Translated from the original French

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| Nguyen c. Directrice des poursuites criminelles et pénales | | | | | | 2021 QCCQ 2722 |
| COURT OF QUÉBEC | | | | | | |
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| CANADA | | | | | | |
| PROVINCE OF QUEBEC | | | | | | |
| DISTRICT OF | | | MONTREAL | | | |
| LOCALITY OF | | | | MONTREAL | | |
| “Criminal and Penal Division” | | | | | | |
| Nos.: | | **500-01-091480-134 500-21-079604-133**  **500-26-082614-144 500-38-017678-136**  **500-26-082615-141 500-38-017680-132**  **500-26-082613-146 500-38-018621-143**  **500-26-082931-142 500-38-018617-141**  **500-26-077860-132 500-38-018671-148**  **500-26-077668-139 500-38-018618-149**  **500-26-077670-135 500-38-018622-141**  **500-26-077750-135 500-38-018623-149**  **500-26-077672-131 500-38-018619-147**  **500-26-077679-136** | | | | |
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| DATE: | **April 9, 2021** | | | | | |
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| PRESIDING: | | | THE HONOURABLE | | ANDRÉ PERREAULT, J.C.Q. | |
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| **THI HUYEN NGUYEN**  **THI HONG CUN**  **ALEXANDRE NGUYEN**  Applicants  v. | | | | | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | | | | | |
| Respondent | | | | | | |
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| |  | | --- | |  | | **CORRECTION OF THE JUDGMENT RENDERED ON APRIL 8, 2021** | | | | | | | |

1. Considering that the name of the applicant’s lawyer is Annik Magri.

# FOR THESE REASONS:

1. The judgment rendered by the undersigned on April 8, 2021, should be corrected so that the name of counsel for the applicants, Mtre Annik Magri, replaces the name Mtre Annick Maori at the very end of the judgment.

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| Mtre Andrew Barbacki  Mtre Annik Magri | | |
| Counsel for the applicants | | |
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| Mtre Émilie Robert | | |
| Counsel for the respondent | | |

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| COURT OF QUÉBEC | | | | | | | |
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| **THI HUYEN NGUYEN**  **THI HONG CUN**  **ALEXANDRE NGUYEN**  Applicants  v. | | | | | | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | | | | | | |
| Respondent | | | | | | | |
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| |  | | --- | |  | | **JUDGMENT ON THE APPLICATION TO DISMISS THE RESPONDENT’S APPLICATION FOR FORFEITURE, FOR THE RETURN OF SEIZED PROPERTY, AND TO CANCEL THE RESTRAINT ORDERS**  **Sections 490(4), 462.37, and 462.43 *Cr. C*., s. 16 *CDSA*, ss. 7, 11(b) and (d) and 24 of the *Canadian Charter of Rights and Freedoms*** | | | | | | | | |

# INTRODUCTION

1. This judgment concerns the power of a judge of the Court of Québec to hear an application for forfeiture of things seized (s. 490(9) *Cr. C*.), forfeiture of property obtained by crime (s. 491.1 *Cr. C*.), forfeiture of proceeds of crime (ss. 462.37(2) *Cr. C.*), and forfeiture of non-chemical offence-related property (s. 16(2) of the *Controlled Drugs and Substances Act* (*CDSA*)), when another judge of the Court of Québec acting as case management judge has stayed the proceedings for unreasonable delay with respect to the three applicants who seek the return of the property, after another co-accused pleaded guilty to the count of production of cannabis.

