



SUPREME COURT OF CANADA

CITATION: R. v. Vallières, 2022
SCC 10

APPEAL HEARD: November 12,
2021

JUDGMENT RENDERED: March
31, 2022

DOCKET: 39162

BETWEEN:

Her Majesty The Queen
Appellant

and

Richard Vallières
Respondent

- and -

**Attorney General of Ontario and Association québécoise des avocats et
avocates de la défense**
Intervenors

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 68)

Wagner C.J. (Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin, Kasirer and Jamal JJ. concurring)

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Her Majesty The Queen

Appellant

v.

Richard Vallières

Respondent

and

**Attorney General of Ontario and
Association québécoise des avocats et avocates de la défense**

Intervenors

Indexed as: R. v. Vallières

2022 SCC 10

File No.: 39162.

2021: November 12; 2022: March 31.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Criminal law — Sentencing — Fine in lieu of order for forfeiture of
property that is proceeds of crime — Discretion of court — Amount of fine — Whether*

court has discretion to limit amount of fine in lieu to profit made by offender from their criminal activities — Whether value of property that is proceeds of crime may be apportioned between co-accused — Criminal Code, R.S.C. 1985, c. C-46, s. 462.37(3).

In 2016, V was convicted of fraud, trafficking and theft in respect of maple syrup. The stolen maple syrup, which had a market value of over \$18,000,000, passed through the hands of several individuals before it was resold by V, who collected the income and paid his various accomplices. By V's own admission, he earned \$10,000,000 in income from the resale of the syrup obtained by theft or fraud and made a personal profit of nearly \$1,000,000, minus certain transportation costs.

Under s. 462.37(3) of the *Criminal Code*, the trial judge imposed a fine on V in lieu of an order for forfeiture of property that was proceeds of crime ("fine in lieu"). Because the trial judge was of the opinion that he had no choice but to impose a fine equal to the value of the property that was proceeds of crime and that had been in V's possession or under his control, he ordered V to pay a fine corresponding to the resale value of the maple syrup obtained by theft or fraud, that is, \$10,000,000, minus the amount of a restitution order. However, the Court of Appeal reduced that amount to the profit made by V, \$1,000,000, minus the amount of the restitution order. It held that courts have the discretion to impose a fine that reflects the profit made from a criminal activity, provided that this penalty meets the dual objective of deprivation of proceeds and deterrence. It was of the view that the fine imposed on V by the trial judge was clearly disproportionate to the objectives of the scheme governing this type of fine

and that it created a situation of double recovery in light of the fines imposed on V's accomplices.

Held: The appeal should be allowed.

V must be required to pay a fine equal to the value of the property that was in his possession or under his control, that is, \$10,000,000, as the trial judge found. This amount is warranted in light of the scheme for the forfeiture of proceeds of crime, under which a fine must, in principle, be equal to the value of the property of which an offender had possession or control at some point in time. Because a court does not have the discretion to limit the amount of a fine in lieu to the profit made by an offender from their criminal activities, the Court of Appeal assumed a discretion it did not have when it reduced V's fine. Moreover, V did not prove either at trial or on appeal that there was a risk of double recovery of the \$10,000,000.

A fine in lieu differs from the sentence imposed for the commission of a designated offence in that its purpose is to replace the proceeds of crime rather than to punish the offender. It is therefore in the nature of a forfeiture order. The imposition of a fine in lieu may be considered where forfeiture of the property that is proceeds of crime has become impracticable. In such a case, a court may, instead of ordering the forfeiture of the property, order the offender to pay a fine equal to the value of the property, as provided for in s. 462.37(3) *Cr. C.*

The use of the word “may” in s. 462.37(3) *Cr. C.* indicates that Parliament intended courts to have some discretion, but this discretion does not allow them to limit the amount of a fine in lieu to the profit made from a criminal activity. The discretion applies only to the decision whether or not to impose a fine and to the determination of the value of the property.

First of all, the wording of s. 462.37(3) *Cr. C.* is categorical with respect to the amount of the fine: it is equal to the value of the property that is proceeds of crime. The definition of the term “property” in s. 2 *Cr. C.* is broad enough to capture gross income derived from the sale of property obtained by crime. Furthermore, a court that limited the scope of a fine to the profit made by an offender from their criminal activities would be disregarding the nature of this order, which serves as a substitute where forfeiture of the property has become impracticable. Equivalency between the amount of the fine and the value of the property is inherent in the notion of substitution. Lastly, limiting a fine in lieu to an offender’s profit undermines and disregards what Parliament intended. The dual objective of such an order is to deprive an offender of the proceeds of their crime and to deter them, as well as potential accomplices and criminal organizations, from reoffending. Through the severity of the proceeds of crime provisions, Parliament is sending a clear message that crime does not pay and is thus attempting to discourage individuals from organizing themselves and committing profit-driven crimes. Parliament’s decision that the fine must correspond to the value of the property is therefore deliberately harsh.

At the step of determining the value of the property, the Crown's burden is only to show that the offender had possession or control of property that is proceeds of crime and to establish the value of that property. The determination of the property's value must be based on the evidence and not on a purely hypothetical calculation. In a situation involving the resale of property obtained by crime, the proceeds of crime are, in principle, the sum obtained in exchange for the property originally in the offender's possession or under their control, in keeping with the definition of the word "property" in s. 2 *Cr. C.* An offender's ability to pay must not be considered in determining the amount of a fine in lieu, any more than in deciding whether or not to impose such a fine.

