrant be made before a judge, and reasonable grounds that the property sought is in the named place and for which a forfeiture order may be made must be shown. S. 462.32(5) allows a judge to require, before issuing a warrant, that notice be given to any person that may have a valid interest in the

Note: because of this difference in difficulty the police and Crown may choose to proceed under a s. 487 warrant rather than under s. 462.32.

Note: In “Money-laundering laws to target lawyers’ trust accounts?” The Lawyers Weekly (18 October 1991) 4, M. Dambrot, then the director of the national drug prosecutions strategy for the federal Department of Justice, in response to the concern of police proceeding under non-Part XII.2 provisions to seize property and therefore, preclude an accused from making a legal fees exemption application, is quoted as saying “[t]he legality of such a police tactic is doubtful … [r]egular search warrants are only for seizing evidence in specie.” [emphasis added]

Note: The lawfulness of this will be discussed in Chapter 4, however, it has been argued that it is possible to use a s. 487 warrant to preclude an accused from making a legal fees exemption application because s. 487 was amended in 1985 to add the words “or any Act of Parliament”, so as to extend its reach to other federal statutes, including Part XII.2.

Note: See Bowie, Interview supra note 131. “The Special Search Warrant is rarely used. Why should we use it when it allows us to do precisely what a s. 487 W does? Given the cumbersome process in obtaining either a special search warrant or a restraint order … wherever we can, wherever it’s feasible, and wherever there is some degree of urgency required we will use a 487 warrant instead of a special warrant. [However] if its a planned search and we know we have time then as a matter of practice, in this office, we will get a special search warrant. I don't want to see us get into the argument that has been raised, most times unsuccessfully, by defence counsel that the only reason we use a 487 search warrant instead of a special warrant. [However] if its a planned search and we know we have time then as a matter of practice, in this office, we will get a special search warrant. I don't want to see us get into the argument that has been raised, most times unsuccessfully, by defence counsel that the only reason we use a 487 search warrant instead of a special search warrant so that would prevent the defence from dipping into the seized assets - so we deliberately made a conscious decision to use a 487 warrant so we could deprive the accused of the ability to retain and instruct counsel. That is absolute [nonsense], but it is an argument that is raised quite often, without success, because allot of our seizures are made without any legal process whatever in the course of an investigation … it is essentially a common law seizure.”

Note: the implications of allowing non-Part XII.2 warrants to be used to seize proceeds of crime are serious because the s. 462.34(4) balancing provisions cannot be accessed. This has been held in relation to where the seizure of property resulted from:


• or a warrantless N.C.A. search, see R. v. Galas (1990), 57 C.C.C. (3d) 353 (B.C.S.C.).

property unless this would result in the disappearance, dissipation or reduction in the value of the property. Before issuing a warrant, s. 462.32(6), which is unique to the Canadian legislation, obligates the judge to have the Attorney General provide an appropriate undertaking with respect to the payment of damages or costs, or both, in relation to the issuance and execution of the warrant. This undertaking requirement has resulted in most provincial Attorneys General being unwilling to use the legislation.181 A noteworthy exception to this lack of eagerness to prosecute is the British Columbia Attorney General’s office.182 The restraint order provisions mirror the special warrant provisions; however, they are very useful for preserving intangible property or property that is not easily seized.

As an enticement for informers to provide information, s. 462.47 provides immunity from civil or criminal liability. To fall within this immunity, the person must have a reasonable suspicion that the property is proceeds of crime or that the person is going to commit an

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181 See Appendix 4: Distribution of Proceeds of Crime Cases in Canada: A Survey.
182 P.J. Donald, “Proceeds of Crime” (Lecture to Proceeds of Crime - Law 512, University of British Columbia, 24 March 1995) [unpublished] stated that this was due to the fact that the then Attorney General, Mr. Bud Smith, felt the Ministry should be very proactive from the outset of the legislation. With regard to the undertaking Ms. Donald felt that there should not be a problem as long as the Ministry proceeds cautiously and chooses its cases wisely.

Note: Ms. Donald’s position is bolstered by the fact that, to date, the B.C. Ministry has not yet been required to pay out on one of its undertakings. Therefore, the other provincial Attorney Generals should follow British Columbia’s lead and begin to actively prosecute proceeds of crime offences by choosing its cases wisely and proceeding cautiously.

Note: there have been instances where it was recognised that damages should be paid:

See R. v. Seman, [1994] M.J. No. 212 at para. 31 -32, 41, 48 - 49, 52 - 54 (Q.B.) (QL), where Oliphant A.C.J.Q.B. awarded costs on a lawyer and client basis because he found the restraint order would not have been issued had there been full disclosure made on the ex parte application.

See also R. v. Cheverie, [1994] N.B.J. No. 253 (P.C.) (QL), where Brien P.C.J. recognised at para. 54 that this was the type of case where the awarding of costs should be considered because, although the conduct of the Crown did not meet the high threshold test required to prove an abuse of process, the Crown’s conduct was found to be unfair. By awarding costs it “may provide a remedy to the accused and a disincentive to the Crown in future matters.”
enterprise offence or designated drug offence.

S. 462.48 allows the Attorney General to make an application for disclosure of income tax information. However, this provision is limited to the offences of possession of proceeds of crime (s. 354), laundering proceeds of crime and designated drug offences.

(iii) Powers of Forfeiture

The decision to order forfeiture is made at the sentencing stage. There are three distinct forfeiture provisions under Part XII.2. Section 462.37(1) requires the Court to forfeit the property where an offender is convicted or discharged of an enterprise crime offence and the court is satisfied on a balance of probabilities that the property is proceeds of crime and the offence was committed in relation to the property. Second, s. 462.37(2) allows the Court to forfeit property where the nexus between the property and the offence was not sufficiently proven, but the property has been shown beyond a reasonable doubt to be proceeds of crime. The third provision, s. 462.38, is improperly titled an ‘In Rem Forfeiture’. It allows for the forfeiture of property where an accused has died or absconded. The court must forfeit the property, if an information has been laid in respect of an enterprise offence, if the property is beyond a reasonable doubt proceeds of crime, and the proceedings in respect of that offence have been commenced.

(iv) Other Powers of the Court

Section 462.37(3) gives the court the discretion to impose a fine in lieu of forfeiture. However, where a fine is ordered to be paid, the amount is set equal to the value of the property that could not be forfeited. In the event that the fine cannot be paid, s. 462.37(4) requires the court to impose a consecutive jail term in lieu of the fine payment. The section also sets out a scale of jail terms that increase with the size of the fine.\(^{183}\) Section 462.37(5) stipulates that the

\(^{183}\) See Part XII.2, ss. 462.37(4)(i) - (vii).

See also Appendix 5: Jail In Lieu of Fine Payment Provisions
fine option program is not available.

Section 462.39 is a limited inference of net worth provision that can be used by the court in relation to forfeiture hearings under ss. 462.37(1) or 462.38(2). This allows the court to infer that the property was obtained as a result of the commission of an enterprise offence if all of the accused’s property exceeds what he or she held before the commission of the offence and the court is satisfied that the ‘legitimate’ income of that person cannot reasonably account for such an increase in value.

Section 462.4 allows the court to void transfers of property that were made to avoid the reach of proceeds provisions. The court may set aside any conveyance or transfer of property that occurred after the seizure or service of a restraining order, unless it was for valuable consideration to a person acting in good faith and without notice.

(v) Pre and Post Forfeiture Remedies / Orders

Longo recognized that “it is important to underscore that the proceeds of crime legislation, in view of its draconian nature, provides a scheme to control abuse. The scheme applies to protect both the accused and innocent third parties.”184 Section 462.34 allows any person who has an interest in the property seized to apply for a review of a special warrant or restraining order and to obtain an order to examine or have returned some or all of the property at issue. Under the review provisions the court is empowered to release seized property or vary a restraining order for, inter alia, meeting reasonable living expenses, meeting reasonable business and legal expenses or entering into a recognizance.185 When the Bill returned from Committee, s. 462.34(5) was added to allay the concerns with regard to an accused’s right to silence. The provision requires the judge to ‘hold an in camera hearing and without the presence of the Attorney General’ for the purpose of determining the reasonableness of legal expenses.

184 Longo, supra note 22 at 6.
185 See Part XII.2, s. 462.34(4)(c).
The legislation also ensures that third parties’ rights to the property are protected prior to and after any forfeiture order is made. Section 462.41 requires a court to notify, before a forfeiture order is made, any person who has a valid interest in the property. This pre-forfeiture notice requirement provides innocent third parties the opportunity to make a claim for restoration of the property.

Under s. 462.42 third parties can also make a post-forfeiture claim for property that has already been ordered forfeited. The application must be made in writing within thirty days after the forfeiture order. The judge has the discretion to order relief where the person appears innocent of any complicity in the offence, has not been charged with an enterprise crime offence or a designated drug offence and has not acquired the property for the purpose of avoiding its forfeiture. Section 462.45 ensures that property is not improperly disposed of until at least thirty days after the forfeiture order and it suspends forfeiture orders until all appeals or applications have been determined.

IV. Summary

The ancient doctrine of forfeiture has a long history. Early English law recognised the state’s interest in land that was liable to forfeiture at the time the crime was committed. Any transfer of land had to have been completed before the crime in order to avoid forfeiture. With regard to goods and chattels, the state’s interest did not arise until a conviction was entered. As a result, transfers of property that were liable to forfeiture were allowed up to the time of conviction, but they had to be bona fide transfers and made in good faith. Forfeiture was recognised as a draconian penalty and forfeitures for felony were abolished in 1870. Canada’s first Criminal Code adopted the laws of England and the only provisions that allowed for forfeiture were ones where either the property was per se illegal or was forfeitable because it was used in the commission of an offence.
In the modern era, the international community began to work towards solving a perceived drug problem. With a major impetus from the United States, the first nation to institute modern forfeiture penalties, the international community recognised that the penalties available to control such illicit activity did not allow for attaching the proceeds of organized crime. The solution was to rely on the ancient doctrine of forfeiture to attack the modern problems of drug abuse and organized criminal activity.

Forfeiture has become a powerful tool in the hands of the prosecution and police. It is recognised by most that there is a legitimate need for such a weapon to be able to combat organized criminal activity, to facilitate attacks on organised crime's profit base. Despite this recognition, it remains a draconian penalty, one that can detrimentally affect the rights of many persons, including those persons charged with proceeds of crime offences.

Facing the combined pressures of the need for a comprehensive legislative enactment to deal with the problems caused by organized crime and those from international obligations, the Canadian government enacted its own proceeds of crime legislation, Part XTI.2 of the Criminal Code. In recognition of the draconian nature of forfeiture the Canadian legislation contains many protections for third parties and accused persons. These provisions were included to help constitutionalise Part XTI.2 and to attempt to control potential abuses.

One of the protections, the legal fees exemption, was an attempt to ensure that accused persons' fundamental rights to counsel and a fair trial would be protected. The following chapter will briefly discuss the history of the right to counsel and the importance that it plays in the proper functioning of our adversary system.
Chapter 2

Right To Counsel: A Historical Perspective

"When a prisoner is undefended, his position is often pitiable, even if he has a good case."

Sir James Fitzjames Stephen

I. Introduction

In comparison to the ancient doctrine of forfeiture, the present day scope of an accused's right to counsel is a relatively new phenomena. This right has become a pillar of our legal system and is recognized by many jurisdictions as being fundamental to ensuring a fair trial. It also acts as a procedural safeguard during the investigatory stages of an offence. The essence of the right to counsel is to "equalize the imbalance between the individual and the state ..." at all stages of the judicial process. If the right to counsel is not allowed, other rights will be negatively impacted.

As a result, it has been recognised that "[i]n order to ensure that the adversarial system produces a fair trial, an accused is entitled to receive the assistance of counsel in making

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2 Note: not only does the right to counsel ensure a fair trial, it also protects other constitutional rights, such as the right to life, liberty and security of the person, and the presumption of innocence.

Note: see M. Pilon, *Life, Liberty and Security of The Person Under The Charter* (Ottawa: Ministry of Supply and Services, 1994) at 5, where the author writes "[t]he Supreme Court of Canada has consistently taken the position ... that 'fairness of the judicial process is what, in the end, fundamental justice is all about.'"


4 See W.M. Beaney, *The Right To Counsel in American Courts* (Westport, Conn.: Greenwood, 1955) at 1 [hereinafter Beaney, The Right To Counsel], "[the] right to counsel might well be considered crucial—a right by which virtually all other rights are protected in practice."
Right To Counsel: A Historical Perspective

full answer and defence.” This chapter will briefly discuss the right to counsel and will conclude with an analysis of how this right is protected in Canada by ss. 7, 10(b) and 11(d) of the Charter.

II. National Developments

The early common law did not recognize the full right to be defended by counsel. The practice at that time was that a person accused of a crime, except a felony or treason, could have limited access to counsel. The extent of the right tended to fluctuate over the centuries, however: “[the] rule [that denied counsel to persons accused of a felony] was gradually relaxed and, over

• Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
• Section 10: Everyone has the right on arrest or detention (b) to retain and instruct counsel without delay and to be informed of that right;
• Section 11: Any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
7 For a comprehensive review of this history see “An Historical Argument for the Right to Counsel During Police Interrogation” (1964) 73:6 Yale L.J. 1000 at 1018 - 34 [hereinafter Police Interrogation], where the author argues at 1032 that “the right to counsel was, at least in some form, one of the basic and continuing procedural rights of criminal defendants in the common law.”
8 Note: the right in relation to these offences would not come about until 1836, see infra note 15 and accompanying text.
time, counsel became entitled to argue points of law on behalf of an accused ....”

Blackstone noted that “it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise to be debated.”

He found this rule to be at odds with the idea of providing a prisoner ‘humane treatment’ and that judges have recognised this defect so “they never scruple [hesitate] to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact: for as to matters of law, arising on the trial, they are entitled to the assistance of counsel.”

He also noted that to prevent an improper denial of this right, the legislature enacted a statute so that persons indicted for high treason could make their full defence

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Note: Finkelstein, supra note 3 at 1-7 - 1-8 fn. 2, sets out the advent of this right from the Norman courts where a ‘narrator’, would handle the technicalities of the pleading and could provide professional advice on the law, to the Middle ages where representation was allowed in many circumstances of an appeal and in some places during trials by indictment.

During the fifteenth and sixteenth centuries, when ‘modern’ procedures of extracting evidence from witnesses were used, the counsel could assist in matters of law but not matters of fact.


Note: during this time period the judge acted as counsel for the prisoner, by seeing that the “proceedings against him were legal and strictly regular” Blackstone, ibid.

Note: while the right of counsel was limited in capital cases, where the penalty was death, those charged with misdemeanors enjoyed the right to counsel, see Beaney, The Right To Counsel, supra note 4 at 9.

See also Salhany, Rights, infra note 21 at 117 - 18.

11 See Blackstone, ibid.

12 Ibid. at 355 - 56. [emphasis in original]

Note: Beaney, The Right To Counsel, supra note 4 at 10 writes the courts gave a generous interpretation as to what was a matter of law, however, because there was no statutory instrument governing this right, the extent of the right varied between courts.
Right To Counsel: A Historical Perspective

with up to two counsel, named by the prisoner.13 This legislative modification only applied in relation to treason and not all felonies. It was, however, the precursor of the widening of this right.

The importance of the right to counsel was recognised in 1836 by a Royal Commission on criminal law as being essential to the discovery of truth and the advancement of justice. The commission noted that:

it will hardly, we think be disputed, that the permitting the advocate to speak for the client tends, generally, to discovery of truth and the consequent advancement of justice, since the practice has obtained in every civilized age and country, and particularly is adopted by our own law in all judicial proceedings excepting trials for Felonies. ... But if the hearing of the accused be essential to justice it is also essential that he should be heard in a manner most likely to be effectual, that is, by his counsel, since without that aid the privilege would frequently be illusory.14

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13 See Blackstone, *ibid.* at 356.

Note: see *The Treason Act*, 1695, 7 & 8 Will. 3, c. 3, s. 1, in *Statutes at Large*, vol. 3 at 593. The statute allowed the accused to receive a copy of the indictment five days before the trial and they were allowed to be advised by counsel to make their full defence. The court was also authorized to assign counsel if the accused requested counsel.

The distinction between counsel being able to assist only on issues of law and not fact was abolished for accused felons in England in 1836.\footnote{See An Act for Enabling Persons Indicted of Felony to Make Their Defence by Counsel or Attorney, 1836 (U.K.), 6 & 7 Will. 4, c. 114, in Statutes at Large, vol. 76 at 653 - 54. S. 1 “it is just and reasonable that Persons accused of Offences ... should be enabled to make their full Answer and Defence ... all Persons tried for Felonies shall be admitted, after the Close of the Case for the Prosecution, to make full Answer and Defence thereto by Counsel learned in the Law ...” S. 2 “in all Cases of summary Conviction Persons accused shall be admitted to make their full Answer and Defence and to have all Witnesses examined and cross-examined by Counsel or Attorney.” Note: it has been argued that this was simply “legislative confirmation of what had been the best judicial practice for almost 75 years.” See R. E. Salhany, The Police Manual of Arrest, Seizure & Interrogation, 6th ed. (Scarborough: Carswell, 1994) at 1028. Note: in 1836 Upper Canada followed the lead of England and passed legislation that provided an accused with the right to be heard in full answer and defence, either personally or by Counsel at his or her election. See An Act to allow persons indicted for felony a full defence by Counsel, and for other purposes therein mentioned, 6 Wm. 4, S.U.C. 1836, c. 44, s. 1. “[I]t shall and may be lawful for any person tried for felony in this Province, to be heard in full defence before the Court and Jury, either personally or by counsel, at his, or her election.” Note, this is the original text of the provision, an altered version is cited in MacFarlane, Right To Counsel, supra note 14 at 442.} As a result, such persons were entitled to the assistance of counsel in all aspects of the trial.

A right associated with the right to counsel is the right to make full answer and defence; this right has been recognised throughout modern criminal trials. Stephen wrote that “[i]n all cases whatever prisoners, charged with any crime, are admitted, after the close of the case of the prosecution, to make full answer and defence thereto by counsel learned in the law or by solicitors in Courts where solicitors practice as counsel.”\footnote{Sir J.F. Stephen, Digest of the Law of Criminal Procedure (London: MacMillan, 1883) at 187 - 88.}
The Supreme Court recognised that indigent accused charged with capital offences have a constitutional right to counsel at trial and on appeal, however, it has cautioned that each decision depends on the facts of the particular case. The Court based this right on the due process provision contained in the Fourteenth Amendment, rather than the Sixth Amendment right to counsel. Later, under Earl Warren C.J. the Supreme Court became more protective of accused persons rights: “How could anyone accused of a crime exercise those rights guaranteed

17 U.S. Const. amend. V. “No person ... held to answer for a capital, or otherwise infamous crime ... [shall] be deprived of life, liberty, or property, without due process of law; ....” See ibid. amend. VI. “In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.” See ibid. amend. XIV, § 1. “No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” See also Winick, supra note 7.


20 See Powell, supra note 18.

Note: in Powell, at 71 the court found that “under the circumstances ... the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was ... a denial of due process ....”

Note: prior to the Powell decision, the due process clause of the Fourteenth Amendment amounted to a guarantee of a fair trial. See Beaney, The Right To Counsel, supra note 4 at 149.

21 Note: the Court had to rely on the Fourteenth Amendment because the state, not the federal government, had jurisdiction over the offence and the Fifth and Sixth Amendments apply to prosecutions conducted by the federal government. See R.E. Salhany, The Origin of Rights (Toronto: Carswell, 1986) at 119 [hereinafter, Salhany, Rights].

Note: the due process protection was first enunciated by a statute in 1354: “[N]o man of what State or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.” See No Person Shall Be Condemned Without His Answer, 1354, 28 Edw. 3, c. 3, in Statutes at Large, vol 1, at 285.
Right To Counsel: A Historical Perspective

to him by the Constitution if he could not afford to hire a lawyer ...."\textsuperscript{22} The Court held that the Fourteenth Amendment incorporates the Sixth Amendment right to counsel.\textsuperscript{23} The Court recognised the belief "that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."\textsuperscript{24} Later the Court held that the *Powell* and *Gideon* principles apply whenever there is a loss of liberty.\textsuperscript{25}

The Supreme Court, in *Miranda*, expanded the right to include the interrogation stage of an investigation.\textsuperscript{26} The court also recognised that states "have the obligation not to take advantage of indigence in the administration of justice."\textsuperscript{27}

The right to counsel in the United States has been recognised as being the right to the 'effective' assistance of counsel.\textsuperscript{28} However, because of the 'crisis in the justice system'\textsuperscript{29} the constitutional protections of accused persons "may be guaranteed only to those who can afford to pay for them."\textsuperscript{30} Given the problems of the indigent defence system, including increased caseloads and low compensation, the effective implementation of the Sixth Amendment right to counsel is in jeopardy.\textsuperscript{31} "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel ...."\textsuperscript{32} Further support for this proposition is evidenced by the fact that "the existence of a federal constitutional right to

\textsuperscript{22} Salhany, Rights, *ibid.* at 120.
\textsuperscript{23} See *Gideon*, *supra* note 18.
\textsuperscript{24} *Ibid.* at 344. [emphasis added]
\textsuperscript{25} See *Argersinger*, *supra* note 18 at 37.
\textsuperscript{27} *Ibid.* at 472.
\textsuperscript{28} This right is well established by U.S. Supreme Court decisional law, see Burkoff, *infra* note 33.
\textsuperscript{30} *Ibid.* at 25.
\textsuperscript{31} *Ibid.* at 3 - 9.
effective assistance of counsel, albeit an implicit right, is now long and well established in Supreme Court decisional law (and in terms of thousands of lower court decisions).”

However, while the American situation is helpful to see how the right developed, it has been argued that it is not relevant to the interpretation of the right to counsel in Canada.

**B. Canada**

1. **Beginning Canada’s Tradition**

As was noted earlier, the Legislature of Upper Canada first passed legislation in this area in 1836 that was similar to the British statute of the same year. The Province of Canada followed with a like statute in 1841. Canada’s first *Criminal Code* also continued this right for both

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34 See MacFarlane, *Right To Counsel*, supra note 14 at 449 - 50, where he sets out three factors why the U.S. experience should not be followed in Canada.

(1) The U.S. “line of authority … has been [consistently] rejected as inapplicable to the situation in Canada.  . . .”

(2) The context of the U.S. decisions is wholly unlike that of Canada in the 1990’s. Canada has publicly funded legal aid schemes, statutory mechanisms for appointment of counsel on appeal and the judge has a duty to protect the unrepresented accused person.

(3) The U.S. Constitutional protections are dissimilar to those found in the *Charter*.

35 See *supra* note 15 and accompanying text.

36 See *An Act for Improving the Administration of Criminal Justice in this Province*, S.C. 1841, 4 & 5 Vict., c. 24,
   - s. 9 “all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by Counsel learned in the Law . . .”
   - s. 10 “in all Cases of summary conviction, persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by Counsel or Attorney.”

Note: this legislation was the precursor for the current *Code* provision, *Criminal Code*, R.S.C. 1985, c. C-46, s. 650(3) [hereinafter *Criminal Code*, 1985], “[a]n accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.” [emphasis added]
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indictable and summary offences. In 1923, the Court of Appeal was given the ability to appoint counsel for an appellant who could not afford to retain counsel. MacFarlane suggests that “[i]t is not sufficient for the court to be satisfied that it is in the interests of the accused to have counsel assigned: the presiding judge(s) must focus upon the broader interests of justice.” In 1954, the 1892 Criminal Code provisions related to right to counsel were amended, and have remained the same since that time.

37 See Criminal Code, 1892, 55-56 Vict., c. 29, s. 659 (indictable) “Every person tried for any indictable offence shall be admitted, after the close of the case of the prosecution, to make full answer and defence thereto by counsel learned in the law.” See also s. 850 (summary) “The person against whom the complaint is made or information is laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf.”

38 See An Act to Amend the Criminal Code, S.C. 1923, c. 41, s. 9 [Now Criminal Code, 1985, supra note 36 at s. 684(1) which is essentially the same as the original provision. “A court or appeal or a judge of that court may at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.”] [emphasis added] Note: Criminal Code, 1985, supra note 36 at s. 694.1 provides a corresponding discretion to the Supreme Court of Canada when an accused or party to an appeal is without counsel.

39 MacFarlane, Right To Counsel, supra note 14 at 464.

Note: the factors he feels the judge or court should consider include: the seriousness of the charge, complexity of the case, whether the accused initiated the appeal or is responding to a crown appeal, whether the individual has advanced meritorious grounds.

40 See supra note 37.

41 S. 659 was amended by Criminal Code, (1954) S.C. 1953-54, c. 51, s. 577(3). “An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.” [now Criminal Code, 1985, supra note 36 at s. 650(3)] S. 850 was amended by Criminal Code, (1954) S.C. 1953-54, c. 51, s. 709(1). “The prosecutor is entitled to conduct his case and the defendant is entitled to make his full answer and defence.” [now Criminal Code, 1985, supra note 36 at s. 802(1)]
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2. Bill of Rights

In 1960 the Canadian Parliament enacted the *Bill of Rights*.\(^{42}\) The rights protected included "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."\(^{43}\) It also provided "the right to retain and instruct counsel without delay, . . ." upon arrest or detention,\(^{44}\) and required that no law "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."\(^{45}\) These rights only apply with regard to federal legislation, such as the *Criminal Code*, and because the Bill is a normal federal statute as opposed to a constitutional document, the rights it embodied could be amended or repealed as any other statute could.

The pre-Charter form "of the right to counsel had evolved into a social right or a human right implying an obligation on the state to provide counsel for an accused who lacks sufficient means to pay a lawyer."\(^{46}\) Because the right to make full answer and defence could be made personally or by counsel, it became to be viewed more as a right to

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\(^{43}\) *Ibid* at s. 1(a).

\(^{44}\) *Ibid* at s. 2(c)(ii).

\(^{45}\) *Bill of Rights*, *ibid*. at s. 2(e).

a fair trial, which only in certain circumstances entailed the requirement of legal counsel.\footnote{47}

In \textit{Ewing}, Farris C.J.B.C., writing in dissent, Branca J.A. agreeing, clearly stated his position by writing:\footnote{48}

\begin{enumerate}
\item An accused person is entitled to a fair trial.
\item He cannot be assured of a fair trial without the assistance of counsel.
\item If, owing to the lack of funds, he cannot obtain counsel, the State has an obligation to provide one.
\end{enumerate}

However, "[a]ll three members of the majority ... agreed with ... the judgment of the chamber's judge ... who held that the right to counsel is not a principle of fundamental justice, and the requirement in law is not that every accused by defended by counsel, but that he receive a fair hearing."\footnote{49} Seaton J.A., writing for himself and Taggart J.A. concluded as follows:

an accused person does not have the right to have counsel assigned to him in all cases. ... [B]ut it does not follow that it is never necessary to appoint counsel. The trial Judge is bound to see that there is a fair trial. Because of the complexity of the case, the accused's lack of competence or other circumstances a trial Judge might conclude that defence counsel was essential to a fair trial.\footnote{50}

Both the majority and dissenting judges concluded that in certain circumstances defence counsel may be essential to a fair trial. On the facts of \textit{Ewing}, however, the majority felt that the circumstances did not warrant providing the accused with counsel to have a fair trial.

\footnotesize\begin{itemize}
\item \footnote{47} See \textit{Ewing, supra} note 44.
\item \footnote{48} \textit{Ibid.} at 360.
\item \footnote{49} See MacFarlane, \textit{Right To Counsel, supra} note 14 at 453. [emphasis added]
\item \footnote{50} \textit{Ewing, supra} note 44 at 365. [emphasis added]
\end{itemize}
Impetus for change was also coming from the international arena, as is demonstrated by the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The fundamental importance of these rights lies in the right of an accused person to employ, through the use of his or her resources, such legal representation as they choose, and if they are unable to afford this expense, the right to have state funding. Where one has resources to fund a defence it is “[obvious] the expenditure of public funds on [their] behalf … is not warranted.” The importance of allowing an accused access to counsel was recognised by the Ontario Court of Appeal, which held that “a person charged with a serious offence is under a grave disadvantage if he is, for any reason, deprived of the assistance of competent counsel.” Therefore, prior to the advent of the Charter, the right to counsel was available when counsel was

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51 See *International Covenant on Civil and Political Rights*, (1967) at art. 14(3) in 6 I.L.M. 368, 999 U.N.T.S. 171 at 372 - 73 [cited to I.L.M.]. “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; …” [emphasis added] Note: Canada is a signatory to this Covenant, and it came into effect on August 19, 1976. See also J. Atrens, *The Charter and Criminal Procedure: The Application of Section 7 and 11*, (Toronto: Butterworths, 1989) at §6.4 [hereinafter Atrens, Application of ss. 7 & 11]. “The international covenants were the inspiration for much of the wording of s. 11(d) of the Charter and s. 2(f) of the Bill of Rights.”