# BACKGROUND

1. Following an investigation conducted by the Service de police de la Ville de Montréal (SPVM) in the file “PROPAGATION”, the three applicants, along with eight other persons, were charged with various counts under the *CDSA*, and with theft, possession of stolen goods, and conspiracy to produce cannabis under the *Criminal Code*.
2. The applicants Thi Nuyen Nguyen and Thi Hong Cun were arrested on June 20, 2013, and July 3, 2013, respectively, pursuant to an arrest warrant issued on June 20, 2013, containing 11 counts, while Alexandre Nguyen was arrested on April 29, 2014, pursuant to an arrest warrant issued on January 26, 2014, containing only the count of conspiracy.
3. Over the course of this investigation, numerous assets were seized during the execution of multiple judicial authorizations in Quebec and British Columbia (those concerning the applicants are listed in the title of this application), as well as through warrantless seizures.
4. Other assets were subject to restraint orders as offence-related property or the proceeds of crime, as it appears from exhibit R-2. Specifically, this property includes money, immovables, bank accounts, documents, and a ring.
5. Search warrants 500-26-082614-144, 500-26-082615-141, 500-26-082613-146, and 500-26-082931-142 were issued under s. 487 *Cr. C*. The property seized in British Columbia was cash and documents.
6. Search warrants 500-26-077860-132, 500-26-077668-139, 500-26-077670-135, 500-26-077750-135, 500-26-077672-131, and 500-26-077679-136 were issued under s. 11 of the *CDSA.* The property seized in Montreal was money, documents, items that the Crown considers to be cannabis production equipment, a recorder/camera, and a computer.
7. File 500-21-079604-133 was opened following a warrantless seizure report to a justice of the peace when applicant Thi Huyen Nguyen’s was arrested.
8. On June 25, 2013, restraint orders 500-38-017678-136 and 500-38-017680-132 were made under s. 14 *et seq*. of the *CDSA* concerning money restrained instead of five immovables located in Montreal.
9. These orders were made in anticipation of potential applications for forfeiture of property under s. 16 *et seq.* *CDSA*.
10. The Crown alleges that the applicant Thi Hong Cun was the owner of one of the immovables, namely the one located on De L’Assomption Boulevard, and that she was involved in the plantation in the immovable on Châteauneuf Street, which belonged to applicant Thi Huyen Nguyen.
11. The Crown intends to prove that Manh Hung Nguyen, the co-accused who pleaded guilty to the production of cannabis, lived in the immovable on De L’Assomption Boulevard with his family, where 400 cannabis plants were seized, and that he tended to a plantation of 845 cannabis plants in the immovable on Châteauneuf Street.
12. The Crown seeks the forfeiture of various assets seized in these five immovables and other searched immovables connected to the accused as offence-related property within the meaning of the *CDSA*.
13. Three of the five immovables were sold during the proceedings, but the positive balances were restrained instead. These amounts are today the object of an application for forfeiture by the Crown as offence-related property within the meaning of the *CDSA*.
14. The Crown seeks the forfeiture of the $129,085.87 restrained instead of the immovable on De L’Assomption Boulevard owned by the applicant Thi Hong Cun and of the $84,565.19 restrained instead of the immovable located on Châteauneuf Street owned by the applicant Thi Hong Cun.
15. Restraint orders 500-38-018621-143, 500-38-018617-141, 500-38-018671-148, and 500-38-018618-149 were made on April 24 and 30, 2014, pursuant to s. 462.33 *Cr. C*. in respect of three immovables located in British Columbia and $29,4695 held in trust at a law firm for the applicant Alexandre Nguyen, as the justice of the peace was satisfied that there were reasonable grounds to believe that this property could be the subject of an application for forfeiture as proceeds of crime in accordance with s. 462.37(2.01) or s. 462.38(2) *Cr. C*.
16. Restraint orders 500-38-018622-141, 500-38-018623-149, and 500-38-018619-147 were made on April 24, 2014, pursuant to s. 462.33 *Cr. C*. in respect of offence-related property in accordance with s. 490.8 *Cr. C*.
17. They concern immovables and money in bank accounts in British Columbia. They were issued because the judge was satisfied that there were reasonable grounds to believe that the property was offence-related property that might be the subject of an order of forfeiture in accordance with s. 490.1 *Cr. C*. or an order of forfeiture as proceeds of crime in accordance with s. 462.37(2.01) or s. 462.38(2) *Cr. C*.
18. Money in Canadian, American, and European currencies, as well as gift cards and bank account balances, were also seized during the searches executed at each phase of the investigation.
19. The Crown asks that it be forfeited as proceeds of crime. It intends to adduce evidence of the results of the searches, the observation and surveillance reports, the forensic accountant reports, and the extensive documentary evidence.
20. The Crown alleges that in 2013, the investigation revealed that five immovables were used or had been used as residential plantations controlled by one of the co-accused. These immovables were generally not inhabited by the accused. They were the owners and appeared to look after a plantation located in the immovable of another family member who was also charged in the same file.
21. The Crown intended to connect each of the co-accused to the counts concerning them.
22. On November 25, 2016, Manh hung Nguyen pleaded guilty to producing cannabis in Montreal between November 28, 2012, and June 19, 2013. He was given a sentence of 12 months’ imprisonment.
23. On that same date, the Crown stated that it did not have evidence to adduce with respect to two of the co-accused.
24. The three applicants were charged with, *inter alia*, conspiracy to produce cannabis in Montreal during the same period, and two of the three applicants, Thi Nuyen Nguyen and Thi Hong Cun, were also charged with producing cannabis in Montreal between November 28, 2012, and June 19, 2013.
25. On December 15, 2017, the Honourable Pierre Dupras of the Court of Québec, acting as case management judge under s. 551.1 *Cr. C.,* ordered a stay of proceedings due to unreasonable delays[[1]](#footnote-1) in the file, which at the time concerned eight co-accused, including the three applicants in the present application to dismiss.
26. On October 3, 2019, the Court of Appeal of Quebec dismissed the Crown’s appeal.[[2]](#footnote-2)
27. On November 6, 2019, the respondent sent the applicants a request to place the case on the roll for December 20, 2019, seeking to dispose of the property seized and restrained and informing them that a formal application would follow.
28. On November 19, 2019, the respondent sent the applicants a draft application under 490(9) *Cr. C*. seeking the forfeiture of certain property, specifically, the property seized and restrained that the respondent considered offence-related property or proceeds of crime, on the grounds that it was [translation] “tainted by illegality”, as well as the return of certain other property.
29. On October 15, 2020, the three applicants filed before the Court of Québec an application for the return of things seized and property subject to restraint orders under ss. 490(7) and 490(9)(c) of the *Cr. C*. That application is still pending.
30. On January 15, 2021, the applicants received an amended version of the respondent’s draft application announcing that the latter also intended to seek the forfeiture of certain property under s. 462.37(2) *Cr. C*. and s. 16(2) *CDSA*.
31. The respondent consented to return all documents seized as well as a ring to the applicants. It seeks the forfeiture of all the other property related to the three applicants.
32. On February 2, 2021, the Crown filed an application for the forfeiture of offence-related property, of proceeds of crime, and of property tainted by illegality, as well as for the return of property (ss. 462.37(2) and 490(9) *Cr. C.*, and s. 16(2) *CDSA*).
33. While awaiting the outcome of the application to dismiss, 20 days of trial before the undersigned were reserved for the weeks of May 3, May 10, May 24, and June 7, in the event that the hearing on the Crown’s application for forfeiture had to be held.
34. The applicants submit that, since the stay of the proceedings against them, the respondent has had no procedural vehicle under the statutory law to seek the forfeiture of their property because there can no longer be a conviction that could justify such a request and because this property is not unlawful *per se*.
35. In the view of the applicants, allowing a hearing to be held on the application for forfeiture of property would render the stay of proceedings ordered obsolete, as the applicants would still find themselves standing trial in a proceeding involving the same interests.