In situations involving co-accused who had possession or control of the same property that constitutes proceeds of crime, courts may divide the value of the property between the co-accused if there is a risk of double recovery, if apportionment is requested by the offender and if the evidence allows this determination to be made. The onus is on the offender to make the request and to satisfy the court that it is appropriate to apportion the value of the property between co-accused. The exercise of the court's discretion to apportion will depend on the circumstances of each case. Where the conditions giving rise to a possibility of double recovery are met, the court must apportion the value of the property between the co-accused in order to reflect the nature of a fine in lieu, which replaces the property that cannot be forfeited, nothing more and nothing less. However, given the approximate nature of the exercise, the court

retains some flexibility in deciding how the value of the property will be apportioned between the co-accused.

While the offender bears the burden of raising apportionment and establishing its appropriateness, the Crown should, to the extent possible and where the available evidence allows, mitigate the risk of double recovery by apportioning, on its own initiative, the value of the property that is proceeds of crime between the co-accused. The Crown should discharge this duty in every case, but especially where the co-accused are tried separately, because it has an overview of the various proceedings and can limit up front the amount it seeks as a fine in lieu in each proceeding in order to ensure that the total of the fines imposed on the co-accused corresponds to the value of the property that is proceeds of crime.

Cases Cited

Applied: *R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392; **considered:** *R. v. Dieckmann*, 2017 ONCA 575, 355 C.C.C. (3d) 216; *R. v. Devloo and Ong*, 2018 MBQB 140; **referred to:** *R. v. Craig*, 2009 SCC 23, [2009] 1 S.C.R. 762; *R. v. Ouellette*, 2009 SCC 24, [2009] 1 S.C.R. 818; *R. v. Nguyen*, 2009 SCC 25, [2009] 1 S.C.R. 826; *R. v. Dwyer*, 2013 ONCA 34, 296 C.C.C. (3d) 193; *R. v. Rafilovich*, 2019 SCC 51, [2019] 3 S.C.R. 838; *R. v. Way*, 2017 ONCA 754, 140 O.R. (3d) 309; *R. v. Angelis*, 2016 ONCA 675, 133 O.R. (3d) 575; *R. v. Ford*, 2013 NBCA 63, 412 N.B.R. (2d) 196; *R. v. Devloo*, 2020 MBCA 3, 384 C.C.C. (3d) 288; *R. v. Banayos and Banayos*, 2018 MBCA 86, 365 C.C.C. (3d) 528; *Quebec (Attorney General) v.*

Laroche, 2002 SCC 72, [2002] 3 S.C.R. 708; *R. v. Schoer*, 2019 ONCA 105, 371 C.C.C. (3d) 292; *R. v. Dritsas*, 2015 MBCA 19, 315 Man. R. (2d) 205; *R. v. Khatchatourov*, 2014 ONCA 464, 313 C.C.C. (3d) 94; *R. v. Piccinini*, 2015 ONCA 446; *R. v. Siddiqi*, 2015 ONCA 374; *R. v. Dow*, 2014 NBCA 15, 418 N.B.R. (2d) 222; *R. v. S. (A.)*, 2010 ONCA 441, 258 C.C.C. (3d) 13; *R. v. Grenier*, 2017 QCCA 57; *R. v. Lawrence*, 2018 ONCA 676; *R. v. Lawlor*, 2021 ONCA 692; *R. v. Chung*, 2021 ONCA 188, 402 C.C.C. (3d) 145; *R. v. Sam* (1998), 163 Sask. R. 314; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 2 “property”, 121(1), 123(1), Part XII.2, 462.3(1) “designated offence”, “proceeds of crime”, 462.37(3), 673 “sentence”.

Authors Cited

German, Peter M. *Proceeds of Crime and Money Laundering: Includes Analysis of Civil Forfeiture and Terrorist Financing Legislation*. Toronto: Carswell, 2021 (loose-leaf updated March 2022, release 1).

Hubbard, Robert W., et al. *Money Laundering & Proceeds of Crime*. Toronto: Irwin Law, 2004.

APPEAL from a judgment of the Quebec Court of Appeal (Hilton, Bouchard and Beaupré JJ.A.), 2020 QCCA 372, [2020] AZ-51674438, [2020] J.Q. n° 1390 (QL), 2020 CarswellQue 1307 (WL Can.), setting aside in part a decision of

Pronovost J., 2017 QCCS 1687, [2017] AZ-51387603, [2017] J.Q. n° 4686 (QL), 2017 CarswellQue 3212 (WL Can.). Appeal allowed.

Julien Beauchamp-Laliberté and *Éric Bernier*, for the appellant.

Julie Giroux, for the respondent.

Melissa Adams and *Vallery Bayly*, for the intervener the Attorney General of Ontario.

Jessy Héroux, for the intervener Association québécoise des avocats et avocates de la défense.

English version of the judgment of the Court delivered by

THE CHIEF JUSTICE —

[1] This appeal gives the Court an opportunity to clarify the scope of judicial discretion when determining the amount of a fine to impose on an offender under s. 462.37(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), in lieu of an order for forfeiture of property that is proceeds of crime (“fine in lieu”). In particular, this Court must determine whether a court has the discretion to limit the amount of a fine

in lieu to the profit made by an offender from their criminal activities and must delineate the circumstances in which a court may apportion between co-accused the value of property that is proceeds of crime. This appeal serves, incidentally, as an occasion for this Court to reaffirm that a fine in lieu is ordered as a substitute for forfeiture and not as a punishment for the commission of an offence, although the fine is part of the sentencing process.

