Date: 20010517
Docket: CAC 166209

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Marriott, 2001 NSCA 84]

Glube, C.J.N.S.; Bateman and Saunders, JJ.A.

IN THE MATTER OF:

AN APPLICATION BY THE ATTORNEY GENERAL OF CANADA FOR FORFEITURE OF PROPERTY OF RICHARD JOSEPH MARRIOTT, DECEASED and GAIL STONE, DECEASED, PURSUANT TO SECTION 462.38 OF THE **CRIMINAL CODE**

REASONS FOR JUDGMENT

Counsel:	M. Karen Bailey for the appellant Lawrence Wm. Scaravelli for the respondents
Appeal Heard:	March 20, 2001
Judgment Delivered:	May 17, 2001
THE COURT:	Appeal allowed in part per reasons for judgment of Bateman, J.A.: Glube, C.J.N.S. and Saunders, J.A. concurring.

BATEMAN, J.A.:

[1] The appellant, the Attorney General of Canada, appeals from the judgment of Moir, J., [2000] N.S.J. No. 421 (Q.L.), following an *in rem* forfeiture application pursuant to s. 462.38 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

BACKGROUND:

[2] Richard Marriott ("Marriott") and Gail Stone ("Stone"), who were common law spouses, were charged on October 5, 1998 with one count of possession of proceeds of crime contrary to s. 8(1) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, (the "**CDSA**") and one count of laundering proceeds of crime, contrary to s. 9(1) of the **CDSA**, the predicate offence being drug trafficking. The Information provides:

> Richard Joseph **MARRIOTT** and Gail Marie **STONE** did, between the 1st day of January, 1993 and the 23rd day of October, 1997 … unlawfully have in their possession, property or proceeds of property, to wit: money, of a value exceeding one thousand dollars, knowing that all or part of the property or of the proceeds were obtained directly or indirectly by the commission in Canada of an offence punishable by indictment, to wit: trafficking in a narcotic (cocaine) thereby committing an offence contrary to section 19.1 of the *Narcotic Control Act* and thereafter contrary to section 8(1) (a) of the *Controlled Drugs and Substances Act*, thereby committing an offence contrary to Section 8 (2)(a) of the *Controlled Drugs and Substances Act*;
>
> **AND FURTHER THAT** Richard Joseph **MARRIOTT** and Gail Marie **STONE** did, between the 1st day of January, 1993 and the 23rd day of October, 1997, … unlawfully use, transfer the possession of, transport, transmit, send or deliver to any person or place, dispose of or otherwise deal with, in any manner or by any means, property or proceeds of property, to wit: money, with intent to conceal or convert that money or those proceeds, knowing or believing that all or part of the property or those proceeds was obtained or derived directly or indirectly, as the result of the commission in Canada of an offence punishable by indictment, to wit: trafficking in a narcotic contrary to section 4(1) of the *Narcotic Control Act;* unlawfully having in their possession the proceeds of crime contrary to Section 19.2 of the *Narcotic Control Act* and thereafter contrary to Section 9 (1) of the *Controlled Drugs and Substances Act*, and trafficking in cocaine, a substance included in Schedule 1 of the *Controlled Drugs and Substances Act* contrary to section 5(1) of the *Controlled Drugs and Substances Act*, thereby committing an offence contrary to Section 9(2)(a) of the *Controlled Drugs and Substances Act;*"

[3] In November of 1998, before the matter could be tried, Mr. Marriott and Ms. Stone were shot. He died instantly and she died six days later. Pursuant to s. 462.38 of the **Criminal Code** the Crown sought forfeiture of certain of their property which was alleged to be proceeds of crime. The *in rem* application was heard over eleven days in October 1999, and March and July 2000. The property in question was both real and personal including their residence at 15 Parkmoor Avenue, Halifax ("Parkmoor"); a lot of land in the Brookside Mews subdivision; cash in the amount of $7800 seized from Parkmoor at the time of a police search on October 23, 1997; cash of $17,178 seized from Parkmoor on November 20, 1998; three motor vehicles; a compact disc player; the monies in Ms. Stone's bank account; and $1,735.46 in an RRSP held in her name.

[4] Upon Mr. Marriott's death, his interest in the subject property passed to Ms. Stone. The heirs of Mr. Marriott released whatever interest they had in the property to the Estate of Ms. Stone. The Estate opposed the forfeiture.