# ISSUES

1. The issues that the Court must rule on are the following:
2. Does the undersigned have jurisdiction to hear the application for forfeiture and the application to dismiss the application for forfeiture?
3. Is s. 490(9) *Cr. C*. a procedural vehicle available to the respondent to seek the forfeiture of property?
4. Are s. 462.37(2) *Cr. C*. and s. 16(2) *CDSA* procedural vehicles available to the respondent to seek the forfeiture of the property?
5. Does the stay of proceedings for unreasonable delay prevent the Crown from seeking the forfeiture of the property?

# THE POSITIONS OF THE PARTIES

1. The applicants answer yes to the first question and no to the three other questions. They add that on the date the application to dismiss was filed, over 91 months had elapsed since the issue of the arrest warrants against the applicants Thi Nuyen Nguyen and Thi Hong Cun, and over 83 months since the warrants against Alexandre Nguyen.
2. The Crown answers yes to all the questions and, in the alternative, submits that if s. 490(9) *Cr. C*. does not apply after the commencement of the proceedings, its application for forfeiture has been amended to add s. 491.1 *Cr. C*., should the Court prefer to use that provision for the forfeiture of all or part of the property concerned.

# ANALYSIS

#### (1) Does the Court have jurisdiction to hear the application for forfeiture and the application to dismiss the application for forfeiture?

1. Subject to the possible conclusions on the application to dismiss, the parties all agree that the undersigned has jurisdiction to deal with the applications.
2. Whether under s. 16(2) *CDSA*, s. 491.1(2), or s. 462.37(2) *Cr. C*., jurisdiction is conferred on the court seized of the matter. The Court will discuss s. 490(9) *Cr. C*. below.
3. Dupras J., who stayed the proceedings, was acting as case management judge. Any judge of the Court of Québec could have heard the trial. The undersigned has jurisdiction to hear the application for forfeiture and the application to dismiss.