[2] The backdrop to this case is a large-scale theft and fraud scheme targeting maple syrup, a scheme in which the respondent, Richard Vallières, was one of the major players. At trial, Mr. Vallières was convicted of fraud, trafficking and theft in respect of maple syrup belonging to the Fédération des producteurs acéricoles du Québec (“Federation”). The Crown’s appeal is limited to the fine in lieu imposed on Mr. Vallières at sentencing. The trial judge imposed a fine in lieu corresponding to the resale value of the maple syrup obtained by theft or fraud, but the Quebec Court of Appeal reduced that amount to the profit made by Mr. Vallières. In both cases, the amount of a restitution order was subtracted from the fine. For the reasons that follow, I am of the view that the Court of Appeal erred.

I. Background

[3] In June 2011, Mr. Vallières met his principal accomplice, Avik Caron. Together, they planned to steal maple syrup from one of the Federation’s warehouses and resell it on the black market.

[4] Essentially, Mr. Caron was in charge of the maple syrup theft operations at the Federation's warehouse in the municipality of Saint-Louis-de-Blandford. Mr. Caron and his accomplices surreptitiously took barrels of maple syrup, emptied them and filled them with water. The maple syrup thereby stolen from the Federation was then transferred to other barrels or plastic containers, which were transported in 53-foot tractor-trailers. The transport operations were overseen by another accomplice, Sébastien Jutras. Mr. Vallières purchased the syrup directly from Mr. Caron and exported it outside Quebec, including to New Brunswick, where his co-accused Étienne St-Pierre carried on business.

[5] The stolen maple syrup therefore passed through the hands of several individuals before it was resold by Mr. Vallières, who collected the income and paid his various accomplices. In this regard, 6 of his 16 accomplices were ordered to pay fines in lieu, in amounts ranging from \$9,840 to \$1,200,000.

[6] This criminal enterprise, which spanned a period of about a year, led to the largest deployment of resources in the history of the Sûreté du Québec for an investigation concerning stolen tangible property. That massive police operation uncovered a theft of 9,571 barrels of maple syrup belonging to the Federation with a market value of over \$18,000,000.

[7] In addition to trafficking in the stolen syrup, Mr. Vallières purchased maple syrup in fraud of the Federation's rights by going directly through Quebec maple syrup

producers without being an authorized buyer or paying the contribution provided for in the provincial syrup marketing regulations.

[8] By Mr. Vallières's own admission, he earned \$10,000,000 in income from the resale of the syrup obtained by theft or fraud and made a personal profit of nearly \$1,000,000, minus certain transportation costs.

II. Procedural History

A. *Quebec Superior Court, 2017 QCCS 1687 (Pronovost J.)*

[9] In 2016, a jury found Mr. Vallières guilty of theft, fraud and trafficking in property obtained by crime, offences that all concerned property with a value of more than \$5,000. At the sentencing stage, the Crown sought, among other things, a fine in lieu of \$9,393,498.44 payable within 8 years.

[10] The trial judge began by considering whether it was appropriate to impose such a fine on Mr. Vallières. Finding that Mr. Vallières had profited from the crimes he had committed with other individuals, which had taken place over a lengthy period of time, the trial judge concluded that a fine in lieu therefore had to be imposed on him. Although the evidence established that the Federation had incurred a financial loss exceeding \$18,000,000, the judge, relying on the admission made by Mr. Vallières, determined that he had had in his possession at least \$10,000,000 from the resale of the syrup obtained by theft or fraud.

[11] The judge noted that his discretion to determine the amount of the fine in lieu was limited: the fine had to be equal to the value of the property that was proceeds of crime and that had been in Mr. Vallières's possession or under his control. Because the evidence showed beyond a reasonable doubt that Mr. Vallières had received \$10,000,000 from the theft, fraud and trafficking he had committed, the judge found that he had no choice but to order the payment of that amount as a fine in lieu. From the \$10,000,000, he subtracted \$606,501.56, which was the amount of a restitution order.¹ Mr. Vallières was subject to a 6-year term of imprisonment if he failed to pay the fine in lieu within 10 years.

B. *Quebec Court of Appeal, 2020 QCCA 372 (Hilton, Bouchard and Beaupré J.J.A.)*

[12] On appeal, Mr. Vallières essentially argued that the trial judge had exercised his discretion improperly by ordering him to pay a fine in lieu, the terms and amount of which were not challenged.

[13] The Court of Appeal rejected that argument and upheld the trial judge's imposition of a fine in lieu. In its view, the syrup sold by Mr. Vallières during the offence period had been obtained either by theft from the Federation or in fraud of its rights, designated offences of which he had been convicted. All of the income generated

¹ Because the \$606,501.56 was in U.S. currency, it should have been converted to \$828,602.43 in Canadian currency based on the conversion rate suggested by the Crown. That error was corrected on appeal.

by Mr. Vallières during that period — \$10,000,000, which he admitted — was therefore proceeds of crime.

[14] Despite that finding, and without requesting further arguments from the parties, the Court of Appeal continued its analysis and intervened on its own initiative to reduce the amount of the fine in lieu.