52 See *European Convention on Human Rights*, 1951, at art. 6(3) in I. Brownlie, *Basic Documents on Human Rights* (Oxford: Clarendon 1992) at 329. “Everyone charged with a criminal offence has the following minimum rights: … (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to be given it free when the interests of justice so require; …” [emphasis added] Note: “The right to choose a lawyer for the defence depends on the accused having sufficient means to pay his [sic] fees, …” in J.E.S. Fawcett, *The Application of The European Convention on Human Rights* (Oxford: Clarendon, 1987) at 190.

53 *Rowbotham*, supra note 9 at 64.

necessary to ensure that a fair trial took place. Where an accused had insufficient funds, the State was required to provide counsel.

3. Charter of Rights

The Charter has provided guarantees in ss. 10(b), 7, and 11(d) that could enhance an accused person’s right to counsel in certain circumstances.55

The purpose of s. 10(b) is to ensure that persons who have been arrested or detained are aware of their rights, including the right to silence and the right not to incriminate themselves, so that they can make informed choices as to how they will act.56 Depending on the circumstances, the presence of counsel may be important to ensure that an informed choice can be made.

Section 10(b) of the Charter provides an accused person the right to retain counsel. In Brydges, Lamer J. as he then was, reviewed the Legal Aid and duty counsel systems, which provided “recognition of the importance to the right to counsel for all persons detained in

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55 See Atrens, Application of ss. 7 & 11, supra note 51 at §9.13. “There can be no doubt ... that the right to counsel is broader that the specified right in s. 10(b) ... it applies to all accused persons at all stages of the prosecution process.”

Note: Section 10: Everyone has the right on arrest or detention
(b) to retain and instruct counsel without delay and to be informed of that right.

56 See R. v. Brydges, [1990] 1 S.C.R. 190 at 202 - 03, 53 C.C.C. (3d) 330, 74 C.R. (3d) 129, 104 A.R. 124 [hereinafter Brydges cited to S.C.R.]. Lamer J., as he then was, adopted the words of Wilson J. from Clarkson v. Queen, where she found that the right to counsel is “aimed ‘at fostering the principles of adjudicative fairness’ one of which is ‘the concern for fair treatment of an accused person’.”

See also M. McConville, et al., Standing Accused: The organisation and practices of criminal defence lawyers in Britain (Oxford: Clarendon Press, 1994) at 281. “Defence lawyers ... play a key, pivotal role in the process, serving more to transmit to the client the system’s imperatives, ... as to assert or translate their client’s own interests within the legal process.”
connection with criminal offences."\(^{57}\) He noted that this recognition extended beyond the rights contained in the *Bill of Rights* and the *Charter*, by referring to Canadian international commitments, all of which "reinforce the view that the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately."\(^{58}\) However, "[the right in s. 10(b)], and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not in terms constitutionalize the right of an indigent accused to be provided with funded counsel."\(^{59}\) More recently in *Prosper*\(^{60}\) and *Matheson*\(^{61}\) Lamer C.J. referred to the Minutes of the Proceedings of the Senate and House of Commons on the Constitution of Canada as an aid to interpret the *Charter* issue so as to conclude

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57 *Brydges*, *supra* note 56 at 214. [emphasis in original]
See also *R. v. Ross*, [1989] 1 S.C.R. 3 at 11, 46 C.C.C. (3d) 129, 67 C.R. (3d) 209, [cited to S.C.R.]. Justice Lamer, as he then was, wrote, that "accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available in a reasonable delay that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer."

58 *Brydges*, *ibid.* at 214 - 15.
See also *R. v. Bartle*, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289, 118 D.L.R. (4th) 83, 33 C.R. (4th) 1. In *Bartle* the Supreme Court reinforced the importance of an accused’s right to seek legal advice by extending the *Brydges’* principles to include the requirement to inform the accused of existing and available duty counsel services, including 1-800 toll free legal advice, where it is available.

59 *Rowbotham*, *supra* note 9 at 65 - 66.
See also *Deutsch v. Law Society of Upper Canada*, [1985] (1986), 48 C.R. (3d) 166 at 171, 11 O.A.C. 30, 16 C.R.R. 349 (Ont. Div. Ct.) [hereinafter *Deutsch* cited to C.R.], where Craig J. concluded that the "entrenched right to retain and instruct counsel is a matter separate and distinct from the issue of right to funded counsel."


that the *Charter* was not intended to entrench a right to funded counsel.\(^\text{62}\) The Minutes revealed that a proposed amendment to s. 10 would have required counsel to be provided if the accused did not have sufficient means to pay and if it was in the interests of justice. However, because the legislative history clearly demonstrated that the amendment was considered and rejected, the Court chose not to interpret the *Charter* to impose such a ‘positive constitutional obligation’ on governments.\(^\text{63}\)

Section 7 of the *Charter* is Canada’s nearest equivalent to the U.S. due process provision. The Supreme Court of Canada in *Reference re s. 94(2)* held that s. 7 protects both substantive and procedural guarantees.\(^\text{64}\) This interpretation was confirmed by the Court in *Vaillancourt*.\(^\text{65}\) Mr. Justice Lamer, as he then was, concluded that “[u]nder section 7, if a conviction, given either the stigma attached to the offence or the available penalties, will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of

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\(^{\text{62}}\) Prosper, *supra* note 60 at 266 - 67.
See also Deutsch, *supra* note 59 at 172.
Note: However, this intention was based on the premise that the provincial legal aid plans adequately dealt with the problem of right to counsel. This is evidenced by the fact that the proposed amendment was not defeated until, the then Minister of Justice Mr. Chrétien, provided assurances that the provincial legal aid plans already dealt with the problem. Therefore, in instances where these plans do not ‘deal with the problem’ or where the accused is denied legal aid, this issue will have to be re-visited.
See also Rowbotham, *infra* note 78 and accompanying text.

\(^{\text{63}}\) See Prosper, *ibid.* at 267.
See also Matheson, *supra* note 61 at 336.

See also N. Finkelstein, & M. Finkelstein, *Constitutional Rights In The Investigative Process* (Toronto: Butterworths, 1991) at 5 [hereinafter Finkelstein & Finkelstein].
Note: Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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fundamental justice.”

66 He also found in Re s. 94(2), that “ss. 8 to 14 provide an invaluable key to the meaning of “principles of fundamental justice”. ... [T]he principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.”

Thus, although s. 7 of the Charter does not contain an explicit right to counsel at trial, such a right is a basic tenet of our justice system and analogous to the s. 10 right. Further, it is of such great importance to our system's values of presumption of innocence and right to a fair trial contained in s. 11(d) of the Charter that it should be included within s. 7.

67 In Dehghani Iacobucci J. of the Supreme Court of Canada noted that Re: 94(2) should be read in light of a later decision, Re: ss. 193 and 195.1(1)(c) of the Criminal Code, where Lamer, J. concluded that “it is desirable to maintain a conceptual distinction between the rights

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Ibid. at 651. [emphasis added]
Re s. 94(2), supra note 64 at 503.

Note: see T. Heintzman, “Balancing the Conflict in Requirements of Legal Aid” (1995) 4:4 National 4, where the author states that “the most basic element of a justice system [is] the freedom to choose your own lawyer.”


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See Finkelstein & Finkelstein, supra note 64 at 10.
Note: See Re s. 94(2), supra note 64 at 503, 07, and 12 - 13, where Lamer J. noted that in defining the ‘principles of fundamental justice’ the Court should look at international conventions on human rights, bills of rights, constitutional committee minutes, and the policies, practices, philosophies and legislation which underlie our judicial process, as well as the other components of our legal system. However, as the constitutional committee minutes provided a record of civil servants views on the issue they were given little weight.

See also Finkelstein & Finkelstein, ibid. at 11 - 13.
Note: Section 11: Any person charged with an offence has the right
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.


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guaranteed by s. 7 and the other freedoms of the Charter." He then noted two other Supreme Court decisions where the Court held that when the plaintiff's complaint falls squarely within a highly specific guarantee in ss. 8 to 14 then the Charter challenge must be determined according to that section, rather than under s. 7. However, Iacobucci J. noted that depending on the particular facts "there may be residual protection of the right to counsel under s. 7 in situations which do not fall within the parameters of 'arrest or detention' in s. 10(b)."

The 'conceptual distinction' argument provides further support for including the right to counsel within s. 7. The facts relevant to proceeds of crime offences may not fall within the traditional parameters of 'arrest or detention' in s. 10(b); therefore, there should be a residual protection of the right to counsel under s. 7 of the Charter. Further "[i]t is important to remember that s. 10(b) ... is not exhaustive of a person's right to counsel. ... Section 10(b) addresses the specific right of counsel at the pre-trial stage in circumstances when a person is arrested or detained. Section 10(b) does not preclude the finding that in other circumstances, the denial of the right to counsel may be a violation of s. 7."

This theory is supported by the Supreme Court decisions in Stinchcombe and

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71 Dehghani, supra note 69 at 1075.
73 Dehghani, ibid.
75 See R. v. Stinchcombe, [1991] 3 S.C.R. 326 at 336, (1992), 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97 [hereinafter Stinchcombe cited to S.C.R.]. "[T]he common law right [of the ability of the accused to make full answer and defence] has acquired new vigour by virtue of its inclusion in s. 7 ... as one of the principles of fundamental justice. ... The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure the innocent are not convicted."
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Seaboyer,76 which “have created a solid base for the recognition of a right to a fair trial or right to make “full answer and defence”. ... The result is that it is not unfair to view s. 7 as a kind of “basket clause” in the Charter from which the courts have found implied a number of fundamental rights.”77 One such right is the constitutional right to be represented a trial in a criminal trial; in recognition of this right Cory J., as he then was, wrote for the Ontario Court of Appeal in Rowbatham, that:

those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, ... the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but

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76 See Seaboyer, supra note 67 at 608 “the right of the innocent not to be convicted is dependent on the right to present full answer and defence.”

77 Macklem, Constitutional Law, supra note 45 at 530.

Note: in Kelly the Court concluded that counsel’s performance was not ‘ineffective’ or ‘unprofessional’ and the appellant was not deprived of the “effective assistance of counsel” within the meaning of that phrase as used in Silvini.

Note: MacFarlane, Right To Counsel, supra note 14 at 442 writes that the “notion of full answer and defence as embraced by the 1836 [Upper Canada] Statute ... has been entrenched within s. 7 of the Charter ....”
cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial. 78

Mr. Justice Cory then set out the s. 24(1) remedy, whereby:

a Trial Judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided. ... Such a stay is clearly an appropriate remedy under s. 24(1) of the Charter. Where the Trial Judge exercises this power, either Legal Aid or the Crown will be required to fund counsel if the trial is to proceed. 79

All persons charged with crimes, regardless of the crime, are presumed to be innocent until proven guilty. A fundamental precept of this right, is the right to counsel. The importance of the presumption of innocence contained in s. 11(d) of the Charter cannot be emphasized.

78 Rowbotham, supra note 9 at 66. [italics in original, underlining added]
Note: the decision in Rowbotham, approved of earlier decisions:
See Deutsch, supra note 59 at 173 - 74 where Craig J. concluded that “under the common law the accused has a right to a fair trial and the trial judge is bound to ensure that an accused person receives a fair trial. ... Pursuant to s. 7 of the Charter the accused has an entrenched right not to be deprived of his liberty except in accordance with the principles of fundamental justice. Also pursuant to s. 11(d), he has an entrenched right to a ‘fair and public hearing’. The right to fundamental justice and a fair and public hearing includes the right to a fair trial. There may be rare cases where legal aid is denied to an accused person facing trial, but, where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel, in such a case it seems to follow that there is an entrenched right to funded counsel under the Charter.”
See also Ewing, supra note 44 and accompanying text.
See also Atrens, Application of ss. 7 & 11, supra note 51 at §9.14. “Sections 7 and 11(d) provide a plausible Charter basis for arguing that a right to have counsel provided exits. ... [T]here will be cases, especially at trial, where the circumstances are such that the principles of fundamental justice or the right to a fair hearing require that the accused be provided with counsel.”

79 Rowbotham, ibid. at 69. [emphasis added]
Note: where a stay is granted, the Supreme Court of Canada has held that it is to all intents and purposes, an acquittal, see R. v. C.I.P. Inc., [1992] 1 S.C.R. 843, 71 C.C.C. (3d) 129 at 145, 12 C.R. (4th) 237.
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enough. In *Oakes* Chief Justice Dickson, as he then was, eloquently stated the importance of the presumption of innocence to our adversary system, in fact to our society:

> The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) ... the presumption of innocence is referable an integral to the general protection of life, liberty and security of the person contained in s. 7 .... The presumption of innocence protects the fundamental liberty and human dignity of any person and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

Chief Justice Dickson then set out the minimal requirements of s. 11(d), which will help guarantee the presumption of innocence. Further, although s. 11(d) only specifies the right to a ‘fair and public hearing’ “proceedings before trial ... are not irrelevant .... What occurs before trial may have an important bearing on the trial process.” One such factor would be depriving an accused person the ability to secure competent counsel in order to prepare a full answer and defence for trial. Madam Justice McLachlin also reiterated the importance of the right by stating:

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82 *Ibid* at 121. “First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof. ... Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness.”
83 Atrens, Application of ss. 7 & 11, *supra* note 51 at §6.7.


“[R]epresentation at trial tells only part of the story. ... The provision or lack of competent legal advice at early stages of the criminal process can substantially influence the outcome of the subsequent proceedings.” [emphasis in original]
that "[t]he precept that the innocent must not be convicted is basic to our concept of justice. One only has to think of the public revulsion felt at the improper conviction of Donald Marshall in this country or the Birmingham Six in the United Kingdom to appreciate how deeply held is this tenet of justice."\textsuperscript{84}

Therefore, Canadian Courts have recognised that the accused's right to counsel falls within the constitutionally protected rights to a fair trial and full answer and defence as outlined above. Given the importance of proper representation to the functioning of the adversary system this right takes on new meaning where alleged proceeds of crime are not allowed to be used to pay for defence counsel.\textsuperscript{85} Justice McLachlin noted that "[t]he right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s. 11(d) ... It has long been recognised that an essential facet of a fair hearing is the 'opportunity adequately to state [one's] case.'"\textsuperscript{86} She then tied this together by concluding that "[t]he right of the innocent not to be convicted is dependent on the right to present full answer and defence. ... If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him."\textsuperscript{87}

\textbf{III. Summary}

Despite the relatively short historical life of an accused's right to counsel it has been recognised as integral to the proper functioning of the adversary system in certain circumstances. Prior to the advent of the \textit{Charter}, the right to counsel was available when counsel was necessary to ensure that a fair trial took place. Where an accused had insufficient funds, the State was required to provide counsel. The basis for the right derives not only from the common law but

\textsuperscript{84} Seaboyer, supra note 67 at 606.
\textsuperscript{85} This issue will be discussed in detail in Chapter Three.
\textsuperscript{86} Seaboyer, supra note 67 at 607.
\textsuperscript{87} Ibid. at 608.
also from fundamental constitutional protections, such as the right to a fair trial, full answer and
defence and the presumption of innocence.

The right to counsel has been entrenched by the Charter where the case is serious and
defence counsel is essential to a fair trial. This right allows a person who has been detained or
arrested to have access to counsel who will then guide them through the judicial process,
including “ensuring that he [sic] does not take steps in ignorance in the investigative process
which will operate to his [sic] prejudice later.”88 Thus, its ultimate purpose is to protect an
accused’s right to a fair trial.

The entire criminal trial process must comport with the standards of fundamental justice in
s. 7 of the Charter, thus it must satisfy the requirements of due process. Where an applicant can
show that his or her right to life, liberty or security of the person was infringed or in jeopardy, the
inquiry will proceed to examine whether the deprivation is contrary to the principles of
fundamental justice.89

In forfeiture cases the liberty of an accused is potentially at stake. Given that s. 7
encompasses both substantive and procedural guarantees and the fact that the Charter guarantees
all citizens the right not to be deprived of the right to liberty except in accordance with the
principles of fundamental justice, the statute and policies of state actors must be examined to
ensure they are constitutional. Where an accused is denied access to funds that have been alleged
to be proceeds of crime on an ex parte basis, before the person has been proven guilty of an

88 Finkelstein, supra note 3 at para 1.20.
See also ibid. at para. 1.21. Where other rationales for the right are set out, such as: to
lessen the possibility of police coercion; to enable the defence to learn the facts of the case
and assess the Crown’s case at an earlier stage; to ensure evidence from the accused is
accurately transcribed; and to safeguard the dignity of the suspect.

57 C.R. (3d) 193, 31 C.R.R. 118 (C.A.) [cited to S.C.R.] where La Forest J. sets out this
two stage procedure.
offence, he or she may be prevented from adequately stating their case. Therefore, the proceeds of crime provisions and their administration by the Crown, including the police, will have to be analysed in terms of how they impact an accused person's access to their property to fund a legal defence. The next Chapter will contain an in depth discussion of the forfeitability of funds intended to be used as legal fees.
Chapter 3

To Forfeit - Or - Not To Forfeit: The Legal Fees Conundrum

"Forfeiture of attorneys' fees represents a grave threat to the very nature of our adversary system."

Bruce J. Winick

I. Introduction

Problems can develop where forfeiture laws clash with the right of accused persons to retain counsel of their choice. The draconian nature of forfeiture laws can affect this right even before property is forfeited. Such persons will not yet have been found guilty of a crime and yet their ability to deal with their property will be constrained by a seizure or a restraining order. A wide definition of assets that are subject to seizure or restraint, combined with a low burden of proof when asserting which assets may be subject to forfeiture, may result in all of an accused’s assets being seized or restrained. The Crown’s ex parte application may leave the person without

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See ibid. at s. 462.31 where “‘proceeds of crime’ means any property, benefit, advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (a) the commission in Canada or an enterprise crime offence or a designated drug offence, or (b) an act or omission anywhere, that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.”

See also ibid. at s. 462.32(1) where the police are allowed to seize “[named] property and any other property in respect of which that person or peace officer believes on reasonable grounds, that an order of forfeiture may be made ....”

See also ibid. at s. 462.33(2)(c) where a restraint order may be issued against any property liable to forfeiture.
means to pay necessary expenses, such as for legal counsel of their choice, before they have been convicted of an offence.2

This Chapter will describe how the proceeds of crime legislation has dealt with the issue of legal fees, and how this affects an accused’s right to counsel. International influences will be discussed first followed by a comparison of how this area was dealt with in the United States, England, Australia and Canada. However, only the Canadian law will be discussed in detail. Then Charter issues that arise in this area will be considered, but not covered in detail until Chapter Four. This will be followed by an analysis of the Part XTI.2 case law, which has dealt with legal fees. The Chapter will conclude with an analysis of a case from the United States that demonstrates what could happen if the American approach to legal fees is followed. This case will provide further evidence of why Canadian Parliamentarians explicitly stated that they were moving away from the American model when developing Part XTI.2’s provisions.

II. International Recognition

As was noted in Chapter 1, the Drug Convention obligates parties to establish criminal offences for laundering the proceeds of drug related offences.3 The enumerated offences include:

[t]he conversion or transfer of property, knowing that [it is derived from a drug offence] for the purpose of concealing or disguising the illicit origin of the property or of assisting

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2 See B. Fisse, “Confiscation of Proceeds of Crime: Funny Money, Serious Legislation” in B. Fisse, D. Fraser & G. Coss, eds., The Money trail Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting (Sydney: Law Book Co., 1992) c. 5 at 96 [hereinafter Fisse, Funny Money]. The author noted that legislation, which allows the confiscation of proceeds of crime, may unduly impede access to legal assistance. “The potential threat has been described by Mark Weinberg in these terms: A judge should be conscious of the dangers of oppression inherent in a situation where the de facto prosecutor can rely on unproven allegations made ex parte, and thereby prevent a defendant from being able to defend himself against criminal charges by the simple expedient of drying up his funds.”

any other person who is involved in the commission of [a drug offence] to evade the legal consequences of his actions.\(^4\)

It has been argued that this provision may give rise to problems for lawyers representing persons accused of proceeds offences because signatories will be obliged to establish an offence related to the conversion or transfer of property for the purpose of providing legal counsel and defence to an alleged launderer.\(^5\) This argument is derived from a literal interpretation of Article 3(1)(b)(i), which would criminalise the transfer of money to assist a defendant in 'evad[ing] the legal consequences of his action'. Another commentator argued that while Article 3(1) appears to make it an offence to use alleged proceeds for the purposes of providing legal counsel to an accused, the answer to the question of the legality of paying lawyers fees out of laundered proceeds would primarily depend on whether the alleged launderer was found to be guilty or innocent.\(^6\) First, if the literal interpretation argument was successful it would have a fundamental affect on the criminal justice system, because it could undermine the ability of lawyers to defend persons who are presumed to be innocent and facing proceeds of crime charges. The \textit{ex post facto} interpretation of having to rely on the outcome of the trial to determine whether or not defence counsel will be paid\(^7\) does nothing to assist accused persons or lawyers involved in

\(^4\) \textit{Ibid.} at art. 3(1)(b)(i). [emphasis added]


\(^7\) See B.J. Winick, “Forfeiture of Attorneys’ Fees under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid it” (1989) 43:4 U. Miami L. Rev. 765 at 775 [hereinafter Winick, Forfeiture of Attorneys’ Fees]. “Not only would this impose a financial risk that few private attorneys could afford, but it also places the attorney in violation of Rule 1.5(d)(2) of the Model Rules of Professional Conduct, which prohibits contingent fees in criminal cases. Such contingent fees are ethically banned because they pose inevitable conflicts of interest between attorney and client and, by making the defence attorney an interested party in the case, provide the potential for corrupting justice.”
providing defence work in this area. Therefore, if this provision is strictly construed persons charged with such offences could be faced with the reality of not having defence counsel who would be willing to take their case.

There are four propositions that support the argument that it should not be a criminal offence to pay defence counsel out of alleged proceeds of crime. First, as Magliveras notes, under Article 3(1)(c) “a state is not under an obligation to outlaw those acts whose criminalisation would be contrary ‘to its constitutional principles and the basic concepts of its legal system’.”

Therefore, Canada may override its obligation and protect the fundamental principles espoused in the Charter principles that are crucial to the proper functioning of our adversary system. Second, the confiscation provisions are not to be construed so as to prejudice the rights of bona fide third parties. This interpretation may be of benefit to defence counsel seeking payment of legal fees out of seized proceeds as a third party. Third, the United States report to the Conference provides the most convincing evidence that such an interpretation was in the minds of the drafters. It noted that this provision

is not intended and does not reach legitimate payment of attorney’s fees. Thus, if an attorney received money for legitimate representation purposes, he/she could not be prosecuted if it turned out that the money was derived from a narcotics offence. The paragraph requires ... ‘evasion’ [which] implies criminal purpose -- not legal avoidance through bona fide representation by counsel.

8 See also Committee on the Judiciary United States Senate, Forfeiture of Assets Intended For Use As Attorneys’ Fees (Washington: U.S. Government Printing, Office, 1986) at 2 [hereinafter U.S. Committee on Attorneys’ Fees]. Senator Metzenbaum recognised “that a lawyer should not have to make a decision as to whether or not he or she is going to be losing his or her fee ... in the event the party is found guilty. I do not think the lawyer ought to be put in that position.”

9 Magliveras, supra note 5 at 165.

10 See Drug Convention, supra note 3 at art. 5(8).

Finally, providing a constitutionally guaranteed right to counsel should not be construed as ‘assisting an accused person to evade the legal consequences of his actions’ because a trial is a legal consequence of the alleged actions.

The more recent European Convention also contains powerful weapons to combat organized crime. It too recognises the importance of protecting all due process guarantees, including the right to be assisted or represented by a lawyer. The Explanatory Report makes it clear that the European Convention should not be interpreted so as to make it a criminal offence for a defendant to hire an attorney or for a lawyer to accept a fee that is paid out of proceeds of crime. However, the accused is only entitled to such protections as long as an order of confiscation has not been made, while bona fide third parties can defend their interests at any time.

Note: art. 6(1)(a) of the Council of Europe Convention is the same provision as is contained in art. 3(1)(b)(i) of the Drug Convention.

13 See Council of Europe Convention, ibid. art. 5. “Each party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by measures under Articles 2 and 3 shall have effective legal remedies in order to preserve their rights.”


15 See also Magliveras, supra note 5 at 166.
See Council of Europe, Explanatory Report, ibid. at para. 31, at 206 in Gilmore.
See also Baldwin & Munro, ibid. at vol. I, Council of Europe 38 - 39.
Thus, there has been international recognition of the right to pay for legal counsel out of alleged proceeds of crime that have been seized or restrained. Although the wording of the Drug Convention was not explicit in this regard, other documentation shows the true intent of the drafters. The more recent European Convention, having observed the confusion surrounding the Drug Convention, explicitly set out this right.

III. National Comparisons

The Canadian legislators had the benefit of observing how various types of proceeds of crime legislation implemented in other countries treated the issue of legal fees. This section will look at examples from the United States, England and Australia, before analyzing how Part XII.2 deals with legal fees.

A. United States

In theory, the American Constitution provides many rights which should be of assistance to accused persons seeking to pay defence counsel out of assets that have yet to be proven as proceeds of crime. The reality of the cornucopia of powerful forfeiture provisions available to police and prosecutors, that were discussed in Chapter One, is that many of these guarantees have been encroached upon.

In 1985 the American criminal forfeiture law was strengthened with the addition of a vesting provision that gave the government an interest in the property from the time the illegal act

\[16\] See U.S. Const. amend. V. “No person ... held to answer for a capital, or otherwise infamous crime ... [shall] be deprived of life, liberty, or property, without due process of law;”

See ibid. amend. VI. “In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.”

See ibid. amend. XIV. § 1, “No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
was committed. There was much concern as to how this provision would affect an accused’s ability to retain counsel. The escalation in the forfeiture powers was to be tempered somewhat by a provision that allowed bona fide transfers for value, where the purchaser was unaware the property was subject to forfeiture. Despite the fact that it would be unlikely that defence counsel could argue that they were ‘unaware’ that the property was subject to forfeiture, the first decision to analyse the proceeds issue after this amendment, U.S. v. Rogers, granted the defense’s motion to exclude attorneys’ fees from forfeiture. The court reasoned that Congress intended to limit the forfeiture provisions to sham or fraudulent transactions and did not intend to subject the compensation legitimately paid for legal services rendered to forfeiture. This decision was soon criticized in Payden, where the court held that the attorneys’ fees should be subject to forfeiture. The rationale of this latter decision was that any fees paid out of profits from illegal

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17 See Comprehensive Forfeiture Act, 21 U.S.C.S. §853(c) [hereinafter CFA]. “All right, title, and interest in [forfeitable] property ... vests in the United States upon the commission of the act giving rise to forfeiture ....”

Note: This change signalled the direction that the United States government was taking with regard to proceeds of crime. As was noted in Chapter One, under the early English law the State’s interest in land arose at the time the offence was committed and for goods and chattels it was not until the time of conviction. Therefore, the American vesting provision, makes their law even wider than the draconian forfeiture laws of early England.

18 See U.S. Committee on Attorneys’ Fees, supra note 8.


19 See CFA, supra note 17.

See also U.S. Committee on Attorneys’ Fees, ibid. at 5, where the Assistant A.G. of the Department of Justice noted that the CFA amendments “places attorneys on the same footing with all other third-person parties ....”


21 See ibid. at 1346 - 48.


See also Mass, Forfeiture of Attorneys’ Fees, supra note 18.
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enterprises would undermine the purpose of forfeiture statutes. The Rogers interpretation was supported by another decision that recognised that when interpreted literally the forfeiture provisions do not exempt attorneys’ fees; never the less, Congress did not intend for them to be included in a forfeiture order because of the ethical and constitutional problems that would arise under such an approach. The legitimacy of protecting legal fees from forfeiture was far from clear in the United States because despite the fact that a number of courts followed the Rogers line of authority, many other jurisdictions followed the Payden argument.