[5] The trial judge found that Mr. Marriott was a drug dealer who earned substantial amounts of money from that trade throughout the time period set out in the indictment ("the charge period"). He further found that Ms. Stone knew of Mr. Marriott's source of funds. These findings were based primarily on the testimony of George Sabean, a former accomplice of Mr. Marriott and the main Crown witness.

[6] The judge ordered forfeiture of all property requested by the Crown with minor exceptions. With respect to the Parkmoor residence, he ordered forfeiture of only a part of the equity. It is in this regard that the Crown says the judge erred.

[7] For the purpose of the *in rem* application the Estate stood in the place of Gail Stone. The Estate is responding on the appeal, seeking to have the trial judgment upheld.

[8] This matter was resolved pursuant to s. 462.38 of the **Criminal Code**. There was a companion application by the Estate pursuant to s. 462.42, whereunder an innocent third party may apply for relief from forfeiture of property. It was not necessary for the judge to proceed on the latter application in view of his disposition of the forfeiture application. (In contrast see **Manitoba (Attorney General) v. Petersen,** [1992] M.J. No. 397 (Q.L.) and **Wilson et al. v. The Queen** (1993), 86 C.C.C. (3d) 464 (Ont.C.A.)).

GROUNDS OF APPEAL:

(a) Did the learned judge hearing the application err in holding that "property" as referred to in s. 462.38(2) of the **Code** is limited to "rights" in the property rather than the property itself?

(b) Did the learned judge err in failing to hold that the $43,240 down payment on the Parkmoor property and any increase in value after October 23, 1997 was not "proceeds of crime"?

(c) Did the learned judge hearing the application err in holding that he was precluded by s. 462.38(2)(b) in making an order of forfeiture with respect to proceeds of crime which arise after the charge period?

ANALYSIS:

[9] The statutory means by which an *in rem* forfeiture application can occur is circuitous. Trafficking in a narcotic is an indictable offence (s. 5(1) **CDSA**). Possessing proceeds of a **CDSA** crime is contrary to s. 8(1) of that **Act**:

> 8. (1) No person shall possess any property or any proceeds of any property knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of
>
> (a) the commission in Canada of an offence under this Part except subsection 4(1) and this subsection;
>
> . . .

[10] Pursuant to s. 9(1) of the **CDSA** it is an offence to launder proceeds of crime:

> 9. (1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal 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 or believing 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 offence under this Part except subsection 4(1);
>
> . . .

[11] The forfeiture of proceeds of crime provisions of the **Criminal Code** apply equally to proceeds of "designated substance offences" (s. 23 **CDSA**). A designated substance offence means an offence under Part I of the **CDSA**, excluding s. 4(1) possession offences, and includes trafficking in cocaine (s.5(1) **CDSA**). For the purposes of the forfeiture provisions of the **Code**, reference to an "enterprise crime offence" includes a "designated substance offence".

[12] The application for forfeiture of the Marriott/Stone property was made pursuant to s. 462.38 of the **Code**. A conviction on the underlying offence is not a prerequisite to a forfeiture order. The relevant section provides:

> 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.
>
> (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.

[13] Section 462.38 applies to property which is not the direct subject-matter of the crime. This is in contrast to s. 462.37 which empowers the Court to order forfeiture of property in relation to which the offence was committed.

[14] As defined in s. 462.3 of the **Code**, "[p]roceeds of crime means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of ... the commission in Canada of an enterprise crime offence or a designated substance offence . . .".

[15] "Property" includes (s. 2 **C.C.**):

> (a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,
>
> (b) 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, and . . .

[16] Ms. Stone and Mr. Marriott purchased the Parkmoor property in July of 1994 paying $43,240 in cash and the balance by a $40,000 mortgage. The judge found that the down payment for the Parkmoor property had derived from legitimate funds - specifically, the balance of a personal injury insurance settlement received by Mr. Marriott and the proceeds of an RRSP account in the name of Ms. Stone. The Crown does not dispute this finding regarding the source of the down payment. Those funds were in the hands of Mr. Marriott and Ms. Stone prior to the commencement of the charge period (January 1993) and were maintained, intact, until the purchase of the house.