[15] Based on its interpretation of *R. v. Dieckmann*, 2017 ONCA 575, 355 C.C.C. (3d) 216, the Court of Appeal held that courts have the discretion to impose a fine that reflects the profit made by an offender from criminal activity, provided that this penalty meets the dual objective of deprivation of proceeds and deterrence. The trial judge had therefore erred in finding that he had no choice but to impose a fine in lieu of \$10,000,000, minus the amount of the restitution order.

[16] The Court of Appeal further noted that the imposition of that fine created a clear situation of double recovery in light of the fines imposed on Mr. Vallières's accomplices, which were also related to profits derived from his resale of the syrup.

[17] In the Court of Appeal's view, the \$10,000,000 fine in lieu imposed in this case was clearly disproportionate to the objectives of the scheme governing this type of fine. Imposing a fine that reflected Mr. Vallières's profit margin of \$1,000,000 was more in keeping with the objective of deprivation of proceeds and with the maxim that "crime does not pay".

[18] The Court of Appeal accordingly allowed the appeal on this ground and reduced the fine in lieu to \$1,000,000, minus the amount of the restitution order (\$828,602.43 in Canadian currency), resulting in a total fine in lieu of \$171,397.57. It also reduced the term of imprisonment in default of payment of the fine from six to three years.

III. Issues

[19] The issues raised by this appeal are as follows:

1. Did the Quebec Court of Appeal err in reducing the amount of the fine in lieu imposed on Mr. Vallières?
2. Did the Court of Appeal err in failing to allow the parties to be heard regarding the change to the amount of the fine in lieu, given that this question had not been raised on appeal?

[20] The analysis of the first issue is sufficient to decide this appeal. I will therefore deal only very briefly with the second issue concerning the Crown's right to be heard on a question that had not been argued in the Court of Appeal.

IV. Parties' Arguments

[21] The Crown submits that the Court of Appeal could not reduce the amount of the fine in lieu so that it corresponded to the profit made by Mr. Vallières from his criminal activities. According to the Crown, the amount of the fine had to be equal to the value of the property that was proceeds of crime, that is, the sum of \$10,000,000 derived from the resale of the syrup obtained by theft or fraud. The Crown contends incidentally that the Court of Appeal erred in modifying the amount of the fine in lieu without giving the parties an opportunity to argue this question, which had not been raised by Mr. Vallières on appeal.

[22] Mr. Vallières argues that the Court of Appeal was justified in intervening because the trial judge had erred in exercising his discretion by stating that he had no choice but to impose a fine in lieu of \$10,000,000, minus the amount of the restitution order. Mr. Vallières adds that the Court of Appeal had no obligation to give the parties an opportunity to make submissions concerning the amount of the fine, since this point necessarily arose from the issues submitted by the parties. He further argues that the Court of Appeal had the requisite factual background to decide this question.

V. Analysis

A. *Did the Quebec Court of Appeal Err in Reducing the Amount of the Fine in Lieu Imposed on Mr. Vallières?*

[23] Answering this question first requires determining whether courts have the discretion to limit the amount of a fine in lieu to the profit made from a criminal activity

where this penalty meets the dual objective of deprivation of proceeds and deterrence. This appeal also provides an opportunity to clarify the circumstances in which courts may apportion the value of property that is proceeds of crime between co-accused who had possession or control of that same property or of part of it.

(1) Nature of a Fine in Lieu

[24] Before beginning my analysis, I should emphasize the special nature of a fine in lieu as a separate component of sentencing. Although a fine in lieu is technically part of a sentence pursuant to s. 673 *Cr. C.*, such an order differs from the sentence imposed for the commission of a designated offence in that its purpose is to replace the proceeds of crime rather than to punish the offender (*R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392, at para. 25). A fine in lieu is therefore, first and foremost, in the nature of a forfeiture order. It has consistently been held that the forfeiture inquiry is independent of the broader inquiry undertaken with respect to sentencing and the principles related thereto (*Lavigne*, at paras. 25-26; *R. v. Craig*, 2009 SCC 23, [2009] 1 S.C.R. 762, at paras. 34-37; *R. v. Ouellette*, 2009 SCC 24, [2009] 1 S.C.R. 818, at para. 2; *R. v. Nguyen*, 2009 SCC 25, [2009] 1 S.C.R. 826, at para. 2). It is therefore imperative that, when calculating the amount of a fine in lieu, courts put aside the general principles of sentencing that are incompatible with the nature of this order.

(2) Discretion to Limit the Amount of a Fine in Lieu to the Profit Made From a Criminal Activity

[25] In order to clearly understand the nature of a fine in lieu, it is important to situate it in the more general context of Part XII.2 of the *Criminal Code*, entitled “Proceeds of Crime”. This term is defined broadly (*R. v. Dwyer*, 2013 ONCA 34, 296 C.C.C. (3d) 193, at para. 21). It means “any property, benefit or advantage . . . obtained or derived directly or indirectly as a result of . . . the commission . . . of a designated offence” (s. 462.3(1) *Cr. C.*). A “designated offence” is “any offence that may be prosecuted as an indictable offence under [the *Criminal Code*] or any other Act of Parliament, other than an indictable offence prescribed by regulation” (s. 462.3(1) *Cr. C.*). In this case, the designated offences of which Mr. Vallières was convicted are theft, fraud and trafficking in property obtained by crime, all of which concerned property with a value of more than \$5,000.