23 See Payden, ibid. at 849 fn. 14. The Court noted that just as a defendant cannot purchase a Rolls Royce with proceeds of crime, they should also not be able to retain the Rolls Royce of attorneys with the same tainted funds.


25 See United States v. Ianniello, 644 F.Supp. 452 (S.D. N.Y. 1985); United States v. Reckmeyer, 631 F.Supp. 1191 (E.D. Va. 1986); United States v. Bassett, 632 F.Supp. 1308 (D. Md. 1986); United States v. Figueroa, 55 U.S.L.W. 2126 (W.D. Pa. 1986); and United States v. Monsanto, 852 F.2d 1400 (W.D. Pa. 1986). Where the New York Court of Appeal held that the ‘bona fide purchaser’ exemption of §853 does not exempt legitimate non-fraudulent attorney’s fees from forfeiture since the plain language of the statute is categorical and contains no exemption for attorney’s fees, however a defendant is permitted to access restrained assets to the extent necessary to pay legitimate attorney’s fees and such payments are exempt from post-conviction forfeiture. [emphasis added]

26 See United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988); United States v. Weisman, 858 F.2d 389 (8th Cir. 1988); United States v. Lewis, 759 F.2d 1316 (8th Cir. 1988); United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988); United States v. Friedman, 849 F.2d 1488 (D.C. Cir. 1988); and United States v. Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988). The Virginia Court of Appeal held that §853 did not provide an exemption for attorneys’ fees and despite the possibility that the forfeiture laws may prevent an accused from hiring a private attorney of his choice, he is not denied his Sixth Amendment right to counsel of choice because he is entitled to a state appointed attorney.
The uncertainty of the law was clarified by the United States Supreme Court, in companion decisions, *Caplin & Drysdale* and *Monsanto.* The Supreme Court verified the *Payden* line of authority by holding that property a defendant wishes to use to pay attorneys’ fees should not be preserved from forfeiture.

The majority of the Supreme Court in *Monsanto* found that “the language of §853 is plain and unambiguous … with no exception existing for the assets used to pay attorney’s fees ….”

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Note: the Supreme Court was far from certain in its decision as it split 5-4 in both of these cases.

28 See *Caplin & Drysdale, ibid.*, which decided the issue in relation to property that was already judged to be forfeitable, *i.e.:* post-forfeiture orders; and *Monsanto, ibid.*, which decided the issue in relation to property that had not yet been judged to be forfeitable, *i.e.:* pre-forfeiture orders.

Note: Another provision, which allows the defense of an innocent owner, 21 U.S.C.S. §881(a)(6), has been interpreted so as not to apply to legal fees, because the money was already seized before it was assigned to the defense attorney. See *United States v. $70,476 in U.S. Currency*, 677 F.Supp. 639 (N.D. Cal. 1987) app dis’d without op 845 F.2d 329 (9th Cir. 1988).


Note: despite the fact that the assets are seized or restrained on an *ex parte* application, the court in *Monsanto*, at 615 fn. 10, left open the issue of whether the Due Process Clause required a hearing before a pre-trial restraining order could be imposed.
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The Court supported this interpretation by noting that since its enactment "Congress has refused to act on repeated suggestions by the defence bar for [an attorney fee] exemption ...."30

In *Caplin & Drysdale* the Court found that the decision not to exempt lawyers' fees from forfeiture would only impose a 'limited' burden on a defendant attempting to retain legal counsel because the Court assumed that such persons "may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future."31 This assumption by the Court leaves the benefit of fundamentally guaranteed rights to chance; those accused who do find such counsel will have their fundamental rights protected, but the others will not. With respect, the Court's inaptly described 'limited burden' is a gross underestimation of the effect that this could have on accused persons who are attempting to retain counsel.

The balance between protecting the State's interest in seeing that crime does not pay and an accused's interest in enjoying Constitutional guarantees should not fall to chance between

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30 See *ibid*. at 610.

Note: The *Monsanto* Court also added at 614 that if their interpretation of "Congress' intent [was wrong] that body can amend this statute ...."

Note: the reasoning of the Supreme Court is supported by the fact that "[i]n 1988, 18 U.S.C. 1957 was amended so that the term 'monetary transaction' does not include any transaction necessary to preserve the person's right to representation as guaranteed by the Sixth Amendment .... The criminal defence bar had long sought a change that would make it clear that bona fide attorneys' fees could be accepted without running afoul of the statute. .... [I]t is now clear that attorneys' fees can be accepted in order to defend a client under a charge of violating 18 U.S. C. 1957...." See J.J. Byrne, "Money Laundering Legislation In The United States" in Fisse, B., D. Fraser & G. Coss, eds., *The Money trail Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Sydney: Law Book Co., 1992) c. 17 at 360.

Note: it should not be a surprise that this amendment benefited those in the banking industry, unfortunately other 'alleged criminal types' do not have as strong a lobbying effort as the banking industry.

Note: the rational of the Supreme Court is that because a similar amendment was not made to other proceeds of crime provisions, they should not be interpreted to allow such a payment.

31 *Caplin & Drysdale*, supra note 27 at 625. [emphasis added]
different accused persons, as the Court has held. Instead the balance should be explicitly struck between the State and all accused persons. However, the balancing of interests argument will carry little weight in the United States, as the majority of the Court found that the “governmental interest in obtaining full recovery of all forfeitable assets ... overrides any Sixth Amendment interest ...”

While the American case law may be of academic interest because of its long history of dealing with proceeds of crime, it is clearly distinguishable in Canada. First, the American legislation does not contain a provision similar to Part XII.2’s legal fees exemption. Second, the U.S. statutes contain a vesting provision that gives the government an interest in the property from the time the illegal act was committed. Finally, further support for this conclusion is found in the statements of Canadian government officials introducing the proceeds legislation as being ‘unique’ to Canada and as legislation that would avoid the ‘unfortunate’ problems

32 See ibid. at 655, where the dissent, written by Blackmun, J. for Brennan, Marshall and Stevens, noted that “[i]t is difficult to put great weight on the Government’s interest in increasing the amount of property available for forfeiture when the means chosen are so starkly underinclusive, and the burdens fall almost exclusively upon the exercise of a constitutional right.”


35 See CFA, supra note 17 and accompanying text.

36 See infra note 88.
with the United States forfeiture laws.\(^{37}\) Because of these factors the dissent in \textit{Caplin}\(^{38}\) can provide some guidance in recognising the problems that result when a defendant’s right to effective assistance of counsel is deprived.

Justice Blackmun, writing for himself and Justices Brennan, Marshall and Stevens authored the dissent in \textit{Caplin & Drysdale}. He noted “that it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defence at trial.”\(^{39}\) Further, given the grave constitutional and ethical problems that arise when attorneys’ fees are not exempted from forfeiture, the practice is inconsistent with the intent of Congress\(^{40}\) and it seriously undermines the criminal justice system.\(^{41}\)

In the United States the full effect of \textit{Caplin & Drysdale} and \textit{Monsanto} is in force today in relation to the access to proceeds through a right to counsel argument.\(^{42}\) However, the issue of a

\(^{37}\) See infra note 95 and accompanying text.
\(^{38}\) See \textit{Caplin & Drysdale}, supra note 27 at 635 - 56.
\(^{39}\) \textit{Caplin & Drysdale}, ibid. at 635.
\(^{40}\) See ibid. at 636 - 43.
\(^{41}\) See ibid. at 644 - 55.
\(^{42}\) United States \textit{v. Sharir}, 755 F.Supp. 77 (S.D. N.Y. 1990) [hereinafter \textit{Sharir}], at 78 where the Court noted that the Supreme Court companion rulings “obviously foreclose [a] Sixth Amendment claim ...."
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constitutional right to due process, raised in *Monsanto*,\(^{43}\) has been decided in favour of requiring a post-seizure\(^{44}\) or post-restraining\(^{45}\) adversarial hearing where such assets are the “only means of securing counsel of choice”.\(^{46}\) Therefore, the government must demonstrate how the assets in question are connected to the illegal activity before denying their use by an accused person. The Court in *Noriega* noted that the “[d]anger that an innocent person may be convicted because of the unfair deprivation of assets that would have been used to retain his counsel of choice is simply too great to permit a freeze to go unchallenged.”\(^{47}\) The Court in *Noriega* took a more balanced approach to the problem when it recognised that while “the Government has a strong interest in combatting the drug epidemic ... this effort must never be at the expense of an accused’s constitutional rights.”\(^{48}\)

**B. England**

As in other countries, the purpose of proceeds of crime legislation in England has been recognised as ensuring “that no one convicted of drug trafficking offences shall be allowed to retain any part of the proceeds of crime.”\(^{49}\) However, in support of a defendant’s right to pay for legal expenses out of restrained property the Court of Appeal concluded that the payment of

\(^{43}\) See *Monsanto*, supra note 27.

\(^{44}\) See *Sharir*, supra note 42.


\(^{46}\) *Ibid.* at 1545.

\(^{47}\) *Ibid.* at 1544.

Note: at 1543 the court found that “[w]ith regard to attorneys’ fees ... the freeze constitutes a permanent deprivation since the defendant needs the attorney now if the attorney is to do him any good.” [emphasis in original]

\(^{48}\) *Ibid.* at 1545.

\(^{49}\) *Re Peters*, [1988] 3 All E.R. 46 at 47 (C.A.) [hereinafter *Peters*].
various expenses, including legal fees, does not contradict this goal. In another case, the Court of Appeal recognised that if it refused to release funds for legal fees the person would be able to receive legal aid, yet it found that “it would be an odd position if the court was forcing someone to qualify for legal aid who would not otherwise qualify ....” Despite the protection of this right the proceeds laws have been harshly criticized.

A number of provisions allow for the release of funds from restrained property to pay for legal fees. First, the new *Drug Trafficking Act*, which came into force 3 February 1995, establishes that a restraint order may be varied in relation to any property, where any person affected by the order makes a variation application. The Rules of the Supreme Court also specify that variation orders can include legal fees as an allowable expense. Third, the High

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50 *Ibid.* at 51. Lord Donaldson wrote that “[t]he exercise of power to vary the restraint order ... was entirely consonant with [the purpose of preserving the value of realisable property so far as is reasonable. However, the accused], is an unconvicted accused person who might be acquitted, [and he] was entitled to ask ... that he should be able to pay for the cost of his defence.”

See also *Chief Constable of Kent v. V. & Another*, [1983] Q.B. 34 (C.A.), where Lord Denning, at 45, concluded that he would “continue the injunction ... but reserving leave to the defendant to apply for the release of such sums as he may need for his defence ...”


52 See C. Sallon & D. Bedingfield, “Drugs, Money and the Law” (1993) Crim. L.R. 165 at 166. The authors wrote that “the Act erodes the intellectual foundations of the freedom of the criminal justice—indeed, central to our understanding of a citizen’s relationship with government. We submit that the damage done by the Act to our criminal justice system as a whole therefore outweighs the relatively limited advantage of sending criminal entrepreneurs to prison for a few more years.”

53 *Drug Trafficking Act* (U.K.), 1994, c. 37 [hereinafter *DTA*].


55 *DTA, ibid.* s. 26(6), which repealed and replaced *Drug Trafficking Offences Act, 1986*, c. 32, s.8(5A), as amended by *Criminal Justice Act* (U.K.), 1988, c. 33, Sched. 5, Part I, s. 3.

56 *Rules of Supreme Court*, 1965, Ord. 115 r. 4(T). “A restraint order may be made subject to conditions and exceptions including but not limited to conditions relating to the indemnifying of third parties against expenses incurred in complying with the order, and exceptions relating to living expenses and legal expenses of the defendant, ....” [emphasis added]
Court is given specific power to grant restraint orders, and may make such orders subject to living and legal expenses. The new legislation also allows the court to release as much 'cash' from the forfeitable property as the court considers appropriate to enable an accused to meet legal expenses in connection with an appeal. However, the limitation of this option is that it only applies where there was a forfeiture of cash made under s. 43 of the DTO by a magistrates court.

C. Australia

The Australian legislation also allows the court to release property held under a restraining order, inter alia, for the person's reasonable expenses defending a criminal charge. However, before granting such a release, the Court must be satisfied that the defendant cannot meet the expense or debt out of property that is not subject to a restraining order.

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57 Criminal Justice Act (U.K.), 1988, c. 33, s. 77(2) “a restraint order may make such provision as the court thinks fit for living expenses and legal expenses.” [emphasis added]

58 DTA, supra note 53 s. 44(4), which repealed and replaced Criminal Justice (International Cooperation) Act (U.K.), 1990, c. 5, s. 26A, as amended by Criminal Justice Act (U.K.), 1993, c. 36, s. 25(1). “On an application made by the appellant to a magistrates' court at any time, that court may order the release of so much of the cash to which the forfeiture order relates as it considers appropriate to enable him to meet his legal expenses in connection with the appeal.” [emphasis added]

59 See ibid. s. 44(1).

60 Proceeds of Crime Act (Aust.), 1987, No. 87, s. 43(3)(b) [hereinafter PCA].

61 See ibid. s. 43(4).
Australian provision is similar to that of England. However, in contrast to the American position, but identical to the English position, an Australian court has recognised that the goal of depriving an offender of the fruits of criminal activity is not interfered with when accused persons are allowed to receive releases for the payment of legal fees. Where releases are granted, the role of the court is to ensure that the "property potentially liable to forfeiture is not depleted wastefully or dishonestly.”

In addition to being able to make an application for release of restrained funds, the Australian statute also allows certain persons to receive legal or financial assistance. Anyone

62 See Re: Burgundy Royale Investments et al. (1992), 37 F.C.R. 492 at 498. “[I]f there is a dispute as to the reasonableness of the legal expenses in question, ... [t]he court will be required to consider what is reasonable, not only from the point of view of the client, but also having regard to the public interest, bearing in mind the possibility that an order for confiscation or forfeiture may be made. ... Underlying the policy of (the relevant provisions) is a recognition that justice requires that persons accused of criminal offences, or confronted with a threat of forfeiture of their property, should not be unfairly deprived of the means of defending themselves, and it would be inconsistent with that recognition to adopt an approach to the question of reasonableness of legal expenses which had the practical consequence of depriving persons of the opportunity of obtaining proper legal representation. Furthermore, the efficient working of the justice system depends heavily upon litigants being professionally and capably represented, and it would not assist the administration of justice to deprive litigants of the means of securing adequate professional assistance.” [emphasis added]

63 See DPP v. Vella, [1993] SCCRG No. 4353 (S.C.) (QL) at para. 11 [hereinafter Vella]. “The financial benefit to the State accruing from a forfeiture order is a mere by-product of that legislative purpose. The legislative purpose is not defeated by an accused person’s access to his property to the extent necessary to secure legal representation of his choice. If he is found not guilty, he has merely used his own money. If he is convicted and an order for forfeiture is made, the amount of the legal expenses, although not available for forfeiture, is nevertheless money of which the offender has been deprived by the proceedings against him, by reason of the necessity of paying his defence.” [emphasis added]

Note: In addition, where the accused has been convicted it is also money that a State agency has not had to pay to fund the accused’s defence.

64 See ibid. at para. 12.

Note: as per PCA, supra note 60 at s. 43(4) and accompanying text, this should include the role of the Court satisfying itself that the accused does not have non-tainted assets with which to pay for legal representation.

65 See PCA, ibid. s. 102.
who is appearing to prevent a forfeiture or restraining order against their property or is appearing to have their property excluded from a forfeiture or restraining order may apply for such assistance. However, the discretion to authorize State assistance is held by the Attorney-General. In determining whether to grant the authorization, the Attorney-General must consider if it would involve hardship to the applicant if refused and if it is reasonable to grant the application. It is obvious that the former option of having legal fees paid out of alleged proceeds of crime is preferred because the latter entails having to rely on the discretion of the Attorney-General. Given that the funds under legal aid schemes are limited, and that the availability of counsel or that the effort put into the case may be restricted, the second option is not an effective solution.

D. Canada

The debate as to access to potentially forfeitable property for the purpose of retaining defence counsel is no different in Canada. Should accused persons be allowed to use part of their seized or frozen funds to pay legal expenses or should they have to rely on government funded legal aid schemes? Canadian legislators recognised the dilemma and in particular they had the benefit of observing the problems caused by the United States legislation. In contrast to the United States, the Canadian legislators, in order to protect the constitutionality of the proceeds of crime legislation, took many steps to guarantee that the purpose of the proceeds provisions was to attack organized criminal activity while at the same time ensuring that the fundamental rights of the accused and innocent third parties were protected. This section will set out how the legal fees provision was developed and indicate interpretative problems that have arisen since Part XII.2 was implemented.

66 See ibid. s. 102(1)(a).
67 See ibid. s. 102(1)(b).
68 See ibid. s. 102(2)(a).
69 See ibid. s. 102(2)(b).
70 See Fisse, Funny Money, supra note 2 at 96.
1. British Columbia Attorney General

The British Columbia Attorney General's office published the first major report on proceeds of crime in Canada. The report recognised the rights of third parties by including a provision for third parties to claim an interest in the forfeited property. However, there were no provisions specifically directed at lawyers fees, nor was their any discussion as to whether lawyers would be included among those able to claim as third parties.

2. Federal - Provincial Study Group

The next proceeds report, written by representatives of the Federal and Provincial governments, set out draft proceeds of crime legislation for Canada. Once again, a legal fees exemption was not specifically set out, but a number of provisions recognised the importance of protecting third party rights. First, it was proposed that where a person was convicted of an enterprise offence the proceeds were required to be forfeited, subject to the rights of innocent third parties. Second, when an in rem forfeiture of the proceeds took place all third party rights were required to be heard and considered by the judge. Finally, during an in rem proceeding the judge had the discretion to order the forfeiture of the property where he or she was satisfied that it was proceeds of crime, subject to any interests or claims of innocent third parties. Given that third parties who would make a claim were only required to be 'innocent

73 See ibid. at cl. 7(a)(1).
74 See ibid. at cl. 7(b)(3).
75 See ibid. at cl. 7(b)(4).
parties', it is arguable that defence counsel could have made a claim under any of these provisions for legitimate legal fees owing. Such a claim would have to rely on the fact that the provision of legal services was \textit{bona fide} and the fees in question were reasonable and not a sham being used to evade the forfeiture provisions.

3. Bill C-19

As was noted in Chapter 1 the proposed forfeiture provisions of Bill C-19\textsuperscript{76} were very wide and suffered much criticism. Part of the concern derived from the fact that it was “suggested that the property interests of innocent third parties would be prejudiced and that lawyers would be unable to properly defend suspects because their fees would be subject to seizure.”\textsuperscript{77}

This concern was felt, despite that fact that Bill C-19 allowed for both pre-forfeiture relief\textsuperscript{78} to “any person, other than the offender, who is the lawful owner or is lawfully entitled to possess ... [the property],”\textsuperscript{79} and post-forfeiture relief to “any person, other than a person convicted of the offence that resulted in the forfeiture ... “\textsuperscript{80} There was a further requirement that ‘any person’ who applied had to appear innocent of complicity in the offence or of any collusion in relation to the offence.\textsuperscript{81} Once again neither the provisions nor the discussion specified who, of those who fit into the categories set out, could apply. Presumably, lawyers could have made an argument that they were eligible under either of these provisions, assuming


\textsuperscript{77} R.G. Mosley, Q.C., “Seizing The Proceeds of Crime: The Origins and Main Features of Canada’s Criminal Forfeiture Legislation” (Ottawa: Department of Justice, 1989) at 13 [unpublished] [hereinafter Mosley, Seizing The Proceeds]. [emphasis added]

\textsuperscript{78} Bill C-19, \textit{supra} note 76 at cl. 206, ss. 668.2(6 - 8).

\textsuperscript{79} \textit{Ibid.} at s. 668.2(8).

\textsuperscript{80} \textit{Ibid.} s. 668.21.

\textsuperscript{81} \textit{Ibid.} ss. 668.2(8) and 668.21(4).
they were not involved in an offence and the legal fees being sought were for legitimate legal service.

Further support for this argument comes from the fact that Bill C-19's freezing order provision contained a subsection that allowed the court to make an order restraining the use of the property subject to, *inter alia*, "the reasonable business and *legal expenses* of the accused out of that property ...."82 This section was the first explicit legislative recognition of a legal fees exemption in Canada, but it was limited to the restraining order provisions because the special search and seizure warrant clause did not allow for similar relief.

At relatively the same time that Bill C-19 was being considered, the Quebec Court of Appeal in *Bourque* recognised that an individual's rights to their property should only be abrogated in limited circumstances. Justice Boilard of the Supreme Court stated that he "endorsee, sans hésitation les commentaires de Stephenson L.J. ...

This decision recognised the need in Canada to balance the interests of private individuals with those of the public.

82 *Ibid.* at cl. 107, s. 445.2(5). [emphasis added]
4. Bill C-61

The next major legislative attempt at proceeds of crime legislation in Canada, Bill C-61, provided a fundamental shift in Canadian criminal law. As was noted in Chapter 1, the new proceeds of crime provisions were enacted to deal with the inadequacies of the previous legislation in combatting organized crime. The legislation provided the police and Crown with powerful new tools to help deal with this problem. In recognition of the procedural and substantive problems with this legislation and in contrast to American legislation, Parliament...
included numerous provisions to ‘balance’ such extensive powers.88 These balancing mechanisms include inter alia, pre- and post-forfeiture relief provisions,89 and an expanded legal fees exemption, which in addition to property frozen by a restraining order encompassed property seized under a special search and seizure warrant.90 By implementing these provisions Parliament attempted to ensure that the pre-trial restraint and potential forfeiture of property would withstand Charter challenges, especially with regard to an accused's right to counsel and full answer and defence.91 Madam Justice Joanne Veit noted in Gagnon92 that:

Parliament’s overall intention in passing the proceeds of crime provisions was to ensure that crime does not pay. It could have done so by seizing and retaining all suspected proceeds of crime. It chose instead to allow some exemptions from the seizures ..., (such as) lawyer’s fees ... Parliament’s special mention of lawyer’s fees must be directed to mitigating some unfortunate results of the American

88 See Bill C-61, second reading, supra note 86 at 8888, the Minister of Justice Hnatyshyn stated that “[t]his uniquely Canadian proposal will strike a balanced middle ground in dealing with the reality of enterprise crime.” [emphasis added] Later at 8890 the Minister said that “[t]he legislative measures are a] strong but equitable means to come to grips with the ever more urgent problems of organized crime.” [emphasis added] And after the committee hearings Mr. Hnatyshyn stated at vol. XIV 17256 that “this bill in its present form ... achieves a reasonable balance ....” [emphasis added]

89 Now Part XII.2 ss. 462.41 and 462.42.

90 Ibid. s. 462.34(4)(c)(ii).

Note: this provision allows any person who has an interest in the property to apply for an order to release, the property or part thereof, for ‘meeting reasonable living expenses’, for ‘meeting the reasonable business and legal expenses’, or for ‘entering into a recognizance’. [emphasis added]

91 This was the view of Mr. Allan D. Gold, made known to the writer through personal correspondence with Mr. Gold. Mr. Gold testified on behalf of the Canadian Lawyers’ Association at the Parliamentary Committee Hearings on Bill C-61. His testimony can be found in Canada Parliament, House of Commons Legislative Committee on Bill C-61 Minutes of Proceedings and Evidence (Ottawa: Queen’s Printer, 1988) (Chair: Fred King) at 3:5 - 27 [hereinafter C-61 Committee Hearings]. Conclusive evidence of this theory comes from the statement of Mr. Ramon Hnatyshyn, see C-61 Committee Hearings, ibid. at 5:9, where he said: “The provision of allowing an application for reasonable legal fees is in fact a noble improvement to the present law, and one I think we have to acknowledge will ensure the constitutional right to retain and instruct counsel.” [emphasis added]

proceeds of crime legislation - the driving of a wedge between persons accused of crime and the criminal defence bar.

She then added:

Although Parliament’s intention is to strip a convict of the right to exercise [a] general kind of discretion [in relation to disposable income], it characterized lawyers’ fees as a special type of expenditure - one related to a constitutionally protected right. 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.\(^{93}\)

As Veit J. noted, the proceeds legislation was designed to ensure that crime does not pay;\(^{94}\) however, it went about this goal in a ‘uniquely Canadian way’. The interpretation espoused by Veit J. is corroborated by the words of the Minister of Justice of the time, Mr. Ramon Hnatyshyn, where he stated, after discussing what he termed “the major aspects of the legislation”, including the legal fees exemption, that:

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

\(^{93}\) \textit{Ibid}, at 512.

Note: the reasonableness of lawyers billings are also governed by the \textit{Professional Conduct Handbook} (Vancouver: Law Society of British Columbia, 1993) [hereinafter PCH]. See \textit{PCH}, \textit{ibid} at c. 1, cl. 3(9). “A lawyer is entitled to reasonable compensation for services rendered, but should avoid charges which are unreasonably high or low.” See also \textit{PCH}, \textit{ibid} at c. 9, cl. 1. “A lawyer shall not charge an excessive fee.”

\(^{94}\) See \textit{An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act}, 2d Sess., 33d Parl., 1987-88, vol. XIV at 17258 (third reading 7 July 1988) [hereinafter Bill C-61, third reading]. Minister Hnatyshyn stated that “[t]he Bill is designed to ensure that offenders are not allowed to profit from their crime. Bill C-61 will provide effective but fair measures to ensure that crime does not pay.” [emphasis added]
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avoids criticisms that have been levied at similar American legislation in this area.95

Therefore, the legal fees exemption was included in the proceeds legislation with much consideration of the problems in the American system. There were different justifications for including a legal fees exemption, three being most prominent.96 First, there was a concern not to interfere with an accused person's right to retain legal counsel and the solicitor-client privilege. This reason was based on the rationale that the fees would be paid by property still owned by the individual, and only alleged to be the fruits of crime. Second, if there was no such exemption, legal aid schemes would have to pay. Thus, it is in the public interest to allow the exemption as it is simply coming out of different government agencies. It comes down to deciding between less funds forfeitable to the government versus less funds available to legal aid schemes. Third, if the exemption was not explicitly set out the courts would carve one out because of the extreme intrusiveness of the proceeds legislation. As a Canadian solution the proceeds legislation was a

95 Ibid. [emphasis added]

Note: Ibid. at 17259 the Minister added that "[t]he Bill is a balanced and fair piece of legislation which does not contain some of the excesses seen in previous legislation. ... [It] is an effective mechanism for getting at the illicit proceeds of crime. It does not expand itself to the extent that is done in the United States. I think this is the Canadian way. We want to make sure, when were are attacking the proceeds of crime, that we do so in a fair way respecting the rights of individuals to ownership of property legitimately obtained."

Note: Such property has not been proven that it was not 'legitimately obtained', therefore accused persons should have access to such property.

96 D. Préfontaine, Q.C., Director The International Centre for Criminal Law Reform and Criminal Justice Policy at U.B.C., and Deputy Minister of Justice, Canada, Interview with Gregory J. Rose (24 April 1995) Vancouver.
reasoned compromise, ensuring that crime does not pay while at the same time recognising that the constitutional rights of all Canadians need to be protected.\footnote{Note: In addition to many of the above statements that provide evidence of this compromise the Honourable N. Nurgitz stated in the Senate, Bill C-61, \textit{An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act}, 2d Sess., 33d Parl., 1987-88, vol. IV at 3922 (Senate, second reading 12 July 1988), that “[t]he legislation] is an initiative that is both firm and fair. The need to deal appropriately with this growing problem has been tempered with the requirement to insure that the fundamental principles of due process are maintained throughout the entire forfeiture process.”}

In recognition of the importance of the legal fees exemption, and to protect the relationship of accused persons with their lawyer, Parliament amended Bill C-61 after the Parliamentary committee hearings on the Bill. This amendment added an \textit{in camera} hearing before a judge, without the presence of the Crown, for the purpose of determining the reasonableness of legal expenses.\footnote{Now Part XII.2 s. 462.34(5).}  Another balancing provision that was amended, after the hearing stage, was the requirement of the Attorney-General to provide an undertaking with respect to damages or costs, or both, in relation to a special search warrant or a restraining order.\footnote{Now \textit{ibid.} ss. 462.32(6) and 462.33(7).}  This provision was amended to make the undertaking mandatory, whereas at First Reading the discretion to require an undertaking was in the hands of the court.