[17] The Parkmoor residence was appraised upon purchase at $82,000. Its value at the time of Gail Stone's death in November of 1998 was $91,700. By the end of the charge period (October of 1997) the mortgage had been reduced to $17,503. The judge found that the drug trade provided the only source of funds for the mortgage payments and property improvements undertaken during the charge period. He was satisfied, as well, that the capital improvements to the property fully accounted for the increase in the appraised value. Upon the deaths of Ms. Stone and Mr. Marriott in November 1998 the balance of the mortgage was discharged through mortgage insurance.

[18] The Crown sought forfeiture of the full value of the Parkmoor property. The judge ordered that the forfeiture be limited to $32,197. This amount was comprised of the increase in the value of the home ($9700), according to the two appraisals, plus the amount by which the mortgage was reduced during the charge period ($22,497). Having found that the down payment could be traced to legitimate funds held by Mr. Marriott and Ms. Stone at the commencement of the charge period, the judge was not satisfied beyond a reasonable doubt that the entire property was “proceeds of crime”. He concluded, as well, that he could not order forfeiture of increases in the equity of the home occurring after the charge period — in particular the insurance pay-out of the mortgage balance. The Crown says that the judge

erred in excluding from forfeiture both the down payment and the paid out value of the mortgage.

(a) The Down Payment:

[19] The Crown submits that between the inception of the charge period (January 1, 1993) and the time of purchase (July 4, 1994), but for the income from the drug trade, Mr. Marriott and Ms. Stone could not have kept the legitimate money intact and available for the down payment on the house. In support of this submission, the Crown refers to the judge's finding that the legitimate funds which came into their hands during the charge period were not sufficient to cover more than their "ordinary household expenses". He found, as well, that the payments on the mortgage came from drug trafficking proceeds.

[20] In the Crown's submission, if Ms. Stone and Mr. Marriott had not had drug funds from which to attend to their needs between the beginning of the charge period and the date of purchase of the house, they would have been forced to encroach upon the RRSP and insurance settlement which were the source of the down payment. The Crown says, therefore, that the down payment for the house was an indirect benefit deriving from the criminal activity and caught within the definition of "proceeds of crime". Bolstering this submission, the Crown says that the size of the down payment, relative to the amount of the mortgage, must have been a factor in the mortgage lender's decision to advance funds for the purchase. The Crown refers, as well, to the fact that the land at Brookside Mews subdivision was listed as one of the parties' assets on the mortgage application. Brookside Mews was found to be proceeds of crime. Parkmoor was, therefore, a benefit derived indirectly from the commission of the predicate offence because Mr. Marriott and Ms. Stone could not have acquired it without the sizable down payment and the drug money used to pay living expenses prior to purchase.

[21] Thus, while the Crown does not take issue with the judge's finding that the down payment represented legitimate monies in the hands of Ms. Stone and Mr. Marriott at the commencement of the charge period, it says that those funds should have been determined by the judge to be an indirect benefit from the drug activity and, therefore, "proceeds of crime".

[22] Pursuant to s. 462.44 of the **Code**, a Crown appeal from a forfeiture order is like an appeal from a verdict of acquittal and, therefore, pursuant to s. 676(1)(a), limited to a question of law alone. The issue before us is whether the trial judge erred at law in concluding that the down payment was not

"proceeds of crime", in other words, not a benefit derived indirectly as a result of a designated substance offence.

[23] To establish the financial circumstances of Ms. Stone and Mr. Marriott during the charge period the Crown presented evidence from forensic accountant Sean Neil. Mr. Neil was able to say that the parties' net worth increased substantially from the beginning to the end of the charge period and that the increase could not be accounted for from their legitimate income. Ms. Stone had modest employment income of about $18,000, annualized. Mr. Marriott had none, as found by the judge. There was limited evidence available to Mr. Neil on the spending habits of Mr. Marriott and Ms. Stone during that period since much of their consumption was presumably paid in cash.

[24] Contrary to the assertion of the Crown, I am not satisfied that the evidence presented compelled the judge to conclude that between the commencement of the charge period and the date of the house purchase the parties, but for the income from the drug trade, would necessarily have encroached upon the legitimate funds to meet their needs. Indeed, it is questionable whether, on the evidence presented here, such an inference was even open to the judge.