[26] The imposition of a fine in lieu may be considered where forfeiture of the property that is proceeds of crime has become impracticable. In such a case, a court may, instead of ordering the forfeiture of the property, order the offender to pay a fine equal to the value of the property (s. 462.37(3) *Cr. C.*). Although the use of the word “may” indicates that Parliament intended courts to have some discretion, I am of the view that this discretion does not allow them to limit the amount of a fine in lieu to the profit made from a criminal activity, even in cases where this would be consistent with the dual objective of deprivation of proceeds and deterrence. I will explain why.

[27] First, the wording of s. 462.37(3) *Cr. C.* is categorical with respect to the amount of the fine. As this Court stated in *Lavigne*, “[t]he words are crystal clear.

Parliament has itself determined the amount of the fine” (para. 34). The fine is “equal to the value of the property” that is proceeds of crime (para. 35; *R. v. Rafilovich*, 2019 SCC 51, [2019] 3 S.C.R. 838, at para. 33).

[28] It is true that the term “proceeds of crime” encompasses not only property but also any “benefit” or “advantage” (s. 462.3(1) *Cr. C.*). The inclusion of these words in the definition of “proceeds of crime” can be explained by the fact that certain designated offences, such as fraud on the government (s. 121(1) *Cr. C.*) and municipal corruption (s. 123(1) *Cr. C.*), involve, among other things, the offer or acceptance of an “advantage” or “benefit”. However, the fine in lieu provision is limited to the concept of “property”, and the value of the property in question dictates the amount of the fine.

[29] The term “property” as defined in the *Criminal Code* includes “property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange” (s. 2 *Cr. C.*). This definition is broad enough to capture gross income derived from the sale of property obtained by crime (see *R. v. Way*, 2017 ONCA 754, 140 O.R. (3d) 309, at paras. 4-7). In the words of R. W. Hubbard et al., “[t]he concept should clearly encompass all proceeds of crime not just those remaining after deducting expenses” (*Money Laundering & Proceeds of Crime* (2004), at p. 442). Moreover, distinguishing between an offender’s income and expenses in order to determine the offender’s profit margin would essentially amount to legitimating

criminal activity. But Parliament specifically enacted s. 462.37(3) *Cr. C.* to deprive offenders of the fruits of their crimes and to take away any motivation for them to pursue their criminal purposes.

[30] Second, a court that limited the scope of a fine to the profit made by an offender from their criminal activities would be disregarding the nature of this order. It is only where forfeiture of property is impracticable that a fine may be ordered as a substitute (*R. v. Angelis*, 2016 ONCA 675, 133 O.R. (3d) 575, at para. 72; *R. v. Ford*, 2013 NBCA 63, 412 N.B.R. (2d) 196, at para. 5). Equivalency between the amount of the fine and the value of the property is inherent in the notion of substitution (*Lavigne*, at para. 35).

[31] Although this case involves maple syrup, the hierarchy among the various accomplices is not unlike that of a drug ring. By way of analogy, in *R. v. Devloo and Ong*, 2018 MBQB 140, at paras. 49-51 (CanLII), the offender was ordered to pay a fine in lieu of \$212,000, which corresponded to the amounts received in exchange for drugs. The offender's profit was only \$4,000, as the balance had been redistributed to other members of the criminal organization. The trial court nonetheless refused to limit the amount of the fine to \$4,000 in the absence of evidence establishing an allocation of benefits between the offender and his co-accused, and that decision was correctly affirmed by the Manitoba Court of Appeal (*R. v. Devloo*, 2020 MBCA 3, 384 C.C.C. (3d) 288, at para. 92).

[32] In this regard, P. M. German notes that “[t]he arrest of one player resembles ‘spin the bottle’, with the bottle facing a person who ends up being responsible for the gross value of the drugs, while other persons in the organization, not arrested, do not share the burden” (*Proceeds of Crime and Money Laundering: Includes Analysis of Civil Forfeiture and Terrorist Financing Legislation* (loose-leaf), at § 15:28). This seemingly harsh result stems from the nature of a fine in lieu: if the drugs had been found in the offender’s hands, they would have been forfeited in their entirety (§ 15:28).

[33] Lastly, limiting a fine in lieu to the profit made by an offender from their criminal activities undermines and disregards what Parliament intended (*R. v. Banayos and Banayos*, 2018 MBCA 86, 365 C.C.C. (3d) 528, at para. 64). As this Court stated in *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708, “[t]he legislative objective of Part XII.2 plainly goes beyond mere punishment of crime” (para. 25; see also *Lavigne*, at para. 25; *Dieckmann*, at para. 88). A fine in lieu is not part of the global sentence imposed on an offender for the commission of a designated offence (*Lavigne*, at paras. 25-26; *R. v. Schoer*, 2019 ONCA 105, 371 C.C.C. (3d) 292, at para. 93; *Angelis*, at para. 44; *R. v. Dritsas*, 2015 MBCA 19, 315 Man. R. (2d) 205, at para. 56; *R. v. Khatchatourov*, 2014 ONCA 464, 313 C.C.C. (3d) 94, at para. 55). It follows that the amount of the fine does not vary based on an offender’s degree of moral blameworthiness or the circumstances of the offence. Rather, the dual objective of the fine is to deprive an offender of the proceeds of their crime and to deter them from reoffending. But the objective of deterrence is not focused only on the actual offender:

it also applies to potential accomplices and criminal organizations (*Lavigne*, at para. 23).