A perceived problem with the legal fees exemption is that s. 462.34(1) clearly stipulates that its provisions only apply where “property ... was seized under a warrant issued pursuant to section 462.32 or in respect of which a restraint order was made ....”  This drafting is understandable, given that the relief provisions were only meant to ‘balance’ the new forfeiture powers in Part XII.2, and were not meant to affect the application of other provisions of the \textit{Criminal Code}.\footnote{See \textit{ibid.} s. 462.49: “This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting forfeiture of property.”}
5. Charter Issues

When assets are seized or restrained, leaving an accused economically powerless and unable to retain counsel, a number of fundamental rights are adversely affected, such as: the person's right to be secure against unreasonable search and seizure [s.8]; the person's right to life, liberty and security of the person [s.7]; the person's right to be presumed innocent until proven guilty in a fair trial [s.11(d)]; and finally the accused's right to retain and instruct counsel [s.10(b)]. Further, the jurisprudence has allowed Crown counsel to cross-examine on the affidavit of an accused who has applied to have seized property released for the purposes of 'reasonable legal fees'. By doing this, the Court has put in jeopardy the accused's right not to be compellable as a witness [s.11(c)] and the rule against self-crimination [s.13]. The question becomes what type of restrictions should be used to prevent people from benefiting from illegal activity, while at the same time ensuring individuals' fundamental rights are protected.

6. Subsequent Case Law

(a) The Legal Fees Exemption

Although Parliament recognised the need for balancing mechanisms, permitting funds to be released to allow an accused to retain private counsel, such mechanisms have been significantly narrowed by subsequent judicial interpretation. As a result many of an accused's fundamental rights are being jeopardized. The courts have held that legal fees cannot be paid out of seized proceeds in the following circumstances: if the property has been seized under a provision other
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than Part XII.2,¹⁰¹ if defence counsel tries to use the pre-forfeiture relief provision to be paid for an assignment held on the seized proceeds;¹⁰² if defence counsel has taken an assignment on the proceeds after they have been seized;¹⁰³ or if a forfeiture order has already been made.¹⁰⁴ Thus according to this case law, an accused can only receive relief for reasonable legal fees where the

¹⁰¹ Note decisions have held that the s. 462.34(4) balancing provisions cannot be accessed where the property was seized pursuant to a:
- s. 487 Criminal Code search warrant, see:
  - Giles v. Canada (Department of Justice) (1991), 63 C.C.C. (3d) 184 (B.C.S.C.); and
  - R. v. Felix, [1993] B.C.J. No. 1870 (S.C.) (QL); and

- or a warrantless NCA search warrant, see:


The Court in Pawlyk found that a lawyer should never make such a claim because of the duty owed to their client, not to receive payment for fees that will result in a longer sentence for their client. However, this argument ignores the discretion the court holds not to impose a fine in lieu of forfeiture for monies that have been used to pay reasonable legal fees.

Note: although Pawlyk is still good law in Manitoba, its interpretation of the pre-forfeiture relief provision has been refuted by the Ontario Court of Appeal. Other courts analyzing the provision should follow the Ontario decision because the wording of s. 462.41 clearly permits such an application. Mr. Justice Doherty noted in R. v. Wilson (1993), 15 O.R. (3d) 645, 66 O.A.C. 219, 25 C.R. (4th) 239 (C.A.) aff'g (1991), 68 C.C.C. (3d) 569 (Ont. G.D.) at 653 [hereinafter Wilson cited to 15 O.R. (3d)], "s. 462.41 ... expressly contemplates consideration of third party claims to forfeitable property as part of the forfeiture application" and therefore such a claim should be able to be heard before a forfeiture order is made.

¹⁰³ See Pawlyk, ibid.
See Wilson, ibid.

¹⁰⁴ See Wilson, ibid. where Doherty J.A. concluded that "the appellants' interest in the payment of their reasonable legal fees should not override the state interest in denying an offender the direct or indirect benefit of his or her own criminal activity."

Note: the Ontario Court of Appeal's interpretation of the proceeds legislation closely follows the American line of authority and ignores the 'unique' Canadian legislative initiatives of creating a fair balance.
property has been seized or restrained under Part XII.2, or the right in the property arose before the seizure or restraining order took effect. The current judicial trend toward not exercising the authority provided under Part XII.2 to release funds for legal expenses undermines the legislative power balance upon which the Canadian proceeds of crime legislation was based. This trend seems to ignore fundamental rules that, in the past, were central both to our criminal justice system and to the rights that all citizens could expect. Another result of this narrow interpretation is that defence work in the proceeds area could become very difficult for lawyers to justify on an economics basis, and it could ultimately lead to a wedge developing between persons accused of proceeds related crimes and the defence bar, as was noted above. 105

While many decisions have allowed the release of funds to pay for legal fees, the decision of Veit J. in Gagnon106 provides an excellent example of how Part XII.2 can be applied. Mr. Gagnon executed an irrevocable and unconditional assignment of his cash deposit for bail to

105 See Gagnon #2, supra note 92 and Chapter Four, for a discussion of the problems that will result if criminal lawyers are consistently not paid for the work that they do. See also Winick, Forfeiture of Attorneys' Fees, supra note 7 at 772 - 84.

Wilkinson J. noted that in excess of $100,000 was withdrawn for legal fees; however the Court of Appeal refused a release to fund an appeal: R. v. Clymore (1992), 15 B.C.A.C. 218, 27 W.A.C. 218 [hereinafter Clymore #2 cited to W.A.C.]; and
R. v. Dickson, [1993] O.J. No. 2612 (G.D.) (QL) [hereinafter Dickson]. Note: the accused was successful in having funds released for his defence, in an earlier application, however in this application Mercier J. at para. 14 noted that “[w]hile I am satisfied I could order the release of funds for [the purpose of satisfying his legal expenses], I am not inclined to exercise my discretion ...” because the accused continued to commit offences after the initial restraining order.; and
R. v. Rossi (1993), 17 C.R.R. (2d) 335 at 337 (B.C.S.C.) where Oppal J. noted that “[t]his court has ... granted orders pursuant to 462.34(c) (i) and (ii) ... permitting the release of funds for living and legal expenses.”; and
R. v. Chen, [1994] O.J. No. 3146 (Ont. G.D.) (QL); and

107 See Gagnon #1, ibid.
his defence counsel for legal expenses incurred. The Crown did not seize the bail funds but it served notice that it would seek their forfeiture, and it argued the Court should set aside the transfer under s. 462.4. Madam Justice Veit refused to set aside the transfer, and found that it would be improper to forfeit the funds because of the policy with respect to the seizure of funds for payment of reasonable legal fees as set out in the legislation.

A critical flaw in the argument of many of the previous cases was that the search and seizures were not in issue because defence counsel chose not to challenge them. In Gaudreau the Saskatchewan Court of Appeal recognised such a flaw in the defence’s argument and the majority hinted that the practice of not using a s. 462.32 warrant may lead to problems. Wakeling, J.A., writing for himself, noted that “the appellant [argued allowing the use of a non-special warrant] makes it possible for the Crown to subvert the legislation by always proceeding under s. 487 in order to avoid the application of the Part XII.2 provisions and particularly s. 462.34. That may be so, but that question does not arise here nor did it arise in Giles ...” The issue did not arise in either of these cases because defence counsel failed to raise it. Further, Cameron J.A. who wrote for himself and Vancise J.A., in a concurring opinion, that “[i]t was taken for granted throughout these proceedings that the warrant, issued on the authority of s. 487
of the Code, had been validly issued and lawfully acted upon even though it was directed at authorizing the search for, and the seizure of, proceeds of crime ...." He then concluded by writing:

In light of the special warrant provisions of s. 462.32 and their incorporation into the Narcotic Control Act, this case might have given rise to the question of whether the provisions of s. 487 provided authority for the warrant that was issued, since the warrant was directed at empowering the police to search for, and if found, to seize money which was said to have constituted the proceeds of crime and to have been in the possession of the appellant, contrary to s.19.1(1) of the Narcotic Control Act. But that question was not raised, and I would not care to say anything about it, simply leaving it open.

Thus all three judges indicated that the defence had an argument as to the impropriety of not using a ‘special warrant’ where proceeds of crime are involved. Short of having Parliament establish a clear requirement that the police and Crown must use a ‘special warrant’ if they want to take advantage of the Part XII.2 forfeiture provisions, the recent line of authority must be distinguished, or overruled, if future arguments are to succeed. Chapter Four will discuss how defence counsel should present an argument as the Saskatchewan Court of Appeal suggested.

113 Ibid. at 438. [emphasis added]
114 Ibid. [emphasis added]
115 Note: another solution would be for the Supreme Court of Canada to settle the law with respect to proper use of the legal fees exemption and the ability of lawyers to utilize the pre- and post-forfeiture remedies. To date the only S.C.C. decision dealing with Part XII.2 was R. v. Tortone, [1993] 2 S.C.R. 973, 84 C.C.C. (3d) 15, 23 C.R. (4th) 83, rev’g in part (1992), 75 C.C.C. (3d) 50 (Ont. C.A.). However, this decision is not relevant to the issues of this thesis.
(b) Availability of Other Resources

An Ontario Court has required the legal fees applicant to demonstrate that he lacked sufficient other ‘non-tainted’ resources to fund their defence. However, there is a strong argument that this is an improper interpretation of Part XII.2 as will be discussed in Chapter Four.

(c) Use of Funds for Any Defence

There may be concern over whether an application can be made for release of legal fees for charges that do not relate to the seizure or restraining order. The wording of s. 462.34 makes it clear that there are no restrictions as to the charges for which the legal fees exemption can be granted. In Dickson Mercier J. referred to the case of Rossi where the court did release legal fees for criminal charges not related to the restraint order and refused to exercise its discretion to release funds for an unemployment insurance dispute. Mr. Justice Mercier also note that the decision of Love stipulated that the funds being released for legal fees were only for legal expenses incurred with respect to the charges it was dealing with. However, this seems to be an exercise of the Court’s discretion on those facts, and is not a principle that will cover all instances.

116 See Dickson, supra note 106, where Mercier J. wrote that “once a court has determined that an applicant has no other resources available to him to meet his legal expenses, it may consider ordering payment of all or any portion of restrained funds which it considers reasonable both as to amount and as to purpose.”

117 See ibid. at para. 5.

118 Ibid. at para. 6.

119 R. v. Love (2 November 1990), Alta. Q.B. [unreported].

120 See, Dickson, supra note 106 at para. 7-8.

Contra see Morra, supra note 106 at 382. “An accused who needs money either to retain a lawyer to defend him or her on outstanding charges related to restrained property, or to pay the lawyer for having defended him or her on those charges, is the person who usually brings an application for reasonable legal expenses to be paid out of the property.” [emphasis added]
(d) The Legal Fees Exemption & Appeals

There is doubt whether the legal fees exemption should allow accused persons to access proceeds to fund an appeal. Despite the fact that the legislation allows for release of funds "at any time" and that a forfeiture order is suspended pending an appeal, it has also been held that,  

121 See Part XII.2, s. 462.34(1).
122 See ibid. at s. 462.45.

See also R.C. Claus & C. Tollefson, "Getting Paid: Legal Fees and Proceeds of Crime", in Proceedings of Crime (Vancouver: B.C. Continuing Legal Education, 1993) c. 4.3 at 4.3.03. "Presumably, while this appeal is pending, the restraining order is revived and, therefore, so too is the possibility of applying under the legal fees exemption. Otherwise, if neither the restraining order nor the forfeiture order have legal force during the pendency of the appeal, there remains no lawful authority for the Crown to retain possession of the subject property. That the effect of the stay provision in s. 462.45 is to revive the antecedent restraining order for the purpose of applications for the release of legal fees is reinforced by two further considerations. First of all, Part XII.2 clearly contemplates Justices of Appeal making orders to release funds under the legal fees exemption. This flows from the definition of 'judge', in this Part defined as a judge of a court of superior jurisdiction, which includes Court of Appeal Justices. Secondly, in the language vesting in 'any person with an interest in property' a right to apply for, among other things, the release of funds for legal fees there are no temporal or contextual limitations attached to the exercise of that right. On the contrary it is expressed to be a right exercisable 'at any time' by application 'to a judge': see s. 462.34(1)."

See also D.J. Martin, ed., "Forfeiture Law Update" 5:10 C. of R. Newsl. (Aurora: Canada Law Book, Inc., 1993), which essentially echoes the argument of Claus and Tollefson.
even if Part XII.2 was used to secure the property, once a forfeiture order is made funds cannot be released for legal expenses pending an appeal. 123

(e) The In Camera Hearing

It has also been argued that the in camera provision of s. 462.34(5), used to determine the reasonableness of legal expenses, has also been subjected to interpretation that is contrary to the intentions of Parliament. Despite the alleged intent of Parliament, Oppal J. of the British Columbia Supreme Court found in Leask that there are two stages to an application process. 124

First, there must be a determination of the entitlement of the applicant to the funds under s. 462.34(1). This would require the applicant to set out the circumstances of the application in an affidavit, and this cannot be done by way of an affidavit of counsel sworn on information and belief. Further, the Crown is able to cross-examine the applicant accused on the affidavit. Second, a determination of the reasonableness of the fees applied for must be made. Mr. Justice Oppal ruled that only the second step fell within the in camera protection found in s. 462.34(5). 125 Without mentioning Re: Leask, McEachern C.J. of the British Columbia Court of

123 Clymore #2, supra note 106. Contra see Norris, supra note 51 at 396 where the English Court of Appeal granted a motion to release funds from a restraining order to pay for the legal expenses of an appeal. The Appeal Court reasoned that “if leave to appeal against conviction is given, there is the obvious possibility that both the restraining order and confiscation order would fall away if the appeal is successful.” The court at 396 concluded that it was fallacious to argue that funds should not be paid out because doing so would harm a future confiscation order. They wrote that the problem with such an argument is that “it assumes what is in issue in the criminal appeal, namely that there is a valid confiscation order which will be maintained and remain in force after the appeal has been heard.” [emphasis added] Note: if legal aid is not granted, because when the restrained or frozen funds are considered the accused is found to have sufficient funds, and “where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal representation ... the fees of counsel shall be paid by the Attorney General ...” see Criminal Code, s. 684. However, this is not an absolute right as the discretion is in the hands of the court.

124 Re: Leask (14 May 1992) Vancouver CC911228 (S.C.) [hereinafter Leask].

125 See ibid. at 3.
Appeal in *Clymore* concluded that “[o]n the question of entitlement, of course, the Crown is entitled to be represented.” Thus, as the law now stands in British Columbia, there is little doubt that the application must go through such a two step process.

Mr. Justice Ewaschuk of the Ontario Court General Division also found that defence counsel lacked standing to bring a legal fees application because “the reasonable legal expenses are those of the client.” In this case, the accused then “filed an affidavit in which he particularized all his assets and his debts and which showed he lacked sufficient funds to pay ... legal fees.” The judge ruled that an open court entitlement hearing was required. Therefore, the accused had to give evidence on the application because “an applicant applying to vary a restraint order prior to the conclusion of the prosecution ... must establish that he or she comes to the court with ‘clean hands’ in respect of the merits of the application.” He also allowed the Crown to cross-examine the accused in open court, however, he narrowed the extent of questioning by agreeing with the defence counsel’s submission that s. 7 of the *Charter* protects the accused from self-incrimination so that “the source of the accused’s assets is immaterial to [the] application. It is the state of the accused’s assets from the date of the restraint order that is material ...” Justice Ewaschuk also found that the “affiant [accused], has an additional right beyond the protection afforded against subsequent use by s. 13 of the Charter not to answer questions in court which may assist the Crown to prosecute him on further criminal charges ...” He noted that while “the Crown would not be entitled to cross-examine the affiant as to the source of any past or present assets ... the affiant is entitled to volunteer evidence as to the source of his assets and, once he opens the issue, the Crown is entitled to cross-examine him on

126 *Clymore* #2, *supra* note 106 at 220. [emphasis added]  
127 See *Morra*, *supra* note 106 at 382.  
130 See *Ibid.*. Because “his answers may provide derivative ‘clues’ to the Crown which will enable it to trace his assets to criminal sources.”  
the matter.”133 Thus, defence counsel must be aware of this issue when drafting the affidavit for the accused. Further, when the accused testifies he or she must be made aware that they cannot be cross-examined as to the source of any asset unless they open the issue by volunteering such evidence.

The Parliamentary intent of the *in camera* provision is clear. The *in camera* provision was not included when Bill C-61 was first proposed, and was added after the Parliamentary Committee hearings.134 The Committee was concerned that “the defence strategy of the accused could ... be revealed before trial”,135 and “solicitor-client privilege could be jeopardized”136 when an accused applied under the reasonable legal fees exemption. The *in camera* approach was first broached by the Chairman, when he queried: “Would it help ... if the investigation of whether the expenses were reasonable were done in camera and/or without the presence of the Crown Attorney ...?”137 The procedure envisioned by Parliament is also clear. It is a two step
procedure similar to that established by Oppal J. in *Re: Leask*. However, this does not mean that there is no violation of an accused’s right to silence as will be discussed in Chapter 4.

**E. U.S. v. Noriega - The U.S. Legislation At Its Worst**

The now famous General Manuel Noriega saga in the United States demonstrates at an extreme level the problems and inequities that can develop under a system that refuses to assist in the release of property to support an adequate legal defence. The United States army invaded Panama on December 20, 1989, as President Bush said “to protect the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to promote the integrity of the

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138 See *ibid.* at 9:14 - 16 for the excellent debate that occurred between Mr. R.G. Mosley and Mr. S.J. Robinson, M.P., just prior to the amendment being approved.

At 9:15 Mr. Mosley argued that it was necessary to have the Crown present at the reasonableness hearing to argue that the order should not be made, otherwise the court would be getting a “one-sided pitch” from the defence.

Also at 9:15 Mr. Robinson responded that “the Crown will be present for all other parts of that application. ... For all the other circumstances ... there is no exclusion ... It is only with respect to the question of reasonable legal expenses. ... It would be up to the judge to determine the reasonableness of the expenses. In those very narrow circumstances, and only in those narrow circumstances, Mr. Chairman, would the Crown not be present on that specific point. With respect to all other points of the application, the Crown will be present.” [emphasis added]

At 9:16 Mr. R. Nicholson, M.P., commented that “the Crown attorney would be present, the applicant, and any other person who may have an interest. It was only after it has been decided that this second step comes in with respect to the [reasonableness of the] legal expenses.” [emphasis added]

At 9:16 Mr. Mosley re-iterated his concern that “[t]he Crown would not have the opportunity [at the second stage] to make the argument against the allocation of the seized funds [for legal fees].”

Also at 9:16 Mr. Robinson concluded by re-assuring the Committee that “[t]he purpose of the in-camera hearing is solely to determine the reasonableness of the legal expenses. That is all. ... The amendment is clear. It is solely for the purpose of determining reasonableness.” [emphasis added]

139 See *Noriega*, supra note 45 which has been recognised as the first of potentially many cases that raise difficult questions of international law and policy with regard to the payment of attorney fees in the area of proceeds of crime. See R.J. Wilson, “Human Rights and Money Laundering: The Prospect of International Seizure of Defence Attorney Fees” (1991) 3:1 Crim. L. Forum 85.
Panama Canal treaty." General Noriega ‘surrendered’ on January 3, 1990 and was immediately ‘escorted’ to the United States. It was estimated that the government was going to spend $25 million to build the prosecution’s case, and that the cost to defend Noriega was conservatively placed at $4 million. However, at the direction of the U.S. government Noriega’s worldwide assets were either frozen or seized and as a result despite the fact that “he found himself under the control of the American judicial system where he would be called upon to defend himself against U.S. prosecutors, his means to pay his lawyers almost vanished - all without a judicial finding of probable cause to show that [all of] his assets had been tainted by illegal narcotics activity.”

Noriega’s counsel began to make concerted efforts to have ‘untainted’ funds released for legal fees in April 1990. The U.S. Government argued that it was unable to help release funds and it refused to pay for Noriega’s defence. On April 30 the defence filed three motions, one was a motion to withdraw because “[t]he government had frozen Noriega’s assets in an effort to deprive him of a defence, to deprive him of a fair trial.” Lead counsel, Frank Rubino told reporters that “the administration’s refusal to negotiate over legal fees is in part motivated by its belief that without experienced counsel and adequate resources [Noriega] will decide to fold.” Finally, in May of 1990 a deal was brokered where the government agreed to pay Noriega’s four counsel a total of $1,250 per hour. Justice Hoeveler tentatively agreed to the deal, subject to approval from his chief judge. The chief judge, however, decided that $75 per hour would be paid to the defence up to a maximum of $10,000. However, to avoid this situation Hoeveler J.

141 See ibid. at 144 - 145 and 174.
142 Ibid. at 145. [emphasis added]
143 Ibid. at 146.
144 Ibid. at 147. [emphasis added]
145 Note: Under the Criminal Justice Act a lawyer could be compensated for $60 per hour of work in court and $40 per hour for out of court work.
preferred that Noriega use his own funds to pay for counsel and he requested that the prosecutors
determine the portion of Noriega’s assets that were ‘untainted’. He wrote that:

[1] The precise issue before the Court is whether the government may deprive a criminal
defendant of his only assets available for attorneys’ fees without any showing that the
assets are connected to illegal activity, and without affording the defendant any
opportunity to contest the seizure. Unless the constitutional rights to due process and
counsel of choice are to be stripped of all meaningful content, the Court must necessarily
answer in the negative.

Justice Hoeveler went on to note that the prosecution’s activity was jeopardizing
Noriega’s fundamental right not to be deprived of property without due process under the Fifth
Amendment, which also impacted on his right to be represented by counsel of his choice. He
stated “a defendant cannot be forced into indigence without due process and then be told that he
has no right to representation he cannot afford. ... Certainly the government has an interest in
combating the drug epidemic ... but this effort must never be at the expense of an accused’s
constitutional rights.” On June 20, 1990 the government agreed to help release between $4.5
and $6 million of Noriega’s assets in exchange for the defence dropping its right to counsel
motions. This agreement allowed the government to keep secret information it held that
would show that Noriega had been receiving a legitimate salary from the United States
government.

As of November 13, 1990 there was still the unresolved question of releasing Noriega’s
assets to pay his defence counsel. A special hearing to determine what progress the prosecution
had made in having the funds released was called by Hoeveler J. He informed the defence that

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146 See Noriega, supra note 45 at 1546.
147 Ibid. at 1542. [emphasis added]
148 See ibid. at 1544 - 45. [emphasis added]
150 Noriega had received at least $1 million as legitimate salary for work done with the CIA
over a 15 year period. See B. Bullington, “All About Eve: The Many Faces of United
States Drug Policy” in F. Pearce & M. Woodwiss, Eds., Global Crime Connections
151 See Albert, The Politics of American Justice, supra note 140 at 174 -175.
he had received permission to appoint two defence lawyers who would be paid $75 per hour under the Criminal Justice Act. The defence argued that it was turning into a David and Goliath battle - two defence lawyers, who had gone without pay for eleven months, against thirty prosecution lawyers and fifty prosecution investigators.152

The matter was finally settled by compromise on January 29, 1991. As a result of the Austrian government releasing $1.6 million in seized money, the defence counsel was allowed to be paid through to the end of December 1990. For the remaining part of the trial all of Noriega's counsel withdrew, except for two counsel retained at the court appointed rate of $75 per hour.153

This case conclusively demonstrates the potential conflict between State authorities attempting to secure the largest possible forfeiture order and an accused person attempting to retain adequate representation. Although such David and Goliath battles would be rare, the principles it demonstrates are clear. Despite having numerous constitutional protections, unless rights, such as the right to counsel, are clearly set out in the legislation and given a fair interpretation by the courts, such rights are at risk of being 'stripped of all meaningful content'.

IV. Summary

The main goal of forfeiture legislation is to remove the profit from crime. Few would argue with the proposition that once a person has been convicted of a specified crime the State can forfeit the proceeds arising from criminal activities. However, problems develop when there is a singular focus on forfeiture. This focus may result in individuals' rights being forfeited along with their assets, as is evidenced by many of the U.S. decisions, which have failed to provide an

152 See Caplin & Drysdale, supra note 27 at 647, where the words of Blackmun, J. in dissent, written years before Noriega, were telling of the problem that could arise, "[w]ithout the defendant's right to retain private counsel, the Government too readily could defeat its adversaries simply by outspending them." [emphasis added]

appropriate balance. Thus, while confiscating the benefits derived from criminal conduct is laudable, such a penalty should only be extracted once the person has been convicted and has exhausted all avenues of appeal. This is not to say that at an early stage assets cannot be restrained or seized to ensure their availability in the event of a forfeiture order. Rather, persons charged with crimes should also be allowed to access the funds to pay reasonable defence fees for all legal matters.

If the current ‘reasonable legal fees’ provisions are given the interpretation they deserve, the ‘nobility’ of the Canadian Parliament’s ‘noble’ attempt to provide a ‘unique’ Canadian solution can be realized. Instead of depriving people, who are presumed innocent, of the use of seized funds for the purpose of making full answer and defence, it would ensure that citizens’ fundamental rights would be defended by counsel of their choice. If the provisions are not given this interpretation, privately retained defence lawyers will soon feel the chill of working in the area of proceeds of crime, if they have not already, and statutory attempts to prevent David and Goliath battles will be lost.

Lawyers defending clients in this area should not feel discouraged with regard to the established discourse which has virtually gone against the intended purpose of the legal fees provision. Defence lawyers have a role to play by challenging this discourse in an attempt to uphold accused persons’ fundamental rights, regardless of the crime their clients face. Chapter Four sets out this role as well as a number of factors that must be considered by criminal defence counsel working in the area of proceeds of crime.

154 As was noted above at Vella, supra note 63. “If he is found not guilty, he has merely used his own money. If he is convicted and an order for forfeiture is made, the amount of the legal expenses, although not available for forfeiture, is nevertheless money of which the offender has been deprived by the proceedings against him, by reason of the necessity of paying his defence.”

155 R. Weisberg, “Legal Rhetoric Under Stress: The Example of Vichy”, part of the University of British Columbia Faculty of Law Seminar Series, October 28, 1994. Professor Weisberg noted that “lawyers tend to feel powerless re an established discourse”.
Chapter 4

The Role of Defence Counsel

I. Introduction

The issue of this Chapter is not whether forfeiture is, or is not, a proper means to attaining the goal of combating organized crime. The concern addressed here is whether people involved in this area deserve the full procedural and constitutional protections, including the right to retain counsel. The issue then becomes whether innocent persons, who have been made indigent as the result of an ex parte government action, should be forced to rely on state legal aid plans because their property may turn out to be proceeds of crime, or whether such persons should be allowed to access their property to pay for specified expenses, including reasonable legal fees. Within this context, a balance must be struck. On the one hand there is a need to restrain or seize property to protect society's interest in ensuring that crime does not pay, so that the property will be available in the event of a forfeiture order. On the other hand there is a need not to interfere with accused persons' constitutional and statutory right to access their property to fund a defence.

In general, the criminal adversary system requires lawyers to protect the interests of individuals who are involved in the system. The role of defence counsel is integral to any accused charged with proceeds of crime offences. This Chapter will set out some of the roles that defence counsel can play in this area and the strategy that should be taken with respect to the issue of

1 B. Fisse, "Confiscation of Proceeds of Crime: Funny Money, Serious Legislation" in B. Fisse, D. Fraser & G. Coss, eds., The Money trail Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting (Sydney : Law Book Co., 1992) c. 5 at 81 [hereinafter Fisse, Funny Money]. "Few would dispute the principle that offenders are disentitled to profits derived from the commission of offences. ... [It] has been asserted that '[e]very legal system would accept as axiomatic that an offender should not enjoy the profits of his criminal activities."

Note: As will be discussed later in this Chapter, the penalty of forfeiture is necessary if the battle against organised criminal activity is going to succeed. This need would become evident if such a penalty was not available.
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warrants, the availability of other resources, and the Charter. The effect of inadequate compensation on the defence bar will be discussed as well as the legal aid issue. Ethical issues that arise in this area will be raised, especially those caused by the fine in lieu of forfeiture provision. Finally, a suggested procedure for the making of legal fee applications will be discussed.