#### (2) Is s. 490(9) *Cr. C.* a procedural vehicle available to the respondent to seek the forfeiture of property?

1. A court that is not a superior court has jurisdiction to make forfeiture orders only when they are based on a power set out in a statutory provision.[[3]](#footnote-3)
2. When the Crown seeks the forfeiture of seized property because possession of it by the person from whom it was seized is unlawful under s. 490(9) *Cr. C*., and a person asks that such property be returned to him or her, that person must establish that he or she was in possession of the property when it was seized.
3. This is sufficient to establish a presumption of the person’s right of possession. He or she does not have to prove that the property is not tainted by illegality. The Crown has the burden of proving beyond a reasonable doubt that the thing is tainted by illegality.[[4]](#footnote-4)
4. This principle applies to an application to return the thing seized under the *Criminal Code*, another statute, [[5]](#footnote-5) or the *Charter*. [[6]](#footnote-6)
5. With respect to the person who applies for the return of a thing seized, the procedural vehicle is the one available under s. 490(7), (8) and (9) *Cr. C*.
6. As McLachlin C.J. explained in *Raponi*,[[7]](#footnote-7) s. 490(9) permits return of items where (1) the time for detention has expired and proceedings have not been instituted, or (2) where the time has not expired but the item is not required for an investigation or proceeding.
7. The applicants submit *Canada (Procureur Général) v. Vincent*,[[8]](#footnote-8) where the Court of Appeal reiterated the words of Hugessen J. of the Federal Court of Appeal in *Lagiorgia v. Canada*,[[9]](#footnote-9) who noted that the only circumstances he could think of as justifying a court in refusing an order to return property seized in violation of ss. 8 and 24 of the *Charter* would be where the initial possession by the person from whom the things were seized was itself illicit, for example in the case of prohibited drugs or weapons.
8. In that case, the applicants had search warrants for unstamped tobacco products issued in violation of s. 8 of the *Charter* quashed through an application for *certiorari* presented to a judge of the Superior Court.
9. The trial judge then ordered the return of all the property seized to the persons who had possession of it at the time of the search.
10. The Court of Appeal allowed the appeal in part and set aside the order to return the items seized.
11. In the view of the three applicants in the case at bar, that case is distinguishable from this one in that the unstamped tobacco products for which the excise duties had not been paid constituted property rendered unlawful and unreturnable on its very face by the mere operation of the *Excise Act*.
12. With respect, this is not determinative of the dispute. In this case, the Court must in fact decide whether the Crown can present its application, which aims to establish, beyond a reasonable doubt, that the property concerned by the application for forfeiture is tainted by illegality under s. 490(9) *Cr. C*., that it is proceeds of crime under s. 462.37(2) *Cr. C*., or that it is offence-related property under s. 16(2) *CDSA*.
13. An application for forfeiture is included in the expression “other proceeding” used in s. 490(1)(b) *Cr. C*., which provides that the thing can be detained until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.[[10]](#footnote-10)
14. Although s. 490(7) and (8) *Cr. C*. might be understood, when considered in isolation, to apply once proceedings have been instituted, s. 490(9) *Cr. C*. applies only when proceedings have not been instituted or their detention is no longer necessary.[[11]](#footnote-11)
15. Once proceedings have been instituted, the court with jurisdiction over the trial is the one with jurisdiction to render orders with respect to the property.[[12]](#footnote-12)
16. Section 490 *Cr. C*. does not provide a specific mechanism to deal with the disposal of exhibits, and the only provision that refers to a time subsequent to the institution of proceedings is s. 490(4) *Cr. C*., which provides that the justice of the peace must forward the thing detained to the clerk of the court before which the trial will take place for detention.
17. Section 490(4) *Cr. C*. is merely declaratory of a practice; it does not provide for the making of any order.[[13]](#footnote-13)
18. The Crown referred to a judicial debate that has emerged in Quebec in recent weeks concerning the application of s. 490(9) *Cr. C*. after proceedings have commenced.
19. In *Guimont*, on the one hand, the Court of Appeal of Quebec upheld the judgment of Huot J. of the Superior Court that applied s. 490(9) *Cr. C*. after a stay of proceedings for unreasonable delay,[[14]](#footnote-14) when the appellants had initially been convicted by a jury.