[25] The finding that the down payment was not proceeds of crime is one of fact, or mixed law and fact. The Crown does not suggest that the judge applied the wrong legal test in reaching that conclusion. Thus, even if persuaded that the trial judge's finding in this regard was wrong, which I am not, we are without jurisdiction to intervene.

[26] The Crown further submits that when legitimate and illegitimate funds are mixed to acquire real property, the entire property is tainted and subject to seizure. Thus, irrespective of the source of the down payment or whether it could have been maintained but for the drug trade, it became mixed with the drug money which was used for the mortgage payments and the entire property was therefore subject to seizure. The Crown says that this follows logically from the language of the forfeiture provisions. The Crown urges that the legislation contemplates only forfeiture of the full subject property and not merely an interest in the property. In rejecting this proposition the judge said:

> ¶ 30 The first condition, proof that 15 Parkmoor Avenue is proceeds of crime, causes me a little trouble. Neither s. 462.38(2) nor the definition of "proceeds of crime" in s. 462.3 provide explicitly for the situation where an item of property is obtained partly as a result of designated drug offences and partly from legitimate

> sources. Ms. Bailey, for the Crown, agrees that a partial forfeiture is appropriate and she stresses the broadened meaning of property in the definition, "any property, benefit or advantage". The problem is, indeed, with the word "property". I must be satisfied that "any property [here 15 Parkmoor or interests in it] is proceeds of crime", and that it is "property, benefit or advantage" derived from the offences. And, the section provides that the "property" is to be forfeited to the Crown. Property is an equivocal word. It can refer to a right or a thing. In the first instance it means "the right ... to the possession, use of disposal of anything" and, in the second, it means "a thing or things belonging to some person": Oxford English Dictionary (Oxford, 1991), p. 639. The latter meaning might incline to the view that s. 462.38(2) is all or nothing. But that is outside the object of s. 462.38(2). As I read the provisions, their purpose is not to impose a penalty. Property is not forfeited as a kind of fine. Rather, the purpose is to reduce the actual profits of certain crimes where charges are laid and to reduce the expectation of profit in certain criminal businesses by placing the proceeds at risk of confiscation. It would not serve this object and its distinction from the object of imposing a penalty to provide either for the confiscation of a thing in part legitimately gained or release of a thing in part criminally gained. Further, the meaning of property as thing is not the meaning which appears in the textual context of s. 462.38(2). It is not the meaning of property intended when forfeiture is the subject. We forfeit rights, not things. Therefore, Parliament did not intend s. 462.38(2) as all or nothing. It used "property" in the sense of interests in things, and required forfeiture of the part interest where a thing was acquired in part only as proceeds of crime. I conclude that s. 462.38(2) requires me to follow part interests in things where property in the thing was acquired in part through the drug trade, and to order forfeiture of a part interest representing in value the part that has been proved beyond reasonable doubt to be proceeds of crime. (Emphasis added)

[27] I would note that, contrary to the above comments of the trial judge, the Crown did not agree that “a partial forfeiture [would be] appropriate”. A review of the transcript, including the summations of counsel, wherein the trial judge discussed this issue with the Crown, reveals that the Crown did not endorse that suggestion by the judge. Accordingly, the Crown's position on this appeal is not inconsistent with that taken at trial.

[28] I am not persuaded that the judge erred in concluding that forfeiture could be limited to an interest in property. Indeed certain sections of the forfeiture provisions allude to partial interests. Section 462.37(3) refers to property “or any part thereof or interest therein” that cannot be subject to a forfeiture order and provides for a fine in lieu of forfeiture where the subject property has been commingled with other property. Section 462.41 requires notice prior to forfeiture to any person who may have a valid interest in the subject

property and where the party is innocent in any complicity in the offence, permits the judge to grant relief from forfeiture for the whole or any part of the property.

[29] In summary, I am not persuaded that the trial judge erred in concluding that forfeiture may be limited to an interest in property nor that the down payment was not "proceeds of crime".

(b) The Mortgage Insurance Pay-out:

[30] The mortgage was discharged through insurance upon the deaths of Mr. Marriott and Ms. Stone in November of 1998. The Crown says that the judge erred in declining to order forfeiture of the mortgage free value of the property. The judge found that during the charge period the mortgage payment, which included the insurance premium, was derived entirely from drug money. It follows, says the Crown, that the mortgage insurance was an indirect benefit flowing from the illegal activity. That benefit should have been subject to forfeiture as proceeds of crime.