A. Defence Strategy

1. Non-Part XII.2 Warrants

Defence counsel must follow the suggestion of the Saskatchewan Court of Appeal, as discussed in Chapter Three, and begin to challenge seizures of proceeds of crime that do not take place under the authority of a ‘special warrant’.

It must be argued that the draconian forfeiture provisions were meant to be offset with a number of balancing provisions, including the legal fees exemption, and that it is an injustice to allow the police and Crown to use the old provisions to access property that would otherwise not be forfeitable, but for the new Part XII.2 provisions. The current trend of allowing the police and Crown to use ‘non-special warrants’ to attach proceeds of crime has in effect resulted in defence counsel being unable to access seized funds as intended by Parliament. If reasonable legal fees are not taken from seized proceeds, provincial legal aid plans will have to provide for appropriate

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2 See R. v. Gaudreau in Chapter 3 notes 111 - 14 and accompanying text.
3 Note: Justice Doherty in R. v. Wilson (1993), 15 O.R. (3d) 645 at 659, 66 O.A.C. 219, 25 C.R. (4th) 239 (C.A.) affg (1991), 68 C.C.C. (3d) 569 (G.D.) [hereinafter Wilson cited to O.R.] found that “[t]here is force to the appellant’s contention that access to seized funds for the purposes of paying reasonable legal expenses should not turn on the statutory authority relied on by the authorities to effect seizure of those funds.” See also R. v. Chen (1994), [1995] O.J. No. 3146 (Ont. G.D.) (QL) at para. 12, where after citing the above quote of Doherty J., Wren J. wrote that “[t]his observation may indicate that there could be merit in an application to remedy this apparent inequity by invoking the application of s. 24(2) of the [Charter] on the basis of an infringement of the Applicant’s rights under s. 7, s. 10(b) and s. 11(d) ... [h]owever, such a constitutional challenge was not advanced on this application.” [emphasis added]


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counsel. However, this may not be a realistic option because of the low funding of these plans and the clear signal that they do not want to fund such defences.\(^4\) Further, it is highly doubtful that a junior legal aid lawyer would be adequately equipped to represent a person charged under these highly complex provisions. Therefore, if the current trend continues, the balance will tip in favour of the Crown and not only will an accused’s property be liable to forfeiture, but their right to counsel will be effectively ‘forfeited’.\(^5\)

The Crown has a well supported argument that because s. 487 of the Criminal Code establishes the powers of a general warrant it can be properly issued in relation to proceeds of crime, even though Part XII.2 contains a special warrant provision. The argument is derived from a line of authority that gave a broad interpretation to the scope of the search powers of a s. 487 warrant. The first decision that recognised the wide power of a s. 487 warrant was *Multiform Manufacturing*.\(^6\) Chief Justice Lamer noted that s. 487 was amended in 1985 to add the words “or any act of Parliament”, he then wrote that “[s. 487 applies] to proceedings under any federal statute, regardless of whether or not the statute in question also contains search and seizure provisions.”\(^7\) Therefore, the Court held that a s. 487 Criminal Code warrant could be invoked in a bankruptcy proceeding even though the Bankruptcy Act had its own search and seizure provisions. Then in *Grant*\(^8\) the Supreme Court upheld *Multiform* in relation to a narcotics investigation, notwithstanding the fact that the NCA has its own search provisions. Mr. Justice

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\(^4\) See infra notes 79 - 89 and accompanying text.


\(^7\) *Ibid.* at 631.

Sopinka noted that this decision was based on "a plain reading of the section and the decision of [the S.C.C.] in Multiform ...."\(^9\) However, he also noted that "[i]n so far as the police act pursuant to a Criminal Code warrant, they are restricted in the extent of search powers which they may employ."\(^{10}\) This line of authority was most recently discussed in obiter with respect to Part XII.2 by Gordon J. in Greco.\(^{11}\) Mr. Justice Gordon found that his court had no jurisdiction to grant the order for certiorari as was requested, and although that would have disposed of the application before him, he chose to comment briefly, in obiter, on other issues, including the propriety of using a non-Part XII.2 warrant in relation to proceeds of crime. He found that a s. 487 warrant "would be available as an alternative to a special warrant dealing with proceeds of crime as authorized by s.462.32."\(^{12}\) He concluded that "s.462.32, neither expressly nor impliedly repeals the application of 487 to crime enterprise prosecutions."\(^{13}\)

This line of authority must be dealt with directly if a defence argument is to succeed. First, it should be argued that the issue has not been dealt with on all fours by a court. Greco is the only judgment that comes close to deciding the issue based on a proceeds of crime analysis. However, in this regard, Greco is flawed and can be distinguished in a number of ways. First, the words of Gordon J. were obiter. Second, his analysis consisted of one brief paragraph. Third, in setting out his approach to the issue Gordon J. only referred to living expenses and did not refer

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10 *Ibid.* at 247. [emphasis added]
to any of the other exemptions, including the legal fees exemption. Fourth, the precedential value of this decision is low, as it is an Ontario General Division decision.

It has long been recognised that the powers of search and seizure are a serious intrusion on the fundamental rights of the citizens of our country. "[T]he right to search a man's [sic] home or premises is regarded as an extraordinary remedy which may only be exercised where there is a clear and unambiguous statutory provision permitting it." However, even where there is a statutory authority governing searches there may be exigent circumstances where a warrantless search would be allowed. Another line of argument would attack the contention that s. 487 warrants are available as 'alternatives' to the special warrant contained in s. 462.32. It should be argued that, barring exigent circumstances, a s. 487 warrant does not provide 'clear and unambiguous' authority to attach proceeds of crime. Further, the decisions of the Supreme Court in Multiform, in relation to the Bankruptcy Act and Grant, in relation to the Narcotic Control Act, do not decide this issue, nor does the Ontario General Division decision in Greco as

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14 Ibid. at para. 5. “In a proceeds of crime investigation, can the police, at their discretion, use a general search warrant under s. 487 ... or must they now use the s. 462.32 special warrant, keeping in mind the availability for the accused in the latter to free seized items for the purposes including living requirements under s. 462.34?”
See also Criminal Code, R.S.C. 1985, c. C-46, as am. by, An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act, R.S.C. (1985) (4th Supp.), c. 42, s. 2, “Part XII.2 - Proceeds of Crime” at s. 462.49(1) [hereinafter Part XII.2]. “This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting the forfeiture of property.”

15 See generally J.A. Fontana, The Law of Search and Seizure In Canada, 3d ed. (Toronto: Butterworths, 1991) at 1 - 6; and


17 See Grant, supra note 8 at 241 - 2, where the S.C.C. adopted a test, established by the Sask. C.A., to determine whether a warrantless search will be allowed. Such a search would be allowed “where there exists an imminent danger of the loss, removal, destruction or disappearance of the evidence sought ... if the search or seizure is delayed in order to obtain a warrant.” This test was established in R. v. D. (I.D.) (1987), 38 C.C.C. (3d) 289 at 296, [1988] 1 W.W.R. 673, 61 C.R. (3d) 292 (Sask. C.A.).
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outlined above. It must be argued that there is little dissonance with the propriety of allowing a s. 487 warrant to effect, for example, assets that may be seized under the NCA or the Bankruptcy Act. Such use can easily be justified as there are no new powers which result from this use, given the restriction set out by the Supreme Court in Grant. The same reasoning cannot be applied in relation to general warrants used in relation to alleged proceeds of crime. When a non-Part XII.2 warrant is used to seize proceeds of crime, the prosecution is able to use the new forfeiture powers of Part XII.2 without having to meet the higher standards of a special warrant. Therefore, the seized assets would be forfeited when they would otherwise not be able to be, but for the Part XII.2 provisions. In addition, accused persons would be unable to access the balancing provisions as contemplated by Parliament. Finally, no court has extensively analysed the non-Part XII.2 warrant issue by examining Part XII.2 from a historical perspective. This would involve an analysis of the Parliamentary Debates and Committee Hearings, to determine the underlying policy of the balancing provisions that are being avoided by such state action, to determine the ramifications of the current jurisprudence in terms of how it affects the constitutional rights of persons accused of proceeds of crime offences, and to determine its effect on the constitutionality of Part XII.2. In the alternative, if it is held that s. 487 warrants are wide enough to deal with proceeds of crime and that the Crown can take full advantage of the draconian provisions of Part XII.2, it must be argued that in order to maintain the constitutionality of Part XII.2, as Parliament had intended, the accused person should be allowed to access the balancing provisions, including the legal fees exemption provision.

2. Availability of Other Resources

The wording of the legal fees exemption in s. 462.34 is clear. "[A]ny person who has an interest in the property" may apply "after hearing the applicant and the Attorney General ... the judge who hears the application may" release funds, "for the purpose of meeting reasonable

18 See Grant, supra note 8 and accompanying text.
business and legal expenses of the person [who has an interest].” While the availability of other assets may be one consideration of the judge deciding the application, it should not be determinative of the issue. First, the individual making the application will have been deprived access to the resource on an ex parte basis where there was found to be reasonable grounds that a forfeiture order may be made. It is wholly improper for the Crown to rely on the argument that such resources are prima facie proceeds of crime and therefore should not be released until all other ‘non-tainted’ assets have been exhausted. Second, the legal fees exemption clearly says that access to seized or restrained property may be done “for the purpose of meeting reasonable business and legal expenses ...” There is no requirement, explicit or implicit, that the person must first exhaust other ‘non-tainted’ assets. Third, the Parliamentary Committee heard argument specifically on this point and no amendment was made in this respect. R.C.M.P. Assistant Commissioner R.T. Stamler suggested the inclusion of the phrase “that the seized funds would be available for a stated purpose if no other funds were available." Mr. Stamler also argued that "without this amendment, criminals will no doubt use this provision of the law to draw first upon

19 Note: the argument that the term ‘reasonable’ modifies both ‘business’ and ‘legal’ is settled. Mr. Alan D. Gold, made the argument to the contrary before the Canada Parliamentary Committee on Bill C-61. See Canada Parliament, House of Commons Legislative Committee on Bill C-61 Minutes of Proceedings and Evidence (Ottawa: Queen’s Printer, 1988) (Chair: Fred King) at 3:15 [hereinafter C-61 Committee Hearings]. Mr. Gold argued “you have ‘reasonable business’ and ‘legal expenses’. Now, if you intend the word ‘reasonable’ to apply to both business and legal, then we can agree to disagree right now because the Department of Justice’s view of whether my legal fees are reasonable or not and my view will not concur. I do not want to have to justify to any state agency the reasonableness of my legal fees ...”

Note: despite Mr. Gold’s objection to the phrase, it was not reworded, however with the addition of s. 462.34(5) there is no doubt that the word ‘reasonable’ also applies to legal fees, as it reads: “For the purpose of determining the reasonableness of legal expenses ...” [emphasis added]

20 Ibid. at 4:39. [emphasis added]
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seized assets until they are depleted, which is defeating the intent of the proposed legislation."\(^{21}\) Despite this argument the amendment was not made. Parliament also had the advantage of observing the Australian legislation, which explicitly requires that the court look to other assets first.\(^{22}\) Therefore, the discretion remains with the Judge hearing the application to allow access to seized resources regardless of the availability of other sources and to determine what is reasonable.

The contention that 'reasonable' must be limited to the Legal Aid Tariff was clearly rejected by the Alberta Queen’s Bench when Conrad J. found no such statutory limitation on her discretion. She also added that: "In this country, an accused is always innocent until the state proves him guilty beyond a reasonable doubt. The accused should have access to his funds so that he can exercise his right to choice of counsel, providing those funds can be obtained and providing that counsel can be obtained on a reasonable fee basis."\(^{23}\)

\(^{21}\) Ibid.
Note: see also ibid. at 4:48 where Assistant Commissioner Stamler reiterated his argument by saying “there are basically two issues involved. One is whether the legal fees should be paid firstly from legitimate assets owned by the individual, and secondly, if those are depleted, whether any of the illegally acquired assets should be used for payment of fees. Dealing with funds handled or controlled by solicitors is a very significant problem. If all the transactions a lawyer might become involved in were somehow protected and the funds he might handle in the course of providing some kind of assistance to his client were protected, a lot of funds would not be subject to seizure.”

\(^{22}\) See Proceeds of Crime Act (Aust.), 1987, No. 87, s. 43(4) [hereinafter PCA]. The Court must be satisfied that the defendant cannot meet the expense or debt out of property that is not subject to a restraining order.


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3. Charter Arguments

As the right to counsel is the focus of this thesis it will be discussed in detail, including the s. 1 analysis. However, depending on the facts of the case, other possible arguments may be made. Of these arguments, the right to silence and the right to a fair trial will be briefly discussed.

The first issue that must be dealt with is whether the Charter applies to proceeds of crime offences. The Crown will argue that property rights and economic interests of accused persons are not protected under the Charter. However, the argument proposed here will not be in relation to the property per se, but rather that the effect of state action against an accused's property adversely impacts their right to counsel, right to life, liberty and security of the person, and the right to presumed innocent until proven guilty in a fair trial.

It will not be argued that the forfeiture provision should be ruled unconstitutional, or abolished as Sir Stephen did many years ago. It is recognised that the promulgation of organized crime could cause numerous societal problems, including threatening economic and political

Contra see Chapter One notes 170 - 172 and accompanying text.
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stability. Further "the doctrine of forfeiture in the laws of Canada has remained unchallenged for many generations. It has become enshrined in our consciousness as a measure of both compliance and regulation, reflecting age-old principles of the action in rem with the resulting forfeiture or destruction of the res used in an illegal activity." But what has changed is that the

25 See the statement of Mr. Ramon Hnatyshyn (Canada's Minister of Justice and Attorney General at that time), in Bill C-61, An Act to Amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act, 2d Sess., 33d Parl., 1987-88, vol. VII at 8888 (second reading 14 September 1987). He said: "Increasingly we are seeing the effects of criminal organizations ... [they] take advantage of modern communications, transportation and corporate structuring to frustrate the reach of national legal systems to amass illicit and illegal wealth." [emphasis added]

See J. Hogarth "Beyond The Vienna Convention: International Efforts To Suppress Money Laundering - Evaluation With Proposals For Action" (Paper presented to The International Conference on Preventing and Controlling Money Laundering and The Use of the Proceeds of Crime: A Global Approach, Courmayeur Mont Blanc, Italy, 1994) [unpublished], where he has discussed the economic, social and political problems that develop when the power of organized crime goes unchecked.

See J.L. Evans, "International Money Laundering: Enforcement Challenges and Opportunities" (Paper presented to Southwestern University School of Law's Symposium on The Americas: Eradicating Transboundary Crime, 1995) [hereinafter Evans, International Money Laundering] [forthcoming in Southwestern University Law Journal], at 14 where he notes: "The sums involved finance, ... extensive criminal operations in drugs, arms, exploitations of women and children, manipulation of markets, infiltration of business, commercial frauds, corruption of officials and politicians and destabilization of nations."

See also Legal and Governmental Affairs Committee - Canadian Bar Association, "Discussion and Policy Paper on Bill C-89" (Ottawa: CBA, 1991) at 49. "[T]he Canadian Bar Association acknowledges that laundering of the proceeds of crime, particularly the proceeds of drug trafficking, could be a serious social problem requiring legislative intervention and control ..."


See also R. v. Shah, [1992] B.C.J. No. 2716 (P.C.) (QL) [hereinafter Shah]. "The authority of the court to order forfeiture of property associated with the commission of a crime ... is undoubted."
penalty of forfeiture has now become a very powerful weapon in the criminal forum, and this must be analysed in the context of the fundamental rights guaranteed by the Charter. Therefore, while forfeiture as a penalty may be constitutional, the provisions of the legislation or the actions of the state in carrying it out may be attacked.

The applicant who seeks a Charter remedy bears the burden, on a balance of probabilities, of demonstrating that a Charter right has been infringed. Despite the argument that “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial ...”, 27 once a violation is made out it is necessary for the Crown to be given the opportunity to demonstrate that the infringement is reasonable, prescribed by law and demonstrably justified in a free and democratic society under s. 1. 28

When making Charter arguments it is important to remember that “the meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such guarantee; it [is] to be understood ... in light of the interests it was meant to protect.” 29 “The fundamental logic of Canadian constitutional law has now been well defined: federal and provincial statutes must have a valid legislative purpose and if they violate or attenuate Charter rights, then to survive attack the legislative regime must be both articulate in addressing clear goals and carefully crafted to minimize interferences with Charter-protected rights.” 30 Therefore, the issue is whether Part XII.2 survives constitutional scrutiny given that the jurisprudence to date

28 However, in some cases it may not be necessary to make the Charter argument because, as will be discussed at infra notes 85 - 86 and accompanying text, following a Rowbotham Application where the Court decides that defence counsel is necessary for a fair trial and the accused is unable to afford such a defence, the Court may stay the proceeding until the necessary funding is provided by the state.
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has resulted in many accused being unable to utilize the legal fees exemption as intended by Parliament.

(a) Right to Counsel

One may argue that it is clear that section 10(b) does not assist the argument that a person accused of a proceeds of crime offence should automatically receive state funded assistance. The case law on s. 10(b) does not deal with the situation where an accused who can afford to retain counsel but cannot do so because the necessary funds cannot be accessed due to an \textit{ex parte} state action. Thus, the argument could be made that an accused's right to retain counsel would be thwarted by such state action.\footnote{31} However, a more convincing argument could be made in conjunction with sections 7 and 11(d).

The Supreme Court has adopted a three part test under section 7:\footnote{32}

(i) Has a right set out in the ‘rights clause’ been infringed or deprived?;

(ii) Does the infringement of the right violate principles of fundamental justice?;

(iii) Where the principles of fundamental justice have been violated, does s. 1 excuse the violation?\footnote{33}

Each of these parts will be dealt with in turn.

\footnote{31} As was discussed in Chapter 2 both s. 10(b) of the \textit{Charter} and s. 2(c)(ii) of the \textit{Bill of Rights}, guarantee the right to retain and instruct counsel without delay, but neither of these sections guarantee the right to have counsel provided at the state’s expense.


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(i) Infringement of the Right

As was discussed in Chapter Three, there is little doubt that given the circumstances of proceeds of crime cases counsel will be essential to a fair trial. Therefore, from an administration of justice perspective, the trial of an unrepresented accused would be highly difficult, prone to prolixity, and fraught with danger.34

Where persons charged with proceeds of crime offences have been denied the right to access seized or restrained property to fund a defence as Parliament intended, their constitutional right to counsel may be infringed. The denial of the right to counsel negatively impacts on other constitutional protections as has been discussed in Chapters Two and Three. One of the possible results of not being able to use the funds to retain counsel is that the accused person could face imprisonment. It has been held that imprisonment infringes the liberty component of section 7.35

In the area of proceeds of crime, imprisonment could result from conviction on a substantive offence. In addition, imprisonment could result from the effect of s. 462.37(3). Where property should have been forfeited under s. 462.37(1), but the forfeiture order has been frustrated, s. 462.37(3) allows the Court to impose a fine in an amount equivalent to that which cannot be forfeited. Where such a fine is imposed, s. 462.37(4) requires the Court to establish a consecutive jail term in lieu of fine payment. Given that in many cases, most of an accused's assets will have been subject to forfeiture, he or she will likely be unable to pay the fine and will face an additional consecutive jail term in default. Further, since s. 462.37(1) forfeitures can be made, 'where the

34 See R. v. Rooke (8 February 1989), Victoria No. 29853 (B.C.S.C.) where McLachlin C.J.B.C., as she then was, adopted the reasoning from Rowbotham and held that s. 7 and 11(d) of the Charter dictate that an accused must have counsel in complex criminal proceedings.

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offender is convicted or discharged under section 736, it will be possible for a person who is discharged from all proceeds offences to still face a substantial jail term in default. A related result is the accused's right to security of the person may be violated if the accused is convicted and loses all, or a substantial portion of his or her assets.

Each of the interests within s. 7 are independent and accordingly it is possible to find a violation of just one component of the 'rights clause' before proceeding to the 'fundamental justice' issue. Further, there does not need to be an actual violation of a Charter right by a government actor or a legislative scheme, as the potential for abuse within legislation is sufficient to claim an infringement. In Smith, Lamer J., as he then was, noted that "[w]hile no such case has actually occurred ... that is merely because the Crown has chosen to exercise favourably its prosecutorial discretion .... However, the potential that such a person be charged .... is there lurking."36 Martin commented that the principle from Smith is that "[o]nce it has been determined that a legislative provision could lead to the violation of an individual's Charter rights, a declaration of invalidity (subject to a finding that the provision is justifiable pursuant to s.1 ...), follows. Reliance upon the restraint and discretion of those who have authority to apply the impugned provision was found to be an inadequate response."37 This approach was modified by the Supreme Court in Goltz.38 The Court created a double aspect assessment:

One aspect involves the assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself and the personal characteristics of the offender. If it is concluded that the challenged provision provides for and would actually impose on the offender a sanction so excessive or grossly disproportionate as to outrage decency

37 Martin, Potential For Abuse, supra note 30 at 1 - 2. [emphasis added]
See also Smith, supra note 36 at 1078 where Lamer J., wrote "the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the Charter."

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in those real and particular circumstances, then it will amount to a prima facie violation ... and will be examined for justifiability under s. 1 of the Charter. ... 

If the particular facts of the case do not warrant a finding of gross disproportionality, there may remain another aspect to be examined, namely a Charter challenge or constitutional question as to the validity of a statutory provision on the grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases.39

The potential of the Crown being able to seize or freeze all of a person's assets, who is accused of a proceeds of crime offence, on an ex parte application before any finding of guilt so that they would be unable to retain counsel with their own funds is arguably a 'sanction [that is] so excessive or grossly disproportionate' that the Court should grant a stay of proceedings. As was held in Goltz a court can decide such a claim on the facts of the particular case before it or on a set of 'reasonable hypothetical circumstances'. Such circumstances would demonstrate how unfair a balance would be struck where the state's resources are used against an accused who has been forced into indigency by state action without having been found guilty of an offence, and thereby effectively denied their right to counsel, fair trial, full answer and defence and right not to be deprived of liberty or security of the person except in accordance with the principles of fundamental justice. The area of legal fees and proceeds of crime provides numerous opportunities for the infringement of the right to counsel, as related to s. 7, and accordingly, it should not be difficult to meet the requirements of the first step.

(ii) Violation of Fundamental Justice

The inherent domain of the judiciary is the guardianship of the justice system.40 Where defence counsel is necessary to ensure a fair trial, the right to counsel becomes a basic tenet of our justice system. In such circumstances, it is incumbent on the Court to ensure that the accused is provided counsel. Given the importance of proper representation to the functioning of the

39 Ibid. at 505 - 06. [emphasis in original].
40 See Re: 94(2) supra note 35 at 31.
adversary system, the denial of the right to access funds to retain counsel could jeopardize not only the accused’s constitutional rights but also the proper functioning of the adversary system. The Supreme Court of Canada in Swain recognised the importance of an adversary system to the protection of an accused’s s. 7 rights. Chief Justice Lamer, writing for the majority, noted that: “The principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person. These principles require that an accused person have the right to control his or her own defence.”

Also the public’s perception of and faith in the adversary system would be tested if the state is allowed to strip an accused of their assets and then infringe their constitutional rights such that they would be unable to properly defend themselves against the machinery of the state. Any legislation or administrative practice that allows such a risk to occur is arguably flawed and contrary to the fundamentals of justice.

(iii) S. 1 Analysis

• Objective of Part XII.2

The objective of Part XII.2 is to access, through seizure and restraint orders, the proceeds of crime for ultimate forfeiture to ensure that crime does not pay. The objective of the legislation also included an attempt to ensure that accused persons’ right to counsel was protected. The modern day forfeiture legislation is designed to be an application of the Roman legal principle, ex turpi causa non oritur actio.

The objective of Part XII.2 must be of sufficient importance to warrant overriding constitutionally protected rights and freedoms. The government has a strong interest in battling the ‘drug war’, but given the effectiveness of their efforts it may be very dangerous and

42 Note: the following s. 1 criteria were first established by the Supreme Court of Canada in Oakes see supra note 33.
Mccarthyistic to attempt to win the 'war' at the expense of accused persons' constitutional rights. The original intent of the legislation to attack organized criminal activity while at the same time ensuring the protection of the fundamental rights of accused persons and third parties has failed with regard to the second objective.

- Proportionality Test

- Rationally Connected to the Objective; Not Arbitrary, Unfair or Based on Irrational Considerations

The ability to forfeit proceeds of crime is rationally connected to the objectives of Part XII.2. Further, "[t]he forfeiture of the proceeds of crime has obvious deterrent effects – the incentive to commit the crime is reduced. If the prospect of gain is reduced, the deterrent effect of any punishment will be increased. This should be the case with regard to both general and specific deterrence."43 The problem with this argument is that it treats the threat of a penalty for proceeds of crime offences as being the same as any offence. However, with increased penalties and increased surveillance, the price of the commodity is driven higher, which may attract more people willing to take the risk in order to garner the potential profit.

- Impairs the Right or Freedom As Little As Possible

The Parliamentary intent for Part XII.2 was to realize its objective of ensuring that crime does not pay, but at the same time recognising the rights of accused persons. The procedure within Part XII.2 allows for the pre-conviction seizure and restraint of property and the post-conviction forfeiture of property. It also recognised the constitutional rights of persons, who are presumed to be innocent, by allowing them to access the seized or restrained property. This well documented intent of Parliament was an attempt to constitutionalise Part XII.2 by providing a fair

43 Shah, supra note 26.
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balance between the public interest and the rights of individuals. The current jurisprudence and prosecutorial action have resulted in the balance being tipped in favour of the state, and as a result the burden has fallen almost exclusively upon the accused person who is in need of exercising the constitutional right to counsel. Therefore, the rights of accused persons are not being impaired as little as possible contrary to Parliament’s intention.

- The Effects on The Limitation of the Right or Freedom are Proportional to the Objective

“One of the most fundamental safeguards which stands between the freedom of the individual and the power of the state is the right of the individual to avail himself of competent legal counsel.” The importance of this right is self-evident in a proceeds of crime trial: the charge is very serious; the legislation is highly complex; the issues raised are complex; there is a high possibility of loss of liberty and loss of most if not all of the accused’s property. The fundamental adverse affect on the judicial system and on accused persons’ rights when proper

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44 See R. v. Gagnon (1993), 80 C.C.C. (3d) 508 at 509, 139 A.R. 264 (Q.B.) [hereinafter Gagnon #2 cited to C.C.C.]. “Parliament’s overall intention in passing the proceeds of crime provisions was to ensure that crime does not pay. It could have done so by seizing and retaining all suspected proceeds of crime. It chose instead to allow some exemptions from the seizures . . . (such as) lawyer’s fees . . . Parliament’s special mention of lawyer’s fees must be directed to mitigating some unfortunate results of the American proceeds of crime legislation - the driving of a wedge between persons accused of crime and the criminal defence bar.” [emphasis added]

45 Note: In Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 at 889, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 120 D.L.R. (4th) 12, Lamer C.J.C. reformulated this third part of the second branch of the Oakes Test. He held “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.” [emphasis in original]


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representation is denied far outweigh any possible benefit the State has in a ‘complete’ forfeiture ideology that is similar to that prevailing in the United States.

   In relation to proceeds of crime, there is also the concern that if legal fees are paid out of seized assets the effect of the forfeiture penalty as an economic disincentive will be substantially undermined. However, the harm done to the integrity of the justice system and accused persons’ rights far outweighs the societal interest in having available an incrementally greater percentage of money that might forfeit to the state.

   Therefore, the denial of an accused’s right to counsel and its possible effect on the adversary system are not proportional to the objective of ensuring that crime does not pay. Further as was noted earlier, the financial benefit to the state accruing from a forfeiture order is a mere by-product of that legislative purpose. The legislative purpose is not defeated by an accused person’s access to his or her property to the extent necessary to secure legal representation of their choice. If he or she is found not guilty, they have merely used their own money. If he or she is convicted and an order for forfeiture is made, the amount of the legal expenses, although not available for forfeiture, is nevertheless money of which the offender has been deprived by the proceedings against him or her, by reason of the necessity of paying for their defence. In addition, where the accused has been convicted it is also money that a state agency, such as Legal Aid, has not had to pay to fund the accused’s defence.