[34] Through the severity of the proceeds of crime provisions, Parliament is sending a clear message that “crime does not pay” and is thus attempting to discourage individuals from organizing themselves and committing profit-driven crimes. In *Lavigne*, Deschamps J. noted that “[t]he effectiveness of the adopted methods depends largely on the severity of the new provisions and on their deterrent effect” (para. 9). Parliament’s decision that the fine must correspond to the value of the property is therefore deliberately harsh. Reducing a fine to the profit made by an offender from their criminal activities would clearly be contrary to this objective.

[35] In summary, the discretion conferred on courts by s. 462.37(3) *Cr. C.* does not allow them to limit the amount of a fine in lieu to the profit made from criminal activity. In accordance with the principles set out in *Lavigne*, judicial discretion applies first to the decision whether or not to impose a fine and second to the determination of the value of the property (para. 35).

[36] At this second step, the Crown’s burden is only to show that the offender had possession or control of property that is proceeds of crime and to establish the value of that property (*Angelis*, at para. 35; *Dwyer*, at paras. 24-27). The Crown does not have to prove that the offender personally benefited from the proceeds of crime (*R. v. Piccinini*, 2015 ONCA 446, at para. 19 (CanLII); *R. v. Siddiqi*, 2015 ONCA 374, at para. 6 (CanLII)). Nor does the court have to consider the offender’s subsequent use of

the property, such as how cash was spent by the offender (*Schoer*, at para. 105; *R. v. Dow*, 2014 NBCA 15, 418 N.B.R. (2d) 222, at para. 37; *R. v. S. (A.)*, 2010 ONCA 441, 258 C.C.C. (3d) 13, at para. 14).

[37] The determination of the value of the property must be based on the evidence and not on [TRANSLATION] “a purely hypothetical calculation that does not correspond to reality” (*R. v. Grenier*, 2017 QCCA 57, at para. 33 (CanLII)). In a situation involving the resale of property obtained by crime, as in this case, the proceeds of crime are, in principle, the sum obtained in exchange for the property originally in the offender’s possession or under their control, in keeping with the definition of the word “property” in s. 2 *Cr. C.* That sum is not necessarily equal to the market value of the property sold by the offender. It must be kept in mind that the purpose of a fine in lieu is to deprive an offender of the proceeds of their crime, not to compensate for the victim’s loss, which is the function of a restitution order (*R. v. Lawrence*, 2018 ONCA 676, at paras. 14-15 (CanLII)). Finally, an offender’s ability to pay must not be considered in determining the amount of a fine in lieu, any more than in deciding whether or not to impose a fine (*Rafilovich*, at para. 32; *Lavigne*, at para. 37).

(3) Discretion to Apportion the Value of Property Between Co-accused

[38] Having outlined the general principles governing the determination of the amount of a fine in lieu, I now turn to situations involving co-accused, which raise particular issues. This Court has not previously considered whether, on an exceptional basis, an offender may be ordered to pay less than the total value of the property that

was in their possession or under their control where several co-accused had possession or control of the same property that constitutes proceeds of crime. More specifically, this case involves successive possession of the same property, namely the \$10,000,000 that was in Mr. Vallières's possession and under his control, only part of which he ultimately kept following a redistribution to his accomplices.

[39] In my opinion, courts may divide the value of property among several co-accused in order to avoid a risk of double recovery. This risk arises where the Crown seeks to have a fine in lieu imposed on more than one offender in relation to the same proceeds of crime. At the stage of imposing a fine in lieu, one can speak only of a "risk" of double recovery, for it may well be that this scenario will never materialize given the fact that some co-accused might be unable to pay their fine within the time allotted. However, this possibility does not prevent a court from apportioning the fine between co-accused if there is a risk of double recovery, if apportionment is requested by the offender and if the evidence allows this determination to be made.

[40] The onus is on the offender to make the request and to satisfy the court that it is appropriate to apportion the value of the property between co-accused, since apportionment is an exception to the general principle that the amount of the fine must correspond to the value of the property that was in the offender's possession or under their control.

[41] This discretion to apportion, the exercise of which is governed by the guiding principle that double recovery should be avoided, is in keeping with the objective of s. 462.37(3) *Cr. C.* and with the nature of the order (*Lavigne*, at para. 27).

[42] First of all, apportioning the value of the property between co-accused is consistent with the dual objective of deprivation of proceeds and deterrence. Each co-accused is deprived of the fruits of their criminal activity and, at the same time, the total value of the property remains recoverable. Second, such apportionment is consistent with the nature of an order substituting a fine for forfeiture. The imposition of a fine that exceeds the total value of the property, or of several fines that together do so, is incompatible with the idea that the fine is imposed instead of forfeiture. If the property had been available, it would have been forfeited just once.

(a) *Principles Guiding the Exercise of the Discretion to Apportion*

[43] The exercise of a court's discretion is limited by the circumstances in which an order is made (*Lavigne*, at para. 27). The conditions under which a court may exercise its discretion to apportion are as follows.