20. On the other hand, Lachance J. concluded that a provincial court judge does not have the power under s. 490 *Cr. C*. to order the forfeiture of property not filed into evidence after the trial is over and that the entire regime of s. 490 *Cr. C*. is no longer applicable once the proceedings have commenced.[[15]](#footnote-15) However, she specified that as a judge of the Court of Québec, the judge nevertheless had jurisdiction to act, but under s. 491.1(2) *Cr. C*.[[16]](#footnote-16)
21. In *Guimont*,[[17]](#footnote-17) the Court of Appeal authorized the appeal in 2017 and ordered a stay of proceedings due to unreasonable delay. The Crown presented an application for disposal of things seized under s. 490(5) and (9) *Cr. C*.
22. At the same time, the appellants presented an application for the return of seized property under s. 490(7) and (9) *Cr. C.*
23. The Court of Appeal concluded that the judge had not erred in ordering the forfeiture of the seized items, noting that, at the stage of the disposal or return of seized property, the guilt or innocence of the accused is no longer in question and the debate has shifted to the legitimacy and lawfulness of the possession.
24. In *9141-2033 Québec inc.*,[[18]](#footnote-18) Lachance J. concluded that the trial judge who acquitted the two co-accused had used the wrong procedural vehicle by mistakenly interpreting s. 490(9) to find in it the power to order the forfeiture of the truck seized without a warrant that had not been filed into evidence during the trial.
25. Lachance J. relied on *Echostar Corporation c. Service des poursuites pénales du Canada*,[[19]](#footnote-19) where Vauclair J., now of the Court of Appeal of Quebec, noted that a minority of cases conclude that provincial court judges retain jurisdiction to dispose of property under the authority of s. 490(9) even after proceedings have been instituted and have ended, and that the prevailing case law seems to indicate that only a superior court can dispose of seized goods that are not court exhibits once proceedings are instituted and, especially, once they have ended.
26. Lachance J. found that the powers vested by s. 490 *Cr. C.* did not survive the trial and that only the Superior Court could dispose of the truck.[[20]](#footnote-20)
27. However, she acknowledged that the trial judge had jurisdiction to apply s. 491.1(2), which provides, among other things, that where an accused is on trial, the court, if it finds that an offence has been committed and the accused is not convicted, may order property not needed in other proceedings forfeit if its legitimate owners, or the person lawfully entitled to its possession, are not known.
28. Lachance J. therefore applied the remedial provision of s. 686(1)(b)(iii) *Cr. C*. to dismiss the appeal, ruling that s. 491.1(1) *Cr. C*. allowed the trial judge to act as the court before which the trial took place and the fact that the accused were acquitted does not strip that judge of jurisdiction to dispose of this property.
29. In *R. c. Garneau*,[[21]](#footnote-21) Pierre Labrie J. noted that *R. c. Desjardins*[[22]](#footnote-22) may suggest that the regime of s. 490 *Cr. C.* applies despite the institution of proceedings.
30. However, referring to *Spindloe*[[23]](#footnote-23) and the remarks of Vauclair J. in *Echostar Corporation,*[[24]](#footnote-24) whose remarks were accepted in *Gagnon*,[[25]](#footnote-25) he concluded that the scope of application of this provision is rather restricted.
31. The applicants note that in *Gagnon*,[[26]](#footnote-26) the Court of Appeal found that quashing the convictions entailed quashing the orders of forfeiture of the offence-related property made under s. 16 of the *CDSA* and other orders made after an application under s. 490(9) *Cr. C*. and s. 462.37 *Cr. C.* was filed.
32. The Court notes that the Court of Appeal ordered a new trial and stated that it was clear that the orders of forfeiture should be quashed in this context.[[27]](#footnote-27)
33. The Court of Appeal must be understood to have referred the outcome of the orders of forfeiture to the trial judge presiding over the new trial that had just been ordered. It did not decide that the property should be returned under s. 490(9) *Cr. C*.
34. Section 490(9) *Cr. C*. does not provide for an application for disposal of things seized. Section 490(9) *Cr. C*. comes into play to address situations where persons are given the power to make an application under the other subsections of s. 490 *Cr. C*. In the absence of that power, s. 490(9) *Cr. C*. does not apply.[[28]](#footnote-28)
35. The Court identifies two difficulties if s. 490(9) *Cr. C.* were to apply to exhibits filed in the context of instituted proceedings.
36. The first difficulty is the fact that, because s. 490(9) *Cr. C*. gives no power to a judge of a superior court of criminal jurisdiction except in the case of an order for further detention exceeding one year from the day of seizure, the Court of Appeal stated that this would mean that, in the case of a Superior Court trial that has concluded, the disposal of property must be before the provincial court, which is unlikely to have been the legislature’s intention.