- S. 1 Summary

Although Part XII.2 was designed to withstand constitutional attack, the procedural safeguards have broken down. While the crime fighting objective of Part XII.2 is important, it

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should not be sought at the expense of the constitutional protections of accused persons. The legal fees exemption is currently being used in only a narrow set of circumstances, which is clearly far from the intent of its drafters. As defence counsel will be essential to defending a proceeds charge properly, where access to seized or restrained property is denied, the Court should either stay the charges\(^49\) until reasonable defence funds are provided or read down s. 462.34(1)\(^50\) by striking out the words “issued pursuant to section 462.32”. This conclusion is supported by the fact that while the goals of Part XII.2 have been clearly articulated, the balancing provisions have not been crafted carefully enough so as to minimize the interference with Charter protected rights.

(b) Right to A Fair Trial and Full Answer & Defence

When accused persons are unable to access their funds to retain defence counsel their right to make full answer and defence could also be in jeopardy. “[A] measure which denies the accused the right to present a full and fair defence would violate s. 7 ...”,\(^51\) as well as the right to a fair trial. As was discussed earlier, where counsel is considered essential to a fair trial, the accused has a fundamental right to counsel. An essential facet of this right is an opportunity to state one’s case.\(^52\) In order to state one’s case properly, with regard to a proceeds of crime offence, an accused would need the guidance of a skilled practitioner familiar with the complexities of Part XII.2. The importance of the evidentiary bricks needed to build a defence was recognised by the Supreme Court of Canada in Seaboyer.\(^53\) Surely a similar abrogation of

\(^{49}\) This authority is derived from s. 24(1) of the Charter.

\(^{50}\) This authority is derived from Part VII of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 52(1).


\(^{52}\) See ibid. at 607.

\(^{53}\) See ibid. at 608. “[T]he right of the innocent not to be convicted is dependent on the right to present full answer and defence. ... If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.”

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the defence would result if the 'brick layer' was not employed. Therefore, where an accused is
denied the right to secure counsel the right to a fair trial and make full answer and defence could
be put in jeopardy.

(c) Right To Silence

As was mentioned in Chapter One, Bill C-61 was amended after the committee stage to
include s. 462.34(5), which requires the judge to hold an in camera hearing and without the
presence of the Attorney General for the purpose of determining the reasonableness of legal
expenses. It has been argued that the effect of the decisions discussed in Chapter Three on the
parliamentary intent of the in camera provision is profound. As evidenced by the Parliamentary
Committee's transcript proves that this argument is incorrect. In fact the prevailing
jurisprudential interpretation is as Parliament had intended. However, the ramifications of such an
interpretation must still be explored as it may still be subject to a Charter challenge.

It is utterly unfair to force an accused, who is presumed innocent, to testify and face
cross-examination because of ex parte accusations that have rendered them indigent. Such a
practice may force accused persons, who wish to avail themselves of their statutory right to
access their funds for legal representation to choose between their constitutional rights to counsel
and to remain silent so as not to face providing possible incriminating evidence. This fundamental
principle was recognised by McLachlin J. in Hebert.55

[I]t has long been felt inappropriate that an accused should be required to betray
himself. Where virtually the only evidence against him is such a betrayal, the effect
is that the accused is required to secure his own conviction. That is contrary to the
notions of justice fundamental to our system of law and calculated, in my opinion,
to bring the administration of justice into disrepute.

54 See Martin, Right To Counsel, supra note 23 at 4.
(2d) 1 [cited to S.C.R.].

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Therefore, although the jurisprudence interpreting s. 462.34(5) is in congruence with the Parliamentary purpose, it should still be argued that the interpretation of the provision violates fundamentally protected Charter rights.

Section 13 of the Charter provides protection for an accused by limiting the subsequent use of evidence provided in Court. Section 7 of the Charter also protects the accused from self-incrimination. It allows an accused to refuse to answer questions in court that may assist the Crown in prosecuting the accused on further criminal charges. The court in Mwra limited Re Leask, by confining the extent of the cross-examination to the state of the accused's assets from the date of the restraint order, and it concluded that the source of an accused's funds is immaterial to the question of sufficiency of his assets to discharge reasonable legal expenses. However, the rational of an entitlement hearing could be challenged. It seems obvious that if an accused has been charged with a proceeds of crime offence and the Crown is seeking the forfeiture of those assets from the person charged, then that person has an 'interest' in the assets. If it were not so, would the Crown not have charged the person with the 'interest' in the alleged proceeds, rather than the person on trial?

(4) Abuse of Process

Defence counsel may be able to make an abuse of process argument where the accused's ability to defend themselves has been denied because of the Crown's ex parte application, which

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56 R. v. Morra (1992), 77 C.C.C. (3d) 380 at 383, 17 C.R. (4th) 325, 11 C.R.R. (2d) 379 (Ont. G.D.). Because “his answers may provide derivative ‘clues’ to the Crown which will enable it to trace his assets to criminal sources.”

57 Ibid. at 384.

has prevented the accused from substantially accessing all of their assets.\textsuperscript{59} A court’s discretion to stay proceedings based on an abuse of process was affirmed by Dickson C.J., who wrote for the full court, in \textit{Jewitt}.\textsuperscript{60} In doing so he adopted the conclusion of \textit{R. v. Young}\textsuperscript{61} that the court’s discretion arises “where compelling an accused to stand trial would violate those fundamental principle of justice which underlie the community’s sense of fair play and decency and to prevent the abuse of a court’s process through oppressive or vexatious proceedings.”\textsuperscript{62}

Chief Justice Dickson also concluded that:

\begin{quote}
The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. No consideration of the merits - that is whether the accused is guilty independently of a consideration of the conduct of the Crown - is required to justify a stay. . . . The stay in this case intervenes to prevent a consideration of the merits lest a conviction occur in circumstances which would bring the administration of justice into disrepute.\textsuperscript{63}
\end{quote}

Therefore, a stay will be warranted where it is necessary to prevent an abuse of the court’s process or wherever the fundamental principles of justice or fairness require it. In \textit{Conway}\textsuperscript{64} L’Heureux-Dubé J. followed the reasoning of \textit{Jewitt} when she set aside the prosecution, not on the merits but, because allowing it to proceed would tarnish the integrity of the court. She noted


\textsuperscript{62} \textit{Jewitt}, supra note 60 at 136 - 37. [emphasis added]

\textsuperscript{63} \textit{Ibid.} at 148. [emphasis added]

Note: see Johnson, Abuse of Process, \textit{supra} note 59 at 335 where he noted the importance of Dickson’s conclusion: “He . . . severed the connection between the abuse of process and the merits of the case, a connection which has been the very foundation of the bulk of traditional abuse of process jurisprudence.”

that “[t]he doctrine is one of the safeguards designed to ensure ‘that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values of society’ ... where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.”

In *Greco*, the Ontario Court of Appeal concluded that “whether or not the Crown’s actions ... in proceeding to obtain a general s. 487 warrant from Warren J. were an abuse of process requires a reading of the leading authority, *R. v. Power* ...” The Court then adopted the words of L’Heureux-Dubé J., who wrote for a slim majority in *Power*:

I ... conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court’s process but only in the ‘clearest of cases’, which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.

To conclude that the situation ‘is tainted to such a degree’ that it amounts to one of the ‘clearest of cases’, ... requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.... The Attorney General’s role ... is not only to protect the public, but also to honour and express the community’s sense of justice. ... Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong

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65 Ibid. at 1667.
66 *Greco*, *supra* note 11 at para. 24.
67 Ibid. at para. 25. See also *Power, supra* note 59 at 615 - 16.

Note: in *Greco*, the Court found that the actions of the Crown did not meet this high threshold for obtaining a stay of proceedings. However, it must be pointed out that this decision was not made with regard to approving the use of a s. 487 warrant rather than obtaining a s. 462.32 special warrant, instead, as noted in para. 24 of *Greco*, the Court was deciding whether the actions of the Crown in obtaining a second s. 487 W from Judge Warren was an abuse of process. This question arose because there had already been a warrant issued by a Justice of the Peace, and when the Crown failed in their attempt to have the initial warrant extended they went to the Supreme Court and obtained a new s. 487 warrant, rather than appealing the issue. In their application for the second 487 warrant the Crown incorrectly stated that there was no right of appeal against the decision regarding the initial warrant. The Court found at para. 26 that although the Crown’s opinion regarding the lack of an appeal was wrong, there was no ‘bad faith or improper motive’ in obtaining the second s. 487 warrant.
that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

In the area of proceeds of crime, it will be very difficult to meet the narrow test established by the Supreme Court. However, where substantially all of an accused's assets are unavailable as the result of an *ex parte* application, his or her inability to defend themselves against the state may be sufficient to shock the conscience of the community. As was noted above, an experienced counsel is essential to a proper defence in this area, so that any denial of this right could be so detrimental to the proper administration of justice that the Court would have to intervene by granting a stay of proceedings until proper funding is provided.

Even where the strict standard to prove an abuse of process has not been met the court could still award costs against the Crown. In *Cheverie* Brien P.C.J. held that "[w]here the conduct of the court finds the conduct of the Crown to be unfair but finds that such does not meet the high threshold test ..., the award of costs may provide a remedy to the accused and a disincentive to the Crown in future matters."\(^68\)

**B. Problems with Low, or Lack of, Compensation**

In England there has been a recognition that financial restrictions on lawyers' compensation could result in some firms permanently withdrawing from criminal defence work, which would detrimentally affect the standard of work in criminal law.\(^69\) It has also been argued


\(^69\) See M. McConville, *et al.*, *Standing Accused: The organisation and practices of criminal defence lawyers in Britain*, (Oxford: Clarendon Press, 1994) at 270 [hereinafter McConville, *Standing Accused*]. "Faced with a remuneration system under which providing a thorough and professional service to clients will frequently lead to payment which falls well short of the proper amount of work done ... many conscientious practitioners will feel they have no choice but to abandon criminal work. ... It seems inevitable that this must have a detrimental impact on the standard of work in the criminal field."
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that "[t]here is considerable evidence, ... that the cost of securing a lawyer affects the use, availability, and quality of representation" and if proper representation cannot be retained it results in "[t]he erosion of basic constitutional and other legal rights; an imbalance of advocacy in our legislative forums; a loss of faith in our governmental processes." These opinions could be equally true in Canada for a criminal lawyer who faces the potential of receiving little or no fee, where funds are not released.72

It has been argued that the past case law under Part XII.2 has made defending such cases very difficult. The most overt judicial pronouncement to this effect was given by Veit J. in Gagnon. She wrote that:

it would be naive to forget that lawyers are also human. If lawyers consistently are not paid for all of the work they do, they may stop doing all of the things that they might have done had they been paid. ... What lawyer would undertake the defence of an accused person if fees paid by the accused could eventually be recovered by the State? What accused would then have the benefit of the constitutional right to a full defence, given the dual problems of finding a lawyer who will act under those conditions and of serving time in addition to the sentence imposed for the substantive crime if the lawyers' fees are not repaid to the state as proceeds of crime?74

A similar conclusion was reached by the dissent in Caplin & Drysdale in the United States, where they noted that "even the best intentioned of attorneys may have no choice but to decline the task of representing defendants in cases for which they will not receive adequate compensation ..."

71 Ibid. at 1.
72 See R. v. Rowbotham (1988), 41 C.C.C. (3d) 1 at 69, 63 C.R. (3d) 113, 35 C.R.R. 207, 4 W.C.B. (2d) 30 (Ont. C.A.) [hereinafter Rowbotham cited to 41 C.C.C. (3d)]. "Having regard to the increase in the length and complexity of modern trials and the increase in overhead costs, the appointment of counsel to act without remuneration is not feasible and indeed may be unfair to counsel."
73 See Tollefson, Forfeiting The Right To Counsel, supra note 5.
74 Gagnon #2, supra note 44 at 512 - 13.
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[and] the result of lowered compensation levels will be that talented attorneys will decline to enter
criminal practice [which] ... could devastate the criminal defence bar.”75

The majority of the United States Supreme Court in Caplin & Drysdale vigorously
opposed the idea that accused persons should be able to use proceeds to retain counsel of choice.
Mr. Justice White wrote that:

a major purpose ... [for the] forfeiture provisions has been the desire to lessen the
economic power of organised crime and drug enterprises. ... This includes the use
of such economic power to retain private counsel. ... [T]he harsh reality [is] that
the quality of a criminal defendant's representation frequently may turn on his
ability to retain the best counsel money can buy [however] ... the modern day Jean
Valjean must be satisfied with appointed counsel.76

Professor Fisse argues that the reasoning of the United States Supreme Court
begs the question. Criminals are not entitled to enjoy the undeserved economic
power but until criminality is established it is premature to say that they should be
stripped of economic power. Since the confiscation provisions ... are conviction
based, it is especially difficult to see why D should not be allowed to spend
whatever he or she considers necessary to obtain genuine legal assistance. ... The
main purpose served by restraining orders is to prevent D from dispersing assets in
such a way as to defeat the operation of confiscation orders. Provided that steps
are taken to ensure the payment of legal fees is not a subterfuge for disposition of
assets to D’s associates, that purpose can still be achieved. ... Lawyers transcend
the balance of market power not because of any professional or moral superiority,
but because they play a unique and essential institutional role in our criminal justice
system. They serve as the necessary advocates of defendants’ rights.77

75 Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 at 646 - 47, 109 S.Ct. 2646,
WL 65717, 105 L.Ed. 2d 528, 57 USLW 4836 (U.S. 1989) [hereinafter Caplin &
Drysdale cited to U.S.].
Note: the potential extent of the problem in the U.S. is not exaggerated as it has been
estimated that the fee forfeiture provision could apply to 25% of all criminal cases brought
in federal court, see Dettelbach, Forfeiting Counsel, supra note 5 at 202 fn. 5.
76 Caplin & Drysdale, ibid. at 630.
77 See Fisse, Funny Money, supra note 1 at 98.
C. Legal Aid

If sufficient funds are not released from seized or restrained property to pay for legal fees, the accused person will have to apply for legal aid. This appears to be an inadequate option for someone who has been made indigent by the state, who has not been found guilty of a crime and whose assets have been taken from their control because someone held a reasonable belief that they may be forfeitable under Part XII.2. Further, the person may then be unable to retain counsel of their choice and the quality of the counsel they receive may not be equivalent to a counsel of choice. Madam Justice Veit recognised the benefit of being able to retain a lawyer privately.

I accept that it will, at the least, be perceived to be to the advantage of the accused to have counsel of choice and to be able to privately retain a lawyer. At the least, it is reasonable for an accused to believe that a lawyer hired privately could do more for her than a legal aid lawyer would.

In addition to it not being fair to force someone to rely on legal aid because they have been made an indigent by state action, and the real or perceived difference in the quality of

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78 See United States v. Noriega, 746 F.Supp. 1541 at 1544 (S.D. Fla. 1990) [hereinafter Noriega], where even an American court recognised that the government’s circular reasoning in asserting that an accused “may not insist on representation he cannot afford. ... [A] defendant cannot be forced into indigency without due process and then be told that he has not right to representation he cannot afford.” [emphasis added]

See also Fisse, Funny Money, supra note 1 at 96. “Legal aid may be provided but plainly this is a second best solution. The money available under legal aid schemes is limited and this factor may restrict both the counsel available and the time that can be expended on cases assisted.”

79 Note: the L.S.S. maintains a policy of allowing an accused person to use a counsel of their choice, however, their chosen counsel may not be willing to accept a legal aid case. See also B.J. Winick, “Forfeiture of Attorneys’ Fees under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid it” (1989) 43:4 U. Miami L. Rev. 765 at 773 [hereinafter Winick, Forfeiture of Attorneys’ Fees].

80 Gagnon #2, supra note 44 at 512.

See also McConville, Standing Accused, supra note 69 at 271, where the authors found that “there is a widespread feeling among prisoners that the standard of legal aid provided is inferior to that available to persons who pay for their own defence ....”

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representation one may receive, the policy of the Legal Services Society of British Columbia
favours the use of seized funds to pay a private lawyer. The stated position of the L.S.S. is
"that as between the taxpayers and an individual possessed with wealth, however, obtained, the

See also D.J. Martin, ed., “The Right To Counsel and The 'Forfeiture' Fine” 6:6 C. of R. Newsl. (Aurora: Canada Law Book, Inc., 1993) at 4 [hereinafter Martin, The 'Forfeiture' Fine]. "Provincial legal aid administrators in several provinces have taken the position that if the legal fees exemption application is available to a person charged with a criminal offence where the assets have been seized then legal aid funding will be denied."

Contra see B.W. Bowie, Inspector, Officer In Charge Anti-Drug Profiteering Section R.C.M.P., Interview with Gregory J. Rose (19 April 1995) Vancouver, stated that “[t]he position of the Legal Aid Society is insupportable and won't stand up in the future, they have an obligation to pay.” Mr. Bowie also referred to a scenario of someone who is caught after robbing a bank and the money is seized as proceeds of crime. He asked “[w]ould the Legal Aid Society be able to argue that they do not have to pay because the accused has money, I think the bank may have something to say about that.” However, in Mr. Bowie’s example the Bank’s claim to the money would override the accused’s claim. With respect, his example does not provide a true analogy of the situation because in the bank robbery example the authorities are absolutely certain of where the money came from, however, the argument breaks down where the absolute certainty of the proceeds’ origin is not known and the authorities simply hold a belief that the proceeds they have taken control of may be forfeitable under Part XII.2.

See Kasting, Legal Aid, ibid. at 4.2.06.

See R.A., Kasting, Legal Services Society of British Columbia, Telephone Interview with Gregory J. Rose (4 January 1995) Vancouver [hereinafter Kasting, Interview]. Mr. Kasting added that “the argument becomes more compelling now that Legal Aid funds are restricted. There is a certain amount of money that has to be distributed among everyone, therefore if there is someone who arguably does not need the money, they should access their own funds before they come to Legal Aid and ask the State to fund them.”

See also Commissioners of Customs and Excise v. Norris, [1991] 2 All E.R. 395 at 397 (C.A.), where Lord Donaldson, writing for the court found that there public policy advantages in releasing funds to enable the accused to prosecute the appeal at his own expense. “[I]f he is forced onto legal aid, then the costs of the defence will come out of public funds whether the conviction is sustained or whether it is not. If, on the other hand, this money is released and is spent on the costs of his appeal, there will be that much saving for the legal aid fund and if the appeal succeeds, it will be [the accused’s] money that paid for the appeal, ….”
To ensure the best possible chance of their policy's success, the L.S.S. will sponsor the necessary applications to make such funds available to an accused. First, it will fund an Exemption application under s. 462.34(4)(c)(ii). However, if this application cannot "be made because seized money is not designated as 'proceeds of crime' or where assets have been tainted by proceeds of crime but not seized," a Rowbotham application will be made. A Rowbotham application "is an application to require the Crown to make available sufficient funds to meet legal expenses, and to stay the charges until such monies are available." To satisfy the test under a Rowbotham application the Judge must first find that 'representation of the accused by counsel is essential to a fair trial'. Given the inherent substantive and procedural difficulties in Part XII.2, this hurdle should not be difficult to surpass. Second, the Judge must be satisfied that the accused lacks the means to employ counsel. Proof of the accused's means could be met by an affidavit of the accused, attesting to the lack of untainted

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83 See Policy Handbook of the Legal Services Society, Update #14, (Vancouver: L.S.S., 16 March 1993). "When someone's assets have been seized as potential proceeds of crime, those funds should be made available to the person to pay a private lawyer to defend such allegations and actions. It may be necessary for L.S.S. to fund an application to make these assets available to the accused."

Note: see Kasting, Interview, ibid. where this policy was confirmed to still be in effect, as of January 1995.

84 Kasting, Legal Aid, supra note 81 at 4.2.04.

85 Ibid.
assets, as would be the case in an Exemption application.\textsuperscript{86} Therefore, where an Exemption application cannot be made, L.S.S. will seek the 'pay or stay' remedy of the \textit{Rowbotham} application.

It has been recognised that it is unfair to force an accused to rely on legal aid because of an \textit{ex parte} governmental action. "In effect, the prosecution could have a role in selecting, influencing, or vetoing the defendant's choice of counsel."\textsuperscript{87} If this occurred the independence of the defence bar would be adversely affected. Due to the economic reality of the fees that are paid by a legal aid scheme compared to what is required to operate a private law practice, many competent counsel will be unable to take such cases.\textsuperscript{88} Therefore, by seizing and/or restraining

\begin{itemize}
\item \textsuperscript{86} See \textit{Rowbotham, supra} note 72 at 65 - 66, where Cory J., as he then was, wrote for the Court, that "those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, ... the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial." Justice Cory then set out the section 24(1) remedy at 69. "[A] Trial Judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided. ... Such a stay is clearly an appropriate remedy under s. 24(1) of the Charter. Where the Trial Judge exercises this power, either Legal Aid or the Crown will be required to fund counsel if the trial is to proceed." [emphasis added]
\item \textsuperscript{87} \textit{United States v. $70,476 in U.S. Currency}, 677 F.Supp. 639 at 646 (N.D. Cal. 1987) appeal dis'd 845 F.2d 329 (9th Cir. 1988).
\item \textsuperscript{88} See Winick, \textit{Forfeiture of Attorneys’ Fees}, \textit{supra} note 79 at 773 - 74. "In view of the complexity, duration and intense time pressures of such cases, experienced defence counsel - even when well paid - often find it impossible to undertake such cases and to maintain their practices at the same time. Thus, the economics of private practice will preclude virtually all private practitioners from accepting such cases at CJA rates [$60 per hour for in-court time and $40 per hour for out-of-court time, with a maximum fee of $3,500]."
\end{itemize}
all of an accused’s assets “the government can gain the ultimate tactical advantage of being able to exclude competent defence counsel.”

D. Ethical Issues

Assuming that all of the above hurdles are overcome and legal fees are paid out of seized or restrained property as contemplated by Part XII.2, there are still other obstacles to overcome. Part XII.2 provides the Court with the discretion to impose a fine in lieu of forfeiture. This raises one of the prime ethical issues in the proceeds of crime and legal fee area. Because funds have been paid out as legal fees they are no longer available for forfeiture. Therefore, the Crown will likely argue that the Court should impose a fine in an equivalent amount under s. 462.37(3). Further, where a fine is ordered to be paid the amount is set as equal to the value of the property that could not be forfeited, in this case the amount paid as legal fees. However, given that an accused will likely not have assets to pay the fine, where all or a substantial portion of their assets have been seized or restrained, it is almost certain that the fine will not be paid. In the event that the fine cannot be paid, s. 462.37(4) requires the court to impose a consecutive jail term in lieu of the fine payment. The section also sets out a scale of jail terms that increase with the size of

89 See *ibid.* at 778.
90 See Part XII.2, s. 462.37(3): "Where a court is satisfied that an order of forfeiture under subsection 1 should be made [i.e. where the offender is convicted or discharged and the court is satisfied on a balance of probabilities that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property] … but that that property or any part or thereof or interest therein cannot be made subject to such an order and, in particular, (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 court may, instead of ordering that property … to be forfeited … order the offender to pay a fine in an amount equal to the value of that property ….”
91 See also Appendix 5: Jail in Lieu of Fine Payment Provisions
the fine\textsuperscript{92} and it also stipulates that the fine option program is not available.\textsuperscript{93} Therefore, there is a clear dilemma between the lawyer's desire to be paid for his or her services and the possibility of such a payment resulting in an increased consecutive jail term for their client.

The Manitoba Court of Appeal in Pawlyk\textsuperscript{94} commented on the fine in lieu of forfeiture provisions in relation to defence counsel asserting a claim based on an assignment of assets. Mr. Justice Twaddle wrote that "the only enumerated circumstance relevant to this case [is] where the property has been transferred to a third party. ... It is the ineffectiveness of forfeiture as a remedy which results in the court being given the option of imposing a fine."\textsuperscript{95} He then added: "I can only assume that it was oversight on [the defence counsel] Mr. Brodsky's part that enabled him to assert his claim when its success might result in his client spending additional time in jail. Even if the sentencing judge did not impose a fine, the inability of the court to forfeit the money may well have been a factor which the sentencing judge would have taken into account in fixing the prison term."\textsuperscript{96} The Ontario Court of Appeal noted the same concerns with regard to the payment of legal fees resulting in an increased sentence to the client, in refusing to grant a post-forfeiture relief award to defence counsel. Mr. Justice Doherty wrote: "To the extent that the interests of

\textsuperscript{92} See Part XII.2 ss. 462.37(4)(i) - (vii).
\textsuperscript{93} See \textit{ibid.} s. 462.37(5).
\textsuperscript{95} See \textit{ibid.} at 73.
\textsuperscript{96} See \textit{ibid.} at 74.

Note: it is interesting that Courts are able to rather easily slot lawyers in as third parties when punitive action is being considered, yet where lawyers attempt to seek the benefits of Part XII.2 provided to third parties they face a much more difficult time being defined as such.

Note: at 67 Scott, C.J.M., Huband, J.A. concurring, agreed with Twaddle and wrote "in light of the provisions of s. 462.37(3) and (4), counsel for Mr. Pawlyk at the sentencing hearing was ill-advised to advance his own claim to the funds to the potential detriment of his client."
The Role of Defence Counsel

the third party are favoured on an application under s. 462.42, the overall goal of Part XII.2 of the
*Criminal Code* suffers."97

The veracity of Doherty J.A.'s conclusion is not questioned. However, third parties are
clearly allowed to claim under s. 462.42; and Parliament must have felt that this benefit
outweighed any perceived harm to the 'overall goal' of the legislation. A more balanced
interpretation of the provision was provided by Veit J. in *Gagnon* where she refused to forfeit
monies paid to legal counsel for reasonable legal fees. She found that by enacting Part XII.2
Parliament "was adding teeth to the precept that crime should not pay."98 Madam Justice Veit
noted that the Crown argued that if money released for lawyers fees is not repaid to the state by
way of a fine "crime pays, at least to the extent of being able to retain privately counsel of
choice."99 However, after discussing the problems that could result when lawyers may not be
paid100 she noted the potential damaging effect of following the Crown's suggestion: "What
accused would then have the benefit of the constitutional right to a full defence, given the dual
problems of finding a lawyer who will act under those conditions and of serving time in addition
to the sentence imposed for the substantive crime if the lawyers' fees are not repaid to the state as
proceeds of crime?"101 Therefore, Veit J. refused to exercise her discretion to impose a fine in
lieu of forfeiture and instead she recognised that Parliament "characterized lawyer's fees as a
special type of expenditure - one related to a constitutionally protected right."102

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97 See *Wilson*, supra note 3 at 660.
Note: Martin, The 'Forfeiture' Fine, *supra* note 81 at 4 wrote that the interpretation given
to this provision by the Courts in *Pawlyk* and *Wilson* "does not appear to be supported by
the plain words of s. 462.37(3) ... [furthermore they] are inconsistent with the purpose
underlying the legal fees exemptions, ..."

98 *Gagnon #2*, *supra* note 44 at 511.
100 See *supra* note 74 and accompanying text.
101 *Gagnon #2*, *supra* note 44 at 512 - 13.
Note: See also *Clymore #1*, *supra* note 24 at 242 "A large fine on forfeiture might interfere
with liberty."
Lawrence Wong J. of the British Columbia Supreme Court refused to impose a fine in lieu of forfeiture. He found that the fine in lieu of forfeiture would “not ... be an appropriate alternative.” Instead of the fine, which would have resulted in an increased jail term for the accused and would have had an adverse impact on the accuseds' families, Wong J. imposed a $1 million compensation order.

In Turmel Wright P.J. analysed the provisions of s. 462.37(3) and noted that they “all are actions of having placed property or an asset ... beyond the power of the court to make a forfeiture order pursuant to ss. (1) or to confuse or hamper identification of property all acts to thwart what I perceive to be the intention of ss. (1).” He then held that Parliament intended to be able “to recover property and, thereby, take away the reason for the enterprise crime and the in default is a disincentive to an offender to carry out those methods described under ss. (3) to place an asset away from the reach of the Crown.” Of the four methods set out under ss. (3) only, ss. (b) relates to legal fees being paid by counsel as Twaddle J.A. recognised in Pawlyk. However, in Turmel Wright P.J. refused to impose a fine in lieu of forfeiture and concluded by writing: “I am satisfied that the intent of ss. (b) is to trace assets which have been removed by an accused with the intent of keeping control over the property and thereby avoiding a forfeiture order ....” An accused’s right to pay reasonable legal fees is statutorily authorized in order to protect the Charter rights of such persons. Therefore, the reasoning of Wright P.J. supports the argument that where funds have been paid out as reasonable legal fees a fine in default should not be imposed. This result would also avoid the ethical problem that defence counsel would otherwise have to face.