[44] First, it is not enough for an offender to argue that they transferred the property to a third party in order to be entitled to apportionment. For the offender to raise a risk of double recovery, that third party must have been charged as well (*Siddiqi*, at para. 6). The issue of double recovery obviously does not arise where the offender is the only person who stands trial (*Schoer*, at para. 95, fn. 2).

[45] In this regard, *Dieckmann* is a unique case. There could be no actual risk of double recovery because the accomplices had died, but apportionment of the total amount of the fraud between the offender and her accomplices was nonetheless justified in the circumstances. The evidence showed that the proceeds of the fraud had been divided, the deceased accomplices were clearly guilty of the alleged offence and, above all, the Crown conceded that it would have apportioned the value of the property among the accomplices if they had stood trial.

[46] Second, the evidence must show that several co-accused had possession or control of the same property, or part of it, at some point in time (*R. v. Lawlor*, 2021 ONCA 692, at para. 27 (CanLII)). In *Dieckmann*, the Ontario Court of Appeal correctly stated that “if there is evidence before the court that establishes or admits of an allocation of benefit, it is open to the court to exercise its discretion to adjust the quantum of the fine” (para. 100).

[47] In *R. v. Chung*, 2021 ONCA 188, 402 C.C.C. (3d) 145, the Ontario Court of Appeal, interpreting its own decision in *Dieckmann*, also stated the following:

Where there are multiple offenders before the court, however, and the property passed through the hands of one offender to another without the first offender retaining the benefit of the full value of the property, the sentencing judge may allocate a portion of the fine less than the full value of the property that had been under the offender’s possession and control, so long as the balance of the total value of the proceeds of crime are distributed to the other offenders before the court. . . . [Emphasis added; para. 101.]

[48] I agree with this statement. In principle, an offender's fine may be reduced only in proportion to the amount of the fines imposed on the offender's co-accused who are sentenced in the same proceeding, such that the total value of the property remains recoverable. This discretionary exercise is approximate in nature and is entitled to deference. For example, in *R. v. Sam* (1998), 163 Sask. R. 314, the Saskatchewan Court of Appeal chose to allocate the total value of illicit substances equally between two co-accused who had run a drug trafficking operation together (paras. 15-17).

[49] The apportionment exercise presents special difficulties where an offender's co-accused are tried in separate proceedings. In such a situation, the court may consider the fines already imposed on the co-accused if it is satisfied that they create a risk of double recovery of the same property. That being said, the fact that some co-accused have not yet stood trial at the time an offender is sentenced should not deprive the offender of the benefit of apportionment. The court cannot foresee whether fines will be imposed on the offender's co-accused in the other proceedings or what their amount might be. To overcome this problem, the court need only find that the available evidence would have allowed it to impose a fine on the co-accused if they had been before it, thereby justifying apportionment based on the risk of double recovery. In the end, the manner in which this discretion is exercised will depend on the circumstances of each case.

[50] Where the conditions giving rise to a possibility of double recovery are met, the court must apportion the value of the property between the co-accused in order

to prevent this risk from materializing. The court has no choice but to proceed in this manner, because it must exercise its discretion in keeping with the nature of a fine in lieu, which replaces the property that cannot be forfeited, nothing more and nothing less. However, given the approximate nature of the exercise, the court retains some flexibility in deciding how the value of the property will be apportioned between the co-accused.

(b) *Duty Owed by the Crown*

[51] While the burden of raising apportionment and establishing its appropriateness rests on the offender, this does not mean that the Crown is relieved of all responsibility in this regard.

[52] To mitigate the risk of double recovery, the Crown should, to the extent possible and on its own initiative, apportion the value of the property that is proceeds of crime between the co-accused where it has evidence indicating that they had simultaneous or successive possession or control of that same property or of part of it. This is a duty that is part of the Crown's "Minister of Justice" role, which excludes any notion of winning or losing (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 65).

[53] The Crown should discharge this duty in every case, but especially where the co-accused are tried separately. The Crown has an overview of the various proceedings and can limit up front the amount it seeks as a fine in lieu in each

proceeding in order to ensure that the total of the fines imposed on the co-accused corresponds to the value of the property that is proceeds of crime.

[54] As an illustration, if the Crown has evidence that an offender had control over a total of \$100,000 derived from fraud and then distributed \$50,000 to their co-accused, the Crown should seek only \$50,000 in each proceeding rather than deliberately creating a risk of double recovery by seeking \$100,000 from the first offender.

[55] Of course, the Crown remains free to forgo seeking a fine in lieu or to limit the amount of the fine as part of a joint submission on the sentence of one of the co-accused. Where the Crown forgoes seeking a fine or a portion thereof, there is clearly no possibility of double recovery in respect of the amount the offender has been exempted from paying. As a result, the offender's co-accused may not rely on that amount to limit their own fines. As stated above, only where there is a possibility of double recovery can a court exercise its discretion to apportion, in keeping with the nature of a fine in lieu as a substitute for forfeiture. The amount of the fine is determined on the basis of the value of the property that can no longer be forfeited, not on the basis of considerations relating to fairness or an offender's ability to pay.

(c) *Conclusion*

[56] In summary, a fine in lieu must, in principle, be equal to the value of the property of which an offender had possession or control at some point in time. The

exception to this principle, whereby an offender may be ordered to pay less than the total value of the property that was in their possession or under their control, is justified by a concern for avoiding double recovery of the value of the same property from a number of co-accused.