[31] The complicating factor is that the mortgage was maintained and ultimately discharged about a year after the end of the charge period. The respondent Estate argues that the court cannot order forfeiture of property the value of which accrued after the charge period ends.

[32] In rejecting the Crown's request to include in the forfeiture order the sum paid to discharge the mortgage the judge said:

> ¶ 31 The amount by which the equity in the residence was improved from proceeds of crime to the end of the period of the charge is $32,197. The Crown submits that I should follow increases in the value of the equity after October 23rd, 1997, particularly the pay-out of the mortgage under life insurance. It is pointed out that the insurance premiums were included with the monthly mortgage payments and were, thus, paid in part during the period of the charge. In my opinion, s. 462.38(2)(b) is preclusive of the Crown's position. I have to be satisfied that proceedings were commenced respecting designated substance offences committed in relation to the property. Proceedings were commenced in respect of the disposition of money in a period ending October 23rd, 1997. While I am satisfied that money raised from the drug trade in that period is traceable to part of the equity in the Parkmoor Avenue property, and the charges were therefore in relation to that part, s. 462.38(2)(b) does not permit me to trace cash raised after the period of the charge. Increments in the equity after October 23rd, 1997 are beyond inquiry under s. 462.38(2). Further, the right to claim under the insurance policy only arose a year after the charges.

(Emphasis added)

[33] The significant issue here was the increase in equity created through the pay-out of the mortgage. Did the judge err at law in concluding that the statute did not permit a forfeiture order in relation to that value?

[34] Where an accused has died or absconded s. 462.38(2) mandates forfeiture, on application, provided 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.

[35] The judge maintained that s. 462.38(2)(b) "precluded" him from ordering forfeiture of the paid out value of the property. He said:

> . . . While I am satisfied that money raised from the drug trade in that period is traceable to part of the equity in the Parkmoor Avenue property, and the charges were therefore in relation to that part, s.462.38(2)(b) does not permit me to trace cash raised after the period of the charge.

[36] In this regard, I would find that the trial judge erred. The Crown asserted that the mortgage insurance pay-out was "proceeds of crime". In other words, that it was a direct or indirect benefit resulting from the commission of the offence of drug trafficking. The judge did not consider whether the equity resulting from the discharge of the mortgage was a part of the "proceeds of crime", but fastened upon the timing of that pay-out. It was central to his decision that the discharge of the mortgage occurred after the end of the charge period. He was apparently of the view that the subject-matter of the forfeiture must be in existence at the time of the commencement of the proceedings. As a result, he concluded that the proceedings were not "commenced in relation to that property". This interpretation is, in my respectful opinion, flawed.

[37] The definition of "property" 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, . . ." (my emphasis). This is clearly broad enough to encompass the mortgage pay-out in order to satisfy the requirements of s. 462.38(2)(b).

[38] The "proceedings" here were those initiated by the Information charging Mr. Marriott and Ms. Stone with possessing and/or laundering illegal gains during the charge period. The "property" which was the subject-matter of the Information was money derived from drug trafficking. In establishing

that the gains were illegal, the Crown proved to the satisfaction of the judge that the two deceased accused were engaged in the predicate offence of drug trafficking. By the time of the *in rem* application the Crown was seeking forfeiture of specific property alleged to emanate from the illegal gains which property included the Parkmoor residence. The trial judge found that the Parkmoor mortgage and insurance payments during the charge period were made from the illegal gains that were the subject-matter of the charge. Parkmoor was, therefore, caught within the broad definition of "property" in s. 2 of the **Code**. The requirement of s. 462.38(2)(b) was satisfied. I would find that the judge erred at law in misinterpreting the requirements of s. 462.38(2)(b).