104 Ibid. at para. 15.
105 Ibid. at para. 19, 21.
107 Ibid. at para. 17.
108 Ibid. at para. 19.
109 See Pawlyk, supra note 96 and accompanying text.
110 Turmel, supra note 106 at para. 24.
In addition to the unacceptability of placing defence counsel in the untenable position of having to decide between receiving payment for their services and therefore causing their client to receive a longer consecutive jail sentence or not being paid at all, the Canons of legal ethics\(^{111}\) dictate that counsel placed in such a conflict may have to withdraw.\(^{112}\) Further, as was noted in Chapter Three, a conflict of interest also arises where a defence attorney’s fee depends on winning the case. Not only does this cause a problem by violating rules against contingency fees in some jurisdictions,\(^{113}\) it also makes the defence counsel an interested party rather than simply the accused’s advocate.\(^{114}\) The United States Supreme Court recognised the potential adverse impact that this could have on the representation of an accused. However, it also recognised that “to assess the impact of a conflict of interests on the attorney’s options, tactics, and decisions in plea negotiations would be virtually impossible.”\(^{115}\) The Ontario Court of Appeal has also


\(^{112}\) Ibid. at c. 10, cl. 1(d). “A lawyer shall sever the solicitor-client relationship or withdraw as counsel if: ... the lawyer’s continued involvement will place the lawyer in a conflict of interest, ...” See also ibid. at c. 1, cl. 3(2). “A lawyer should disclose to the client all the circumstances of the lawyer’s relations to the parties and interest in or connection with the controversy, if any, which might influence whether the client selects or continues to retain the lawyer. A lawyer shall not act where there is a conflict of interests between the lawyer and a client or between clients.”

\(^{113}\) Note: Ontario is the lone Canadian province not ‘officially’ permitting contingency fee agreements.

Note: In British Columbia the Legal Profession Act, S.B.C. 1987, c. 25 as amended, s. 78(2) allows members to enter into contingency fee agreements. The only areas where agreements are explicitly not allowed are in relation to child custody and access (s. 78(5)) and matrimonial disputes (s. 78(6)).

\(^{114}\) Winick, Forfeiture of Attorneys’ Fees, supra note 79 at 775, where he wrote that where the defence attorney becomes “an interested party in the case, [it could] provide the potential for corrupting justice.”

\(^{115}\) Holloway v. Arkansas, 435 U.S. 475 at 491, 55 L.Ed. 2d 426, 98 S.Ct. 1173 (1978) [cited to U.S.].
recognised that accused persons have a right to the effective assistance of counsel unencumbered by a conflict of interest. 116

E. The Application Procedure

The legal fees exemption application must be made before a judge as defined in s. 552 or a judge of a superior court of criminal jurisdiction. If the client is without sufficient resources the lawyer must have the client apply to legal aid for funding to make either a Rowbotham or Legal Fees Exemption application. The client will then have to swear an affidavit as to his or her entitlement to the assets. If the lawyer does not want the affiant cross-examined as to the source of the assets, they must ensure that the affidavit does not contain references to sources, as the Crown can not cross-examine on the asset’s source unless the affiant raises the issue. Therefore, it is important for the lawyer to prepare the affiant for cross-examination, by taking care to explain the scope of possible questions.

Some jurisprudence requires the affiant to also show that they are without sufficient other resources to fund their defence. However, as was shown above there is a strong argument against this interpretation. The case law is divided as to whether the alleged proceeds can only be used for matters related to the proceeds of crime charge or for any other charge. However, there is also a strong argument that funds should be released for any criminal charge.

The narrow interpretation given to s. 462.34(4)(c)(ii) currently requires the property to have been seized or restrained under Part XII.2. It has also been found that the Court should refuse to exercise its discretion to release funds where the applicant has committed additional non-related offences after being charged with the related offences. Further, any counsel who takes an assignment of assets as payment of legal fees after proceeds of crime issues have arisen will have a difficult time realizing on the assignment under the third party provisions.

II. Summary

Defence counsel has an important role to play in upholding the right of accused persons to Charter protections regardless of the charges they face. However, because of the narrow interpretation currently being given to the legal fees exemption this role will be very difficult. Until the Supreme Court of Canada establishes clear authority on the issue it may be an economically improvident area in which to practice.

Despite the financial risks involved for defence counsel, challenges must be made to the current practice of using non-Part XII.2 warrants to access alleged proceeds of crime as the Parliamentary record clearly demonstrates. There are also numerous Charter and procedural arguments as to why accused persons should be allowed to access seized or restrained property to retain defence counsel. However, the reality of the economics of criminal practice may dissuade many competent counsel from practicing in the area of proceeds of crime until these issues are decided.

Therefore, the Supreme Court of Canada or Parliament must reaffirm the original intent of Part XII.2. Persons who have their property seized, under the draconian features of forfeiture law, must have their fundamental rights protected. If this is not done the Government's move to shift the philosophy of criminal law enforcement fundamentally, which envisioned protecting the constitutional rights of accused persons, will end up destroying the protections that all citizens deserve.
CONCLUSION

The dilemma caused by the legal fees exemption in the area of proceeds of crime is more than an academic interest. This issue, while admittedly important to the economic survival of defence lawyers competent in the area, is fundamental to protecting the constitutional rights of any person accused of a proceeds of crime offence.

There is little doubt that forfeiture laws can be a useful weapon for removing the proceeds of crime from 'convicted' criminals. However, problems develop when the powers associated with forfeiture laws are not used as Parliament has intended and the rhetoric of the war on crime is allowed to invade constitutionally protected rights.

Persons accused of proceeds of crime offences who have their assets seized or frozen are often rendered *de facto* indigent by the *ex parte* pre-trial forfeiture or restraining order that is implemented to protect the governmental interest in a post-conviction forfeiture order. The driving factor in the case law to date, which has narrowly interpreted the legal fees provision, is a persistent assumption of guilt by virtue of accusation. This result imposes tremendous burdens on accused persons as well as the adversary system. It is also contrary to the values of a criminal justice system, which is based on the presumption of innocence and the right to due process and

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1 C. Dickens, *Bleak House* (London: Bradbury Evans, 1853). "The one great principle of the English law is, to make business for itself."
full answer and defence. The guardianship of these values will ultimately help guarantee a fair trial.\(^2\)

It has been recognised that society has an interest in having a strong forfeiture law that combats organized crime, combats the illicit drug trade, and ensures that crime does not pay. However, one has to question the benefit that is derived from the public policy that allows individuals, who are presumed to be innocent, to be deprived of their property so that they are unable to defend themselves fully.

When the Canadian Parliament enacted Part XII.2, the result was a paradigm shift in the philosophy of criminal law enforcement in this country. The legislation was an attempt to remedy the difficulties the common law had in dealing with enterprise offences in the hope of more effectively combating organized crime and the trade in illicit drugs. To help reach this goal the legislation provided the police and prosecution with extensive powers to deal with the proceeds of crime. However, in contrast to the American legislation, the Canadian Parliament included numerous provisions to balance the extensive powers, such as those that allow for reasonable legal fees to be paid out of seized proceeds and an in camera session to determine reasonableness of such fees. Such ‘concessions’ made in the ‘war on drugs’ and the statements of legislators at the time indicate that Parliament was attempting to ensure that the pre-trial restraint of property would withstand constitutional attack and avoid the problems that were evident with American legislation and jurisprudence. This goal was to be accomplished by balancing the strengthening of police and Crown powers and of the crime control - ‘drug war’ values of our society with the

\(^2\) A.W. Meyer, “To Adjudicate or Mediate: That Is The Question” (1993) 27 Valparaiso U. L. Rev. 357 at 371. “The rules and the system are designed to protect the accused against the state, ... we see the value of ‘truth’ to be subordinate to the value of stacking the deck in such a way as to minimize the risk that the state will persecute the innocent.” [emphasis added]

See also The Canadian Civil Liberties Association, The Effective Right to Counsel in Ontario Criminal Cases, Submissions to the Honourable G.A. Kerr, Q.C., D. Bales, Q.C., and J. Yaremko, Q.C. (1972) at 1. “The lawyer is the indispensable instrument of equality between the powerful state and the beleaguered accused.”
rights of all citizens. Since its enactment there has been a philosophical debate with regard to the balancing provisions, and their encroachment on the size of realizable forfeitures. However, the ‘unique’ Canadian solution to this problem attempted to provide a reasonable power balance in dealing with the problems of enterprise crime. The legal fees exemption was heralded as a ‘noble improvement to the present law’ as it was intended to ensure the constitutional right to retain and instruct counsel would be protected. The legislative history of Part XII.2 demonstrates the clear intentions of Parliament to allow for the payment of reasonable legal fees out of seized or restrained property. Canadian courts should keep this compromise in mind and not adhere to the complete forfeiture mentality emanating from the United States, a mentality our Parliamentarians explicitly avoided.

The provisions of the Code and the Charter intended to protect individuals are fast becoming casualties in the war sieged by specialized teams of police and prosecution. The highly restrictive case law to date has made defence work in the proceeds area very difficult. This could ‘effectively’ deny the right of an accused person to rely on the ‘reasonable legal fees’ exemption to retain counsel, except in a limited set of circumstances. As one author noted, “we can expect to hear calls for legislative reform aimed at ensuring that Pt. XII.2 does not compel accused in proceeds cases to forfeit their right to counsel.” The right to counsel is of paramount importance to any person accused of a crime. An accused charged with a proceeds of crime

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3 See Canada Parliament, *House of Commons Legislative Committee on Bill C-61 Minutes of Proceedings and Evidence* (Ottawa: Queen’s Printer, 1988) (Chair: Fred King) at 5:9. Mr. Ramon Hnatyshyn, said: “The provision of allowing an application for reasonable legal fees is in fact a noble improvement to the present law, and one I think we have to acknowledge will ensure the constitutional right to retain and instruct counsel.” [emphasis added]


See also S. Dettelbach “Forfeiting The Right To Counsel” (1990) 25 Harvard Civil Rights - Civil Liberties L. Rev. 201. Dettelbach pointed out this reality in relation to the U.S. Supreme Court’s interpretation of their forfeiture laws.

Note: whether such pleas will be answered is another matter. Given the get tough on crime mentality of reform minded politicians such an amendment will not be forthcoming.
Conclusion

offence faces a difficult battle: there is strong likelihood of a lengthy case; the charges are serious; there are complex issues; there are specialized Crown attorneys; and there are specialized proceed of crime task forces. As a result anyone forced to navigate the substantive and procedural quagmire of Part XII.2 requires a competent legal advisor well versed in its provisions.

Allowing accused persons access to their property for reasonable legal fees does not subvert the public interest in seeing that guilty people are convicted. Rather, it ensures the proper functioning of our adversary system so that all citizens' fundamental rights are protected and that the guilt or innocence of accused persons is decided in a fair proceeding where the accused is allowed to make full answer and defence. If Courts were to allow this payment it would act as the fuel for, rather than the 'engine of destruction' of our adversary system.

The courts must strive to strike a balanced middle ground between the public and the private individual by ensuring that crime does not pay, while at the same time protecting the constitutional rights of all Canadians. However, there is no simple answer as to where the balance should be struck. One author noted that "the task of the court ... is to strike a balance between the interest of the defendant in having recourse to his assets to enable his defence in the criminal trial to be prepared and conducted as he thinks appropriate, and the interest of the community in preserving those assets intact to satisfy any pecuniary penalty that the defendant might ultimately be ordered to pay ...".

5 See also R. v. Ewing (1974), 18 C.C.C. (2d) 356, 49 D.L.R. (3d) 619, 29 C.R.N.S. 227 (B.C.C.A.) at 385 [cited to C.C.C.]. C.J.B.C. Farris, noted in obiter that "the Crown ... employs counsel who are trained in the law. This means not only trained in the rules of evidence and the rules of procedure but knowledgeable in the art of advocacy, in the marshalling of facts and in the case law. The prosecution not only has this advantage but he has the resources of the State and the power of a police force behind him."

Conclusion

In determining where this balance should be struck in Canada the courts must consider a number of factors, *inter alia*:

First, the ancient doctrine of forfeiture was resurrected by Part XII.2 in Canada in an attempt to ensure that crime does not pay;

Second, the right to counsel, has been recognised as an integral part of the proper functioning of the adversary system where defence counsel is necessary to ensure the fairness of the trial;

Third, fundamental justice entails fairness of the judicial process, and defence counsel play a pivotal role in advancing the interests of justice;

Fourth, when developing Part XII.2 Parliament explicitly indicated that it was moving away from other jurisdictions’ forfeiture laws by providing a “unique Canadian solution”;

Fifth, Parliament explicitly included a legal fees exemption in Part XII.2;

Sixth, the legal fees exemption, along with other balancing provisions were included in order to balance the extraordinary powers that were given to the police and the Crown under Part XII.2, and to ensure the constitutionality of this Part;

Seventh, a competent legal advisor well versed in the provisions of Part XII.2 is essential to an accused who is charged with a proceeds of crime offence because there is strong likelihood of a lengthy case, the charges are serious, there are complex issues, and there are specialized Crown attorneys and specialized proceeds of crime task forces;
Eighth, before funds are released to pay for legal fees, the court must determine that the requested amount is reasonable. This condition ensures that such payments would not include fraudulent transfers to lawyers for the purpose of evading a potential forfeiture order;

Ninth, at the time of the legal fees exemption application, the assets have only been alleged to be ‘proceeds of crime’ in an ex parte procedure, thus they are still the ‘assets’ of the person, who is presumed to be innocent; and

Tenth, the legislative purpose of Part XII.2 is not defeated by allowing accused persons to access seized or restrained property in order to retain a defence counsel.

Therefore, while the public has an important interest in ensuring that crime does not pay, this interest should be carried out in a manner that does not breach fundamental protections that all citizens enjoy, nor should it be allowed to degrade the adversary system. The Canadian Parliament deliberately took a balanced approach to the area of proceeds of crime when it decided to make an exception for expenses, such as for reasonable legal fees to be paid out of seized or restrained property. The payment of bona fide reasonable legal fees out of alleged proceeds ensures that all citizens’ constitutional rights are protected, while upholding the public interest in securing a realizable asset pool in the event of a forfeiture order. If this balance can be struck, the interests of all competing parties will be met without undermining the objectives of Part XII.2.

Given the past jurisprudential experience with regard to Part XII.2, one witness before the Parliamentary Committee on Bill C-61 was highly pernicious he predicted that “there is going to be a lot of confusion in the ensuing years before the Supreme Court does something definitive.”

7 See the testimony of Mr. Rocky Pollock who was testifying as the Chair of the Canadian Bar Association’s National Criminal Justice Section. Canada Parliament, House of Commons Legislative Committee on Bill C-61 Minutes of Proceedings and Evidence (Ottawa: Queen’s Printer, 1988) (Chair: Fred King) at 2:11.
The time is right for the Supreme Court to 'do something definitive' in the area of proceeds of crime and legal fees. It should undertake a comprehensive examination of the legal fees issue from a historical perspective. This would involve an analysis of the Parliamentary Debates and Committee Hearings to determine the underlying policy of the balancing provisions that are being avoided by such State action. As well, it would include a study of the ramifications of the current jurisprudence in terms of how it affects both the constitutional rights of persons accused of proceeds of crime offences and the overall constitutionality of Part XII.2.

The Supreme Court must articulate clear principles to govern Crown and police activities when dealing with proceeds of crime. Accused persons should not have to rely on the choices made by the Crown or police, choices effectively determining whether an accused will be able to use the legal fees exemption. The potential for abuse is lurking - we are at risk of stripping the right to counsel of all meaningful content. Failure to allow an accused the benefit of the legal fees provision, except in the narrowest set of circumstances, impedes the ability of an accused to make full answer and defence, a right which has acquired new vigour by virtue of its inclusion in s. 7 of the Charter. The Charter protections extend to all individuals including those charged with proceeds of crime offences.

The Supreme Court of Canada must strike an appropriate balance between the fundamental freedoms that all citizens enjoy and the rights of society as a whole to be protected from criminal behaviour:

[All] members of a civilized society should be concerned with the means whereby any one of their number loses his [or her] liberty. The repulsive act of criminal [acts] should not blind us to any element of unfairness in the procedure by which "justice" is done, for each of us is threatened by an official act of injustice ... [I]nterest is justified if inadequate and dangerous procedures are being employed by our courts when defendants, both the innocent and the guilty, come before
them. The essence of trial in the Anglo-American system of law is to determine
guilt or innocence in a fair proceeding.\footnote{W.M. Beaney, \textit{The Right To Counsel in American Courts} (Westport, Conn.: Greenwood, 1955) at 3.}
I. Addresses

Boyd, N., "Bill C-7 and The Control of Drugs" (Address for the Green College Criminal Law Lecture Series, University of British Columbia, 15 March 1995) [unpublished].

Donald, P.J., "Proceeds of Crime" (Lecture to Proceeds of Crime - Law 512, University of British Columbia, 24 March 1995) [unpublished].


Nadelmann, E., "Alternate Drug Policies" (Address for the International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 1994) [unpublished].

dezayas, A., "The Right To The Homeland, Ethnic Cleansing, and The International Criminal Tribunal" (Address for the International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, 9 March 1995) [unpublished].

II. Authors


Alexander, B.K., Peaceful Measures: Canada’s Way Out of the War on Drugs (Toronto: University of Toronto Press, 1990).


Campagna, T., “Putting the Cart Before the Horse: Attorney Fees are Subject to Pre-Trial Restraint and Relation-Back Forfeiture under RICO and CCE” (1991) 12:4 Whittier L. Rev. 675.


Dickens, C., Bleak House (London: Bradbury Evans, 1853).

“Discussion and policy paper on Bill C-89” (Ottawa: Canadian Bar Association, Legal and Governmental Affairs, 1991).


_________ “International Money Laundering: Enforcement Challenges and Opportunities” (Paper presented to Southwestern University School of Law’s Symposium on The Americas: 165


_________ “The Right To Counsel at Trial and on Appeal” (1990) 32:4 Crim. L.Q. 440.


——— “Attempts To Combat Money Laundering: An International Perspective” (LL.M. Candidate, Faculty of Law, University of British Columbia, 1995) [unpublished].

——— “Proceeds of Crime Legislation: A Comparative Analysis” (LL.M. Candidate, Faculty of Law, University of British Columbia, 1995) [unpublished].


Bibliography


Snider, W.J., "The Forfeiture (Confiscation) of the Proceeds of Drug Trafficking By The United States Government" (Address to The Society for the Reform of Criminal Law: 8th International Conference, The Corporation and The Criminal Law - Hong Kong, 4 - 8 December 1994) [unpublished].


Steffen, G., "Pretrial Restraint and Posttrial Forfeiture of Assets Which A Defendant Intends To Use To Pay Attorneys’ Fees Does Not Violate The Defendant’s Sixth Amendment Right To Choice of Counsel Nor His Fifth Amendment Right To Due Process" (1990) 21 Texas Tech. L. Rev. 833.


Stuart, D., Canadian Criminal Law: A Treatise (Scarborough: Carswell, 1982).


_______ “Protecting the Rule of Law from Assault in the War Against Drugs and Narco-Terrorism” (1991) Nova L. Rev. 703.
Bibliography

III. Case Law

A. Canada

1. Part XII.2


R. v. Love (2 November 1990), Alta. Q.B. [unreported].


R. v. Shewan (26 April 1991), (Alta. Q.B.) [unreported].


R. v. Watts (22 June 1992), (B.C.S.C.) [unreported].


2. Non-Part XII.2


Bibliography


Bibliography


Bibliography


Bibliography


B. Australia

Re: Burgundy Royale Investments et al. (1992), 37 F.C.R. 492.

C. United Kingdom

Bibliography

D. United States


IV. Legislative Materials

A. British Columbia

Legal Profession Act, S.B.C. 1987, c. 25 as amended.

B. Canada


An Act to allow persons indicted for felony a full defence by Counsel, and for other purposes therein mentioned, 6 Wm. 4, S.U.C. 1836, c. 44.


---- vol. VII at 8914 (legislative committee referral 14 September 1987).

---- vol. XIII at 16187 (report from committee 7 June 1988).

---- vol. XIV at 17255-7 (report stage 7 July 1988).

---- vol. XIV at 17257 (concurrence 7 July 1988).

---- vol. XIV at 17257-60 (third reading 7 July 1988).
Bibliography

______ vol. XIV at 17260 (passed 7 July 1988).
______ vol. IV at 3917 (Senate, first reading 12 July 1988).
______ vol. IV at 3922 - 23, 92 (Senate, second reading 12 July 1988).
______ vol. IV at 3993 (Senate, committee referral 13 July 1988).
______ vol. IV at 4237 - 38, 53 - 54 (Senate, report from committee 1 September 1988).
______ vol. IV at 4263 (Senate, third reading 7 September 1988).
______ vol. XV at 19202 (Senate passage 13 September 1988).
______ vol. XV at 19219 (Royal Assent 13 September 1988).
______ Came into Force 1 January 1989.


______ as amended by *Seized Property Management Act*, S.C. 1993, c. 37, ss. 21(1), 21(2), 32(a), 32(b),
______ as amended by *An Act to amend the Criminal Code and the Customs Tariff*, S.C. 1993, c. 46, s. 5.
______ as amended by *An Act to amend the Department of National Revenue Act and to amend certain other Acts in consequence thereof*, S.C. 1994, c. 13, s. 7(1)(b).

______ R.S.C. 1906, c. 146.
______ R.S.C. 1927, c. 36.
______ R.S.C. 1953-54, c. 51.
Bibliography


Customs Act, R.S.C. 1985, (2d Supp.) c. 1.


Food and Drugs Act, R.S.C. 1985, c. F-27.

Forfeiture Act, 1880 incorporated into Criminal Code, 1892.


C. Australia

Cash Transaction Reports Act (Aust.), 1988, No. 64.


Customs Act (Aust.), 1901, No. 1, as amended.


and as amended by the Proceeds of Crime (Miscellaneous Amendments) Act (Aust.), 1987, No. 73.

and as amended by the Proceeds of Crime Legislation Amendment Act (Aust.), 1991, No. 120.


D. United Kingdom

An Act for Enabling Persons Indicted of Felony to Make Their Defence by Counsel or Attorney, 1836 (U.K.), 6 & 7 Will. 4, c. 114.

An Act to Abolish Deodands, 1846, 9 & 10 Vict., c. 62.

An Act to Abolish Forfeitures For Treason and Felony, and to Otherwise Amend The Law Relating Thereto, 1870, 33 & 44 Vict., c. 23, s. 1.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3.

Criminal Justice Act (U.K.), 1988, c. 33.

Criminal Justice (International Cooperation) Act (U.K.), 1990, c. 5.

Criminal Justice Act, (Scotland) 1987, c. 41.

Drug Trafficking Act (U.K.), 1994, c. 37. [Date-In-Force: 3 February 1995]

Drug Trafficking Offences Act, 1986, c. 32.

No Person Shall Be Condemned Without His Answer, 1354, 28 Edw. 3, c. 3, in Statutes at Large, vol 1, at 285.

Rules of Supreme Court, 1965, Ord. 115 r. 4(I).

The Treason Act, 1695, 7 & 8 Will. 3, c. 3, s. 1, in Statutes at Large, vol. 3 at 593.

E. United States


United States Constitution, Amend. IV, V, and VI (1791).
F. International


V. Regulations

A. Canada


Seized Property Disposition Regulations, 1994

VI. Meetings


Ewing, D., Minutes of a Meeting of The CBA - Criminal Justice Section of Vancouver (16 November 1994).


Préfontaine, D., Q.C., Director The International Centre for Criminal Law Reform and Criminal Justice Policy at U.B.C., and Deputy Minister of Justice, Canada, Interview with Gregory J. Rose (24 April 1995) Vancouver.

Stovern, S., Minutes of a Meeting of The CBA - Criminal Justice Section of Vancouver (16 November 1994).
VII. Newspapers


"B.C. legal aid group may help ‘unencumber’ seized assets" *The Lawyers Weekly* (21 May 1993).

"B.C. to enact law on proceeds of crime" *The Lawyers Weekly* (9 July 1993).


"Bill proposes plan for feds to share forfeited crime cash" *The Lawyers Weekly* (21 May 1993).

"Counsel knew they were taking a risk, says Ont. C.A. Lawyers can't collect defence fees from cash seized as proceeds of crime" *The Lawyers Weekly* (9 July 1993).

"Courts giving narrow interpretation to ‘legal fees exemption’ in proceeds law" *The Lawyers Weekly* (21 May 1993).


"Judge refuses to fine man who assigned crime cash to lawyer" *The Lawyers Weekly* (9 July 1993).


_________ "Bail money that accused assigned to Edmonton lawyer doesn't have to be forfeited as proceeds of crime: Court" *The Lawyers Weekly* (16 October 1992) 2.

_________ "Can't cross-examine on source of funds if lawyer to be paid" *The Lawyers Weekly* (20 November 1992).

_________ "Judgement creditor takes debtor’s assets before provincial AG forfeits them as proceeds." *The Lawyers Weekly* (2 October 1992) 16.
Bibliography

“Proceeds of crime? Experts examine some of the difficult dilemmas that Canada's four-year old money laundering law poses for lawyers” *The Lawyers Weekly* (21 May 1993).

**VIII. Television**

Inspector Bruce Bowie Officer In Charge Anti-Drug Profiteering Section - R.C.M.P., as interviewed by *Market Place*, CBC Television (January 17, 1995).
Appendix 1: Criminal Code Part XII.2


as amended by Seized Property Management Act, S.C. 1993, c. 37, ss. 21(1), 21(2), 32(a), 32(b).

as amended by An Act to amend the Criminal Code and the Customs Tariff, S.C. 1993, c. 46, s. 5.

as amended by An Act to amend the Department of National Revenue Act and to amend certain other Acts in consequence thereof, S.C. 1994, c. 13, s. 7(1)(b).


S. 462.3

Interpretation

Definitions

In this Part, "designated drug offence" means

(a) an offence against section 39, 44.2, 44.3, 48, 50.2 or 50.3 of the Food and Drugs Act, (b) an offence against section 4, 5, 6, 19.1 or 19.2 of the Narcotic Control Act, or (c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a) or (b);

"enterprise crime offence" means

(a) an offence against any of the following provisions, namely, (i) section 119 (bribery of judicial officers, etc.), (ii) section 120 (bribery of officers), (iii) section 121 (frauds on the government), (iv) section 122 (breach of trust by public officer), (v) section 163 (corrupting morals), (v.1) section 163.1 (child pornography) (vi) subsection 201(1) (keeping gaming or betting house), (vii) section 202 (betting, pool-selling, book-making, etc.), (viii) section 210 (keeping common bawdy-house), (ix) section 212 (procuring), (x) section 235 (punishment for murder), (xi) section 334 (punishment for theft), (xii) section 344 (punishment for robbery), (xiii) section 346 (extortion), (xiii. 1) section 347 (criminal interest rate), (xiv) section 367 (punishment for forgery), (xv) section 368 (uttering forged document), (xvi) section 380 (fraud), (xvii) section 382 (fraudulent manipulation of stock exchange transactions), (xviii) section 426 (secret commissions), (xix) section 433 (arson), (xx) section 449 (making counterfeit money),
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(xxi) section 450 (possession, etc., of counterfeit money),
(xxii) section 452 (uttering, etc., counterfeit money), or
(xxiii) section 462.31 (laundering proceeds of crime),
(b) an offence against section 354 (possession of property obtained by crime), committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of
   (i) the commission in Canada of an offence referred to in paragraph (a) or a designated drug offence, or
   (ii) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence referred to in paragraph (a) or a designated drug offence
(b.1) an offence against section 126.1 or 126.2 or subsection 233(1) or 240(1) of the *Excise Act* or section 153, 159, 163.1 or 163.2 of the *Customs Act*, or
(c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (b.1);
"judge" means a judge as defined in section 552 or a judge of a superior court of criminal jurisdiction;
"proceeds of crime" means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of
   (a) the commission in Canada of an enterprise crime offence or a designated drug offence, or
   (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

S. 462.31

**Offence**

Laundering Proceeds of Crime

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
   (a) the commission in Canada of an enterprise crime offence or a designated drug offence; or
   (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

Punishment

(2) Every one who commits an offence under subsection (1)
   (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
   (b) is guilty of an offence punishable on summary conviction.
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S. 462.32
Search, Seizure and Detention of Proceeds of Crime

Special search warrant
462.32 (1) Subject to subsection (3), where a judge, on application of the Attorney General, is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in any building, receptacle or place any property in respect of which an order of forfeiture may be made under subsection 462.37(1) or 462.38(2), the judge may issue a warrant authorizing a person named therein or a peace officer to search the building, receptacle or place for that property and to seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made under that subsection.