(4) Application to the Facts of the Case

[57] In this case, the Court of Appeal reduced the fine imposed on Mr. Vallières on the ground that a court can set a fine that reflects an offender's profit margin, provided that this penalty meets the dual objective of deprivation of proceeds and deterrence (para. 245 (CanLII)). In doing so, the Court of Appeal relied on a misreading of *Dieckmann* and thereby assumed a discretion it did not have.

[58] *Dieckmann* is not a departure from the principle that the fine must be equal to the value of the property; rather, that decision states that the value of the property may be apportioned between co-accused where the evidence shows that they had possession or control of it at some point. The decision does not establish a new approach based on the profit made by an offender.

[59] With regard to the dual objective of deprivation of proceeds and deterrence, Parliament has clearly specified the means chosen to achieve its end: the fine must be equal to the value of the property. On this point, the Court of Appeal erred in stating that [TRANSLATION] “[t]he eight-year term of imprisonment, combined with a \$1,000,000 fine in lieu, fully meets [the objective of deterrence]” (para. 249). The

eight-year term of imprisonment was the punishment imposed on Mr. Vallières for the commission of the designated offences, whereas the fine was intended to replace the property whose forfeiture had become impracticable. The purpose of ordering a fine in lieu is not to punish an offender for the commission of an offence. The overall deterrent effect of a fine and a term of imprisonment therefore plays no role in determining the appropriate amount, which has been set by Parliament.

[60] Moreover, contrary to what the Court of Appeal stated, *Lavigne* does not stand for the proposition that a fine in lieu can be limited to the profit made by an offender from their criminal activities (paras. 243-44). That decision clearly indicates that the fine must correspond to the value of the property (*Lavigne*, at para. 35). In that case, this Court ordered the offender to pay the \$150,000 fine in lieu sought by the Crown because the evidence established beyond a reasonable doubt that the offender had made at least that much from drug trafficking. The value of the property could not be determined otherwise.

[61] The Court of Appeal also erred in finding that Mr. Vallières had never had \$10,000,000 in his possession while at the same time stating that the money in question had served as an input that allowed him to purchase more syrup for resale (para. 250). By his own admission, Mr. Vallières had control over that amount, which was in his hands or in his bank accounts at some point. From that moment on, the proceeds of crime provisions applied. The manner in which Mr. Vallières subsequently used the money, namely to buy more maple syrup, was not relevant to the analysis.

[62] Furthermore, in this Court and for the first time, Mr. Vallières takes issue with the trial judge's failure to apportion the \$10,000,000 between his co-accused and him. It is sufficient to note that Mr. Vallières did not prove at trial, or on appeal for that matter, that there was a risk of double recovery of that amount, which meant that the trial judge in fact had no choice but to order him to pay a fine equal to that amount.

[63] Nor can the Crown be reproached for not discharging its duty in this case. At the time of the trial, the Crown's theory was that Mr. Vallières had paid only his co-accused Sylvain Bourassa, Martin Vallières and Yves Lapierre, his other accomplices having had possession or control of proceeds of crime from other sources. From the Crown's perspective, the fine imposed on Mr. Vallières gave rise to a possibility of double recovery only with respect to the fines imposed on Sylvain Bourassa, Martin Vallières and Yves Lapierre, which totalled \$204,400.

[64] However, in light of the evidence available to the Crown, that possibility of double recovery was non-existent. Considering, as a guide, that the value of the stolen syrup was over \$18,000,000, the Crown could reasonably infer that Mr. Vallières, as the directing mind of the operation, had controlled an amount much greater than \$10,204,400. Indeed, the evidence shows that Mr. Vallières had [TRANSLATION] "at least \$10,000,000" under his control (C.A. reasons, at para. 176). The Crown could therefore legitimately seek such an amount from him without deliberately creating a risk of double recovery.

[65] Moreover, even with account taken of all the fines ultimately imposed on Mr. Vallières's co-accused in connection with the criminal enterprise involving the theft of maple syrup, which together amounted to about \$2,000,000, the possibility of double recovery remained negligible from the Crown's perspective, insofar as it could reasonably assume that Mr. Vallières had actually exercised control over an amount close to the value of the stolen syrup.

[66] In the end, Mr. Vallières did not meet his burden, and he must therefore be required to pay a fine equal to the value of the property that was in his possession or under his control, that is, \$10,000,000. Even though the amount of the fine in lieu may seem high, it is warranted in light of the scheme for the forfeiture of proceeds of crime.

B. *Did the Court of Appeal Err in Failing to Allow the Parties to Be Heard Regarding the Change to the Amount of the Fine in Lieu, Given That This Question Had Not Been Raised on Appeal?*

[67] Given my answer to the first question, it is unnecessary to decide the second issue in order to dispose of the appeal. Suffice it to say that the determination of the amount of a fine in lieu involves different legal and factual considerations than the question of whether such a fine should be imposed on an offender, as this case shows. In such circumstances, a court should provide the parties with an opportunity to make submissions before deciding a question on which they have not had a chance to comment (*R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689).

VI. Disposition

[68] For these reasons, the appeal is allowed. The fine imposed on Mr. Vallières is set at \$9,171,397.57, that is, \$10,000,000 minus the amount of the restitution order, \$828,602.43. Mr. Vallières has 10 years to pay this fine, in default of which he is subject to imprisonment for 6 years consecutive to any other term of imprisonment.

Appeal allowed.

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