[39] Indeed, the judge had earlier found that the requirements of s. 462.38(2)(b) were fulfilled. In considering whether the fact that specific property in relation to which forfeiture was sought need be set out in the Information he said:

> ¶ 29 Subsection 23(1) of the *Controlled Drugs and Substances Act* applies proceeds of crime sections of the *Criminal Code*, including s. 462.38, to substance offence proceedings "with such modifications as the circumstances require". Paragraph 23(2)(a) provides that references in sections of the Criminal *Code*, including s. 462.38, to an enterprise crime offence include a designated substance offence. Subsection 2(1) of the *Controlled Drugs and Substances Act* and s. 462.3 of the *Criminal Code* define "designated substance offence", and the trafficking carried on by Mr. Marriott falls within that phrase, as do the proceeds of crime charges laid against Ms. Stone and Mr. Marriott in October 1998. With the modifications, s. 462.38(2) obligates me to order forfeiture where three conditions are proved. Firstly, I must be satisfied beyond reasonable doubt that the property is proceeds of crime within the meaning of s. 462.3, which is to say that it is "property, benefit or advantage ... obtained or derived directly or indirectly as a result of ... the commission in Canada of ... a designated substance offence ...." Secondly, I must be satisfied that proceedings were commenced in respect of a designated substance offence "in relation to that property". And thirdly, the accused in those proceedings must have died or absconded. Sadly, the couple were killed. At the time, they were charged with designated substance offences. The charges do not refer to 15 Parkmoor Avenue, or to any of the other items of property sought by the Crown except cash and the CD player. With a little editing, the relevant charges stated the couple, during the period from January 1st, 1993 until October 23rd, 1997, did,

> unlawfully have in their possession, property ... to wit: money ... knowing that .. the property ... [was] obtained ... by .. trafficking in a narcotic ..., and
>
> unlawfully use ... dispose of or otherwise deal with ... money, with intent to conceal or convert that money knowing the [money] was obtained ... as a result of ... trafficking in a narcotic ...
>
> Can I be satisfied that these charges are "in relation to that property", being 15 Parkmoor Avenue? I am. Although the charges refer to money, the laundering charge specifically refers to disposal and conversion. It contemplates other property into which the money has been converted. Further, I think the trust concept of tracing will apply. We can find the money, but it is in other things. (Emphasis added)

[40] The purpose of s. 462.38(2)(b) is to ensure that property is not forfeited where a proceeding in relation to that property has not been commenced. It does not require that the precise property sought to be forfeited be in existence during the charge period. Property may appreciate or be converted to substitute property, during or even after the charge period. Although not in existence at the time of the laying of the Information, that property may nevertheless be proceeds of crime.

[41] Having found that the judge erred, it is appropriate to consider whether the mortgage pay-out is “proceeds of crime”. The judge found that during the charge period the mortgage, including insurance premiums, was paid entirely from drug money. The insurance coverage was thus attributable to the illegal gains from the predicate offence — the drug trafficking. If the discharge of the mortgage through insurance had occurred prior to the end of the charge period, the full value of Parkmoor (excepting the down payment) would be proceeds of crime.

[42] Does it follow that the mortgage-free value of Parkmoor, attained after the expiration of the charge period, was “proceeds of crime”? The *origin* of the mortgage insurance as well as its maintenance over the charge period is clearly a benefit derived from the criminal activity. It is my view that the fact that this entitlement to insurance was preserved for the year after the end of the charge period from funds of unknown origin does not preclude a finding that the continued availability of the insurance is an “indirect benefit” of the illegal activity. I am satisfied, beyond a reasonable doubt, that, in these circumstances, the insurance proceeds are “proceeds of crime” and should be subject to forfeiture. In reaching this conclusion I have taken

into account the following: that from its inception in July of 1994 to the end of the charge period in October of 1997 the mortgage insurance was maintained entirely from funds illegally obtained; that the time during which the insurance premiums were paid after the end of the charge period is short relative to the length of the charge period; that the mortgage insurance pay-out is not an accumulation of capital, part of which may have derived from legitimate funds; and that there is no suggestion that any innocent third party contributed to the maintenance of the asset. If the mortgage payments had not been made during the charge period with the monies from the drug trade the insurance policy would have been terminated. I am satisfied that any amount paid down on the principal of the mortgage during the post charge period was negligible and, therefore, for practical reasons, should not be excluded from forfeiture.

DISPOSITION:

[43] Accordingly, I would allow the appeal in part. Pursuant to s. 462.38(2) of the **Criminal Code**, in addition to the property ordered forfeited by Justice Moir, 15 Parkmoor Avenue, Halifax, shall be forfeited save and excepting the amount of $43,240 representing the down payment on the property.

[44] The parties shall, within 30 days of the date of the judgment, submit a form or Order for approval by this Court.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A.