Procedure
(2) An application for a warrant under subsection (1) may be made ex parte and shall be made in writing.

Execution of warrant in other territorial jurisdictions
(3) Subsections 487(2) to (4) and section 488 apply, with such modifications as the circumstances require, to a warrant issued under this section.

Detention and record of property seized
(4) Every person who executes a warrant issued by a judge under this section shall
(a) detain or cause to be detained the property seized, taking reasonable care to ensure that the property is preserved so that it may be dealt with in accordance with the law;
(b) as soon as practicable after the execution of the warrant but within a period not exceeding seven days thereafter, prepare a report in Form 5.3, identifying the property seized and the location where the property is being detained, and cause the report to be filed with the clerk of the court; and (c) cause a copy of the report to be provided, on request, to the person from whom the property was seized and to any other person who, in the opinion of the judge, appears to have a valid interest in the property.

Notice
(5) Before issuing a warrant under this section in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before the issuance of the warrant would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be seized pursuant to the warrant.

Undertakings by Attorney General
(6) Before issuing a warrant under this section, a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the issuance and execution of the warrant.
Appendix 1: Criminal Code Part XII.2

S. 462.33
Application for restraint order
462.33 (1) The Attorney General may make an application in accordance with subsection (2) for a restraint order under subsection (3) in respect of any property.

Procedure
(2) An application made under subsection (1) for a restraint order under subsection (3) in respect of any property may be made ex parte and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters, namely,
(a) the offence or matter under investigation;
(b) the person who is believed to be in possession of the property;
(c) the grounds for the belief that an order of forfeiture may be made under subsection 462.37(1) or 462.38(2) in respect of the property; and
(d) a description of the property.

Restraint order
(3) Where an application for a restraint order is made to a judge under subsection (1), the judge may, if satisfied that there are reasonable grounds to believe that there exists any property in respect of which an order of forfeiture may be made under subsection 462.37(1) or 462.38(2), make an order
(a) prohibiting any person from disposing of, or otherwise dealing with any interest in, the property specified in the order otherwise than in such manner as may be specified in the order; and
(b) at the request of the Attorney General, where the judge is of the opinion that the circumstances so require,
(i) appointing a person to take control of and to manage or otherwise deal with all or part of that property in accordance with the directions of the judge, which power to manage or otherwise deal with all or part of that property includes, in the case of perishable or rapidly deprecating property, the power to make an interlocutory sale of that property, and
(ii) requiring any person having possession of that property to give possession of the property to the person appointed under subparagraph (i).
(3.1) Where the Attorney General of Canada so request, a judge appointing a person under subparagraph 462.33(3)(b)(i) shall appoint the Minister of Supply and Services.

Idem
(4) An order made by a judge under subsection (3) may be subject to such reasonable conditions as the judge thinks fit.

Notice
(5) Before making an order under subsection (3) in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before making the order would result in the disappearance, dissipation
or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be subject to an order of forfeiture under subsection 462.37(1) or 462.38(2).

Order in writing
(6) An order made under subsection (3) shall be made in writing.

Undertakings by Attorney General
(7) Before making an order under subsection (3), a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and execution of the order.

Service of order
(8) A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.

Registration of order
(9) A copy of an order made under subsection (3) shall be registered against any property in accordance with the laws of the province in which the property is situated.

Continues in force
(10) An order made under subsection (3) remains in effect until
(a) it is revoked or varied under subsection 462.34(4) or revoked under paragraph 462.43(a);
(b) it ceases to be in force under section 462.35; or
(c) an order of forfeiture or restoration of the property is made under subsection 462.37(1), 462.38(2) or 462.41(3) or any other provision of this or any other Act of Parliament.

Offence
(11) Any person on whom an order made under subsection (3) is served in accordance with this section and who, while the order is in force, acts in contravention of or fails to comply with the order is guilty of an indictable offence or an offence punishable on summary conviction.

S. 462.34
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.

Notice to Attorney General
(2) Where an application is made under paragraph (1)(a),
Appendix 1: Criminal Code Part XII.2

(a) the application shall not, without the consent of the Attorney General, be heard by a judge unless the applicant has given to the Attorney General at least two clear days notice in writing of the application; and

(b) the judge may require notice of the application to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property.

Terms of examination order

(3) A judge may, on an application made to the judge under paragraph (1)(b), order that the applicant be permitted to examine property subject to such terms as appear to the judge to be necessary or desirable to ensure that the property is safeguarded and preserved for any purpose for which it may subsequently be required.

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,

(a) if the applicant enters into a recognizance before the judge, with or without sureties, in such amount and with such conditions, if any, as the judge directs and, where the judge considers it appropriate, deposits with the judge such sum of money or other valuable security as the judge directs;

(b) if the conditions referred to in subsection (6) are satisfied; or

(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.

Hearing

(5) For the purpose of determining the reasonableness of legal expenses referred to in subparagraph (4)(c)(ii), a judge shall hold an in camera hearing and without the presence of the Attorney General.

Conditions to be satisfied

(6) An order under paragraph (4)(b) in respect of property may be made by a judge if the judge is satisfied

(a) where the application is made by
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(i) a person charged with an enterprise crime offence or a designated drug offence, or
(ii) any person who acquired title to or a right of possession of that property from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,

that a warrant should not have been issued pursuant to section 462.32 or a restraint order under subsection 462.33(3) should not have been made in respect of that property, or

(b) in any other case, that the applicant is the lawful owner of or lawfully entitled to possession of the property and appears innocent of any complicity in an enterprise crime offence or designated drug offence or of any collusion in relation to such an offence, and that the property will no longer be required for the purpose of any investigation or as evidence in any proceeding.

Saving provision
(7) Section 354 of this Act, sections 44.2 and 50.2 of the Food and Drugs Act and section 19.1 of the Narcotic Control Act do not apply to a person who comes into possession of any property or thing that, pursuant to an order made under paragraph (4)(c), was returned to any person after having been seized or was excluded from the application of a restraint order made under subsection 462.33(3).

Form of recognizance
(8) A recognizance entered into pursuant to paragraph (4)(a) may be in Form 32.

S. 462.35
Automatic expiration of special warrants and restraint orders
462.35 Where property has been seized under a warrant issued pursuant to section 462.32 or a restraint order has been made under section 462.33 in relation to property, the property shall not be detained or the order shall not continue in force, as the case may be, for a period of more than six months after the time of the seizure or the making of the order, as the case may be, unless, before the expiration of that period, the Attorney General establishes to the satisfaction of a judge that the property may be required after the expiration of that period for the purpose of section 462.37 or 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding.

S. 462.36
Forwarding to clerk where accused to stand trial
462.36 Where a judge issues a warrant under section 462.32 or makes a restraint order under section 462.33 in respect of any property, the clerk of the court shall, when an accused is ordered to stand trial for an enterprise crime offence, cause to be forwarded to the clerk of the court to which the accused has been ordered to stand trial a copy of the report filed pursuant to paragraph 462.32(4)(b) or of the restraint order in respect of the property.
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S. 462.37

Forfeiture of Proceeds of Crime

Order of forfeiture of property on conviction
462.37 (1) Subject to this section and sections 462.39 to 462.41, where an offender is convicted, or discharged under section 736, of an enterprise crime offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

Proceeds of crime derived from other offences
(2) Where the evidence does not establish to the satisfaction of the court that the enterprise crime offence of which the offender is convicted, or discharged under section 736, was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

Fine instead of forfeiture
(3) Where a court is satisfied that an order of forfeiture under subsection (1) should be made in respect of any property of an offender, but that that property or any part thereof or interest therein cannot be made subject to such an order and, in particular,
(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 court may, instead of ordering that property or part thereof or interest therein to be forfeited pursuant to subsection (1), order the offender to pay a fine in an amount equal to the value of that property, part or interest.

Imprisonment in default of payment of fine
(4) Where a court orders an offender to pay a fine pursuant to subsection (3), the court shall
(a) impose, in default of payment of that fine, a term of imprisonment
(i) not exceeding six months, where the amount of the fine does not exceed ten thousand dollars,
(ii) of not less than six months and not exceeding twelve months, where the amount of the fine exceeds ten thousand dollars but does not exceed twenty thousand dollars,
(iii) of not less than twelve months and not exceeding eighteen months, where the amount of the fine exceeds twenty thousand dollars but does not exceed fifty thousand dollars,
(iv) of not less than eighteen months and not exceeding two years, where the amount of the fine exceeds fifty thousand dollars but does not exceed one hundred thousand dollars,
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(v) of not less than two years and not exceeding three years, where the amount of the fine exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars,
(vi) of not less than three years and not exceeding five years, where the amount of the fine exceeds two hundred and fifty thousand dollars but does not exceed one million dollars, or
(vii) of not less than five years and not exceeding ten years, where the amount of the fine exceeds one million dollars; and
(b) direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other term of imprisonment imposed on the offender or that the offender is then serving.

Fine option program not available to offender
(5) Section 718.1 does not apply to an offender against whom a fine is imposed pursuant to subsection (3).

S. 462.38
Application for forfeiture
462.38 (1) Where an information has been laid in respect of an enterprise crime offence, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2) in respect of any property.

Order of forfeiture of property
(2) Subject to sections 462.39 to 462.41, where an application is made to a judge under subsection (1), the judge shall, if the judge is satisfied that
(a) any property is, beyond a reasonable doubt, proceeds of crime,
(b) proceedings in respect of an enterprise crime offence committed in relation to that property were commenced, and (c) the accused charged with the offence referred to in paragraph (b) has died or absconded,
order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

Person deemed absconded
(3) For the purposes of this section, a person shall be deemed to have absconded in connection with an enterprise crime offence if
(a) an information has been laid alleging the commission of the offence by the person,
(b) a warrant for the arrest of the person has been issued in relation to that information, and
(c) reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of six months commencing on the day the warrant was issued, and the person shall be deemed to have so absconded on the last day of that period of six months.
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S. 462.39
Inference
462.39 For the purpose of subsection 462.37(1) or 462.38(2), the court may infer that property was obtained or derived as a result of the commission of an enterprise crime offence where evidence establishes that the value, after the commission of that offence, of all the property of the person alleged to have committed the offence exceeds the value of all the property of that person before the commission of that offence and the court is satisfied that the income of that person from sources unrelated to enterprise crime offences or designated drug offences committed by that person cannot reasonably account for such an increase in value.

S. 462.4
Voidable transfers
462.4 A court may,
(a) prior to ordering property to be forfeited under subsection 462.37(1) or 462.38(2), and
(b) in the case of property in respect of which a restraint order was made under section 462.33, where the order was served in accordance with subsection 462.33(8), set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the order under section 462.33, unless the conveyance or transfer was for valuable consideration to a person acting in good faith and without notice.

S. 462.41
Notice
462.41 (1) Before making an order under subsection 462.37(1) or 462.38(2) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to and may hear any person who, in the opinion of the court, appears to have a valid interest in the property.

Service, duration and contents of notice
(2) A notice given under subsection (1) shall
(a) be given or served in such manner as the court directs or as may be prescribed by the rules of the court;
(b) be of such duration as the court considers reasonable or as may be prescribed by the rules of the court; and
(c) set out the enterprise crime offence charged and a description of the property.

Order of restoration of property
(3) Where a court is satisfied that any person, other than
(a) a person who was charged with an enterprise crime offence or a designated drug offence, or
(b) a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,
is the lawful owner or is lawfully entitled to possession of any property or any part thereof

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that would otherwise be forfeited pursuant to subsection 462.37(1) or 462.38(2) and that
the person appears innocent of any complicity in an offence referred to in paragraph (a) or
of any collusion in relation to such an offence, the court may order that the property or
part thereof be returned to that person.

S. 462.42
Application by person claiming interest for relief from forfeiture
462.42 (1) Where any property is forfeited to Her Majesty under subsection 462.37(1) or
462.38(2), any person who claims an interest in the property, other than
(a) a person who was charged with an enterprise crime offence or a designated drug offence
that was committed in relation to the property forfeited, or
(b) a person who acquired title to or a right of possession of that property from a person
referred to in paragraph (a) under circumstances that give rise to a reasonable inference
that the title or right was transferred from that person for the purpose of avoiding the
forfeiture of the property,
may, within thirty days after that forfeiture, apply by notice in writing to a judge for an order
under subsection (4).

Fixing day for hearing
(2) The judge to whom an application is made under subsection (1) shall fix a day not less
than thirty days after the date of filing of the application for the hearing thereof.

Notice
(3) An applicant shall serve a notice of the application made under subsection (1) and of the
hearing thereof on the Attorney General at least fifteen days before the day fixed for the
hearing.

Order declaring interest not subject to forfeiture
(4) Where, on the hearing of an application made under subsection (1), the judge is satisfied
that the applicant is not a person referred to in paragraph (1)(a) or (b) and appears
innocent of any complicity in any enterprise crime offence or designated drug offence that
resulted in the forfeiture or of any collusion in relation to any such offence, the judge may
make an order declaring that the interest of the applicant is not affected by the forfeiture
and declaring the nature and extent of the interest.

Appeal from order under subsection (4)
(5) An applicant or the Attorney General may appeal to the court of appeal from an order
under subsection (4) and the provisions of Part XXI with respect to procedure on appeals
apply, with such modifications as the circumstances require, to appeals under this
subsection.

Return of property
(6) The Attorney General shall, on application made to the Attorney General by any person
who has obtained an order under subsection (4) and where the periods with respect to the
Appendix 1: Criminal Code Part XII.2

taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined,
(a) direct that the property or the part thereof to which the interest of the applicant relates be returned to the applicant; or
(b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

S. 462.43
Residual disposal of property seized or dealt with pursuant to special warrants or restraint orders
462.43 Where property has been seized under a warrant issued pursuant to section 462.32, a restraint order has been made under section 462.33 in relation to any property or a recognizance has been entered into pursuant to paragraph 462.34(4)(a) in relation to any property and a judge, on application made to the judge by the Attorney General or any person having an interest in the property or on the judge's own motion, after notice given to the Attorney General and any other person having an interest in the property, is satisfied that the property will no longer be required for the purpose of section 462.37, 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding, the judge
(a) in the case of a restraint order, shall revoke the order;
(b) in the case of a recognizance, shall cancel the recognizance; and
(c) in the case of property seized under a warrant issued pursuant to section 462.32 or property under the control of a person appointed pursuant to subparagraph 462.33(3)(b)(i),
(i) if possession of it by the person from whom it was taken is lawful, shall order that it be returned to that person,
(ii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, shall order that it be returned to the lawful owner or the person who is lawfully entitled to its possession, or
(iii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known, may order that it be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

S. 462.44
Appeals from orders under subsection 462.38(2) or section 462.43
462.44 Any person who considers himself aggrieved by an order made under subsection 462.38(2) or section 462.43 may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI and that Part applies, with such modifications as the circumstances require, to such an appeal.
Appendix 1: Criminal Code Part XII.2

S. 462.45
Suspension of forfeiture pending appeal
462.45 Notwithstanding anything in this Part, the operation of an order of forfeiture or restoration of property under subsection 462.34(4), 462.37(1), 462.38(2) or 462.41(3) or section 462.43 is suspended pending
(a) any application made in respect of the property under any of those provisions or any other provision of this or any other Act of Parliament that provides for the restoration or forfeiture of such property,
(b) any appeal taken from an order of forfeiture or restoration in respect of the property, or
(c) any other proceeding in which the right of seizure of the property is questioned,
and property shall not be disposed of within thirty days after an order of forfeiture is made under any of those provisions.

S. 462.46
Copies of documents returned or forfeited
462.46 (1) Where any document is returned or ordered to be returned, forfeited or otherwise dealt with under subsection 462.34(3) or (4), 462.37(1), 462.38(2) or 462.41(3) or section 462.43, the Attorney General may, before returning the document or complying with the order, cause a copy of the document to be made and retained.

Probative force
(2) Every copy made under subsection (1) shall, if certified as a true copy by the Attorney General, be admissible in evidence and, in the absence of evidence to the contrary, shall have the same probative force as the original document would have had if it had been proved in the ordinary way.

S. 462.47
Disclosure Provisions
No civil or criminal liability incurred by informants
462.47 For greater certainty but subject to section 241 of the Income Tax Act, a person is justified in disclosing to a peace officer or the Attorney General any facts on the basis of which that person reasonably suspects that any property is proceeds of crime or that any person has committed or is about to commit an enterprise crime offence or a designated drug offence.

S. 462.48
Disclosure of income tax information
462.48 (1) The Attorney General may, for the purposes of an investigation in relation to
(a) a designated drug offence, or
(b) an offence against section 354 or 462.31 where the offence is alleged to have been committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of
(i) the commission in Canada of a designated drug offence, or
(ii) an act or omission anywhere that, if it had occurred in Canada, would have constituted
Appendix 1: *Criminal Code* Part XII.2

a designated drug offence, make an application in accordance with subsection (2) for an order for disclosure of information under subsection (3). Application

(2) An application under subsection (1) shall be made ex parte in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or a person specially designated by the Attorney General for that purpose deposing to the following matters, namely,

(a) the offence or matter under investigation;
(b) the person in relation to whom the information or documents referred to in paragraph (c) are required;
(c) the type of information or book, record, writing, return or other document obtained by or on behalf of the Minister of National Revenue for the purposes of the Income Tax Act to which access is sought or that is proposed to be examined or communicated; and
(d) the facts relied on to justify the belief, on reasonable grounds, that the person referred to in paragraph (b) has committed or benefited from the commission of an offence referred to in paragraph (1)(a) or (b) and that the information or documents referred to in paragraph (c) are likely to be of substantial value, whether alone or together with other material, to the investigation for the purposes of which the application is made.

Order for disclosure of information

(3) Where the judge to whom an application under subsection (1) is made is satisfied

(a) of the matters referred to in paragraph (2)(d), and
(b) that there are reasonable grounds for believing that it is in the public interest to allow access to the information or documents to which the application relates, having regard to the benefit likely to accrue to the investigation if the access is obtained, the judge may, subject to such conditions as the judge considers advisable in the public interest, order the Deputy Minister of National Revenue for Taxation or any person specially designated in writing by that Deputy Minister for the purposes of this section

(c) to allow a police officer named in the order access to all such information and documents and to examine them, or

(d) where the judge considers it necessary in the circumstances, to produce all such information and documents to the police officer and allow the police officer to remove the information and documents, within such period after the expiration of seven clear days following the service of the order pursuant to subsection (4) as the judge may specify.

Service of order

(4) A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.

Extension of period for compliance with order

(5) A judge who makes an order under subsection (3) may, on application of the Minister of National Revenue, extend the period within which the order is to be complied with.
Appendix 1: Criminal Code Part X.II.2

Objection to disclosure of information

(6) The Minister of National Revenue or any person specially designated in writing by that Minister for the purposes of this section may object to the disclosure of any information or document in respect of which an order under subsection (3) has been made by certifying orally or in writing that the information or document should not be disclosed on the ground that

(a) the Minister of National Revenue is prohibited from disclosing the information or document by any bilateral or international treaty, convention or other agreement respecting taxation to which the Government of Canada is a signatory;
(b) a privilege is attached by law to the information or document;
(c) the information or document has been placed in a sealed package pursuant to law or an order of a court of competent jurisdiction; or
(d) disclosure of the information or document would not, for any other reason, be in the public interest.

Determination of objection

(7) Where an objection to the disclosure of information or a document is made under subsection (6), the objection may be determined, on application, in accordance with subsection (8), by the Chief Justice of the Federal Court, or by such other judge of that Court as the Chief Justice may designate to hear such applications.

Judge may examine information

(8) A judge who is to determine an objection pursuant to subsection (7) may, if the judge considers it necessary to determine the objection, examine the information or document in relation to which the objection is made and shall grant the objection and order that disclosure of the information or document be refused where the judge is satisfied of any of the grounds mentioned in subsection (6).

Limitation period

(9) An application under subsection (7) shall be made within ten days after the objection is made or within such greater or lesser period as the Chief Justice of the Federal Court, or such other judge of that Court as the Chief Justice may designate to hear such applications, considers appropriate.

Appeal to Federal Court of Appeal

(10) An appeal lies from a determination under subsection (7) to the Federal Court of Appeal.

Limitation period for appeal

(11) An appeal under subsection (10) shall be brought within ten days from the date of the determination appealed from or within such further time as the Federal Court of Appeal considers appropriate in the circumstances.
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Special rules for hearings
(12) An application under subsection (7) or an appeal brought in respect of that application shall
(a) be heard in camera; and
(b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the National Capital Act.

Ex parte representations
(13) During the hearing of an application under subsection (7) or an appeal brought in respect of that application, the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations ex parte.

Copies
(14) Where any information or document is examined or provided under subsection (3), the person by whom it is examined or to whom it is provided or any officer of the Department of National Revenue may make, or cause to be made, one or more copies thereof and any copy purporting to be certified by the Minister of National Revenue or an authorized person to be a copy made pursuant to this subsection is evidence of the nature and content of the original information or document and has the same probative force as the original information or document would have had if it had been proved in the ordinary way.

Further disclosure
(15) No person to whom information or documents have been disclosed or provided pursuant to this subsection or pursuant to an order made under subsection (3) shall further disclose the information or documents except for the purposes of the investigation in relation to which the order was made.

Form
(16) An order made under subsection (3) may be in Form 47.

Definition of "police officer"
(17) In this section, "police officer" means any officer, constable or other person employed for the preservation and maintenance of the public peace.

S. 462.49
Specific Rules of Forfeiture Specific forfeiture provisions unaffected by this Part
462.49 (1) This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting the forfeiture of property.

Priority for restitution to victims of crime
(2) The property of an offender may be used to satisfy the operation of a provision of this or any other Act of Parliament respecting the forfeiture of property only to the extent that it
Appendix 1: *Criminal Code Part XII.2*

is not required to satisfy the operation of any other provision of this or any other Act of Parliament respecting restitution to or compensation of persons affected by the commission of offences.

**S. 462.5**

**Regulations**

462.5 The Attorney General may make regulations governing the manner of disposing of or otherwise dealing with, in accordance with the law, property forfeited under this Part.
### Appendix 2: Comparative Table of Selected Proceeds of Crime Legislation

<table>
<thead>
<tr>
<th>Provision / Country</th>
<th>Australia</th>
<th>Canada</th>
<th>England</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Investigative / Enforcement Tools:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Search Warrant</td>
<td>36 70 - 72</td>
<td>462.32</td>
<td>56</td>
<td>21 U.S.C. § 853 (f)</td>
</tr>
<tr>
<td><strong>Powers of Forfeiture:</strong></td>
<td>14(1)(a) Tainted Property</td>
<td>462.37(1)</td>
<td>2 Confiscation Order</td>
<td>18 U.S.C. § 1963</td>
</tr>
<tr>
<td>30(1) Serious Offence Forfeiture Order</td>
<td>462.37(2)</td>
<td>43 Forfeiture of Money</td>
<td>21 U.S.C. § 881 Civil</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>14(1)(b) Pecuniary Penalty Order</td>
<td>462.38 Dies or Absconds</td>
<td>19 Dies or Absconds</td>
<td></td>
</tr>
<tr>
<td></td>
<td>27 Charging Order</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>27(2 - 5) Inference of Net Worth</td>
<td>462.39 Inference of Net Worth</td>
<td>4 Assessing the Proceeds</td>
<td>21 U.S.C. § 853(d) Inference of Net Worth</td>
</tr>
<tr>
<td></td>
<td>462.4 Voidable Transfers</td>
<td></td>
<td>49 -53 Proceeds Offences</td>
<td>18 U.S.C. § 1963(c) Voidable Transfers</td>
</tr>
<tr>
<td>Third Party Relief</td>
<td>22 Forfeiture Order Quashed</td>
<td>462.45 Forfeiture Order Quashed</td>
<td>18 Compensation to Defendant</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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Appendix 3: Proceeds of Crime - Part XII.2 Flowchart

Definitions
s. 462.3

Designated Drug Offence (D.D.O.)
Enterprise Crime Offence (E.C.O.)
Proceeds of Crime (Proceeds)
Money Laundering Offence (462.31)

Investigative / Enforcement Tools

Special Warrant
s. 462.32

Restrainting Order
s. 462.33

Informer Immunity
s. 462.47

Disclosure of Income Tax Information
s. 462.48

Review of Special Warrants & Restraining Orders

Application for Business and Legal Expenses
s. 462.34(4)(c)(ii)

Application to Set Aside
s. 462.34(6)

Automatic Expiry of Special Warrant
s. 462.35

Pre-Forfeiture Notice Requirements
s. 462.41

Powers of Forfeiture

Offence Committed In Relation To Proceeds
s. 462.37(1)

Proceeds But No Nexus To The Offence
s. 462.37(2)

Accused Dies or Absconds
s. 462.38

Other Powers of The Court

Fine In Lieu of Forfeiture
s. 462.37(3)

Consecutive Jail Term In Lieu of Fine Payment
s. 462.37(4)

Fine Option Program Not Available
s. 462.37(5)

Inference of Net Worth
s. 462.39

Voidable Transfer of Property
s. 462.4

Post Forfeiture Remedies / Orders

Third Party Application
s. 462.42

Suspension of Forfeiture Order Pending Appeal
s. 462.45
Appendix 4: Distribution of Proceeds of Crime Cases In Canada

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>POC Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alta.</td>
<td>7</td>
</tr>
<tr>
<td>B.C.</td>
<td>30</td>
</tr>
<tr>
<td>Man.</td>
<td>6</td>
</tr>
<tr>
<td>N.B.</td>
<td>8</td>
</tr>
<tr>
<td>Nfld.</td>
<td>0</td>
</tr>
<tr>
<td>N.W.T.</td>
<td>0</td>
</tr>
<tr>
<td>N.S.</td>
<td>2</td>
</tr>
<tr>
<td>Ont.</td>
<td>30</td>
</tr>
<tr>
<td>P.E.I.</td>
<td>1</td>
</tr>
<tr>
<td>Que.</td>
<td>5</td>
</tr>
<tr>
<td>Sask.</td>
<td>4</td>
</tr>
<tr>
<td>Yukon</td>
<td>1</td>
</tr>
<tr>
<td>Federal</td>
<td>1</td>
</tr>
</tbody>
</table>

Note: This sample consists of ninety-five cases drawn, for the most part, from a search of QL Systems’ QUICKLAW Database. Of the ninety-five cases, seventy-three, or 77%, were drug related.
### Appendix 5: Jail In Lieu of Fine Payment Provisions

<table>
<thead>
<tr>
<th>Fine</th>
<th>Jail In Default</th>
<th>Approx. Rate per Day</th>
</tr>
</thead>
<tbody>
<tr>
<td>$x \leq 10,000$</td>
<td>$y \leq 6$ mths</td>
<td>$55.55$</td>
</tr>
<tr>
<td>$10,000 &lt; x \leq 20,000$</td>
<td>$6$ mths $\leq y \leq 12$ mths</td>
<td>$55.55$</td>
</tr>
<tr>
<td>$20,000 &lt; x \leq 50,000$</td>
<td>$12$ mths $\leq y \leq 18$ mths</td>
<td>$55.55 -&gt; 92.59$</td>
</tr>
<tr>
<td>$50,000 &lt; x \leq 100,000$</td>
<td>$18$ mths $\leq y \leq 2$ yrs</td>
<td>$92.59 -&gt; 138.89$</td>
</tr>
<tr>
<td>$100,000 &lt; x \leq 250,000$</td>
<td>$2$ yrs $\leq y \leq 3$ yrs</td>
<td>$138.89 -&gt; 231.49$</td>
</tr>
<tr>
<td>$250,000 &lt; x \leq 1,000,000$</td>
<td>$3$ yrs $\leq y \leq 5$ yrs</td>
<td>$231.49 -&gt; 55.55$</td>
</tr>
<tr>
<td>$x &gt; 1,000,000$</td>
<td>$5$ yrs $\leq y \leq 10$ yrs</td>
<td>$55.55 -&gt; ??$</td>
</tr>
</tbody>
</table>