37. The second difficulty with the interpretation that s. 490(9) *Cr. C*. applies to exhibits is that it would mean that the return or forfeiture of the property depends on the lawfulness of the possession at the time of seizure, without concern for maintaining the public’s respect for the administration of justice. The Court gives the example of a knife used to inflict violence.[[29]](#footnote-29)
38. The three applicants consider that the judgments[[30]](#footnote-30) cited by the Crown in support of their application for forfeiture based on s. 490(9) *Cr. C* are of no help to it in this regard.
39. In the Court’s view, whether these judgments have an impact on an application for forfeiture based on s. 490(9) *Cr. C*. is precisely what must be decided.
40. In *Directeur des poursuites criminelles et pénales du Québec c. Lacelle*,[[31]](#footnote-31) Bonin J. ruled that the prosecution does not have to prove that the money came from a specific transaction or a specific crime to seek its forfeiture pursuant to s. 490(9) *Cr. C*. The three applicants correctly note that this has not been supported in the case law.
41. However, in the Court’s view, it is important to note that no decision in the case law has taken exception to Bonin J.’s interpretation either.
42. The Crown does not have the onus of establishing that the proceeds of crime came from a specific transaction. It must, however, prove that a designated substance offence was committed and identify the source of this money based on the indicia.[[32]](#footnote-32)
43. The three applicants submit that this applies to s. 462.37 *Cr. C.*, not to s. 490(9) *Cr. C*.
44. The applicants are of the view that the specific forfeiture regimes set out in the *Criminal Code* and the *CDSA* are a bar to applications concerning these subjects being brought under s. 490 *Cr. C*.
45. In this regard, the Court finds that nothing in the wording of s. 462.37(2) *Cr. C.* and s. 16(2) *CDSA* rules out establishing a forfeiture power based on ss. 490 or 491.1 *Cr. C*.
46. In the Court’s view, although there is still a debate with respect to the application of the regime of s. 490 *Cr. C.* when proceedings have commenced, there is no longer any debate regarding the lack of jurisdiction of a provincial court judge to apply s. 490(9) *Cr. C*. with respect to property that has not been filed as exhibits.
47. Lachance J.’s conclusion was not called into question by *Guimont*,[[33]](#footnote-33) where the order of forfeiture under s. 490(9) *Cr. C.* was rendered by a judge of the Superior Court.
48. This is sufficient to resolve the issue of the application of s. 490(9) *Cr. C*. in this case.
49. As a judge of the Court of Québec, the Court does not have jurisdiction to apply 490(9) to seized property not filed into evidence in proceedings that were instituted and concluded.
50. The Court does, however, have jurisdiction to act pursuant to s. 491.1(2) *Cr. C*., as argued in the amended application for forfeiture.[[34]](#footnote-34) This provision does not require that the accused was convicted, but solely that an offence was committed and that, at the time of the trial, the property obtained by the commission of the offence is before the court or has been detained so that it can be immediately dealt with, and that this property will not be required as evidence in any other proceedings. That is the case here.
51. Based on this analysis, the Court adopts the following reasoning:

* Section 490(9) *Cr. C*. does not apply once proceedings have been instituted, as in this case.
* Section 491.1 *Cr. C*. may be invoked in the alternative by the Crown, as is the case here. The fact that a co-accused was convicted suffices for the Court to determine whether to rule that any detained property be returned or forfeited, including in respect of all the co-accused. The determination of lawful ownership or the right of lawful possession must be made in the context of the application for forfeiture, even in respect of the co-accused. The Crown cannot be prevented from proving beyond a reasonable doubt that the property that was seized and that was owned by or in the possession of the three applicants, regarding which proceedings were stayed due to unreasonable delay, must be forfeited because its ownership was not lawful, they did not have lawful possession of it, and no lawful owner or possessor is known.

#### (3) Are s. 462.37(2) *Cr. C.* and s. 16(2) *CDSA* procedural vehicles available to the Crown to seek the forfeiture of the property?

1. The three applicants submit that it is apparent upon reading s. 462.37 *Cr. C*. that the person named in a restraint order must be convicted of a designated substance offence.
2. They base their reasoning on ss. 462.32, 462.33, and 462.37 *Cr. C*.
3. The procedures for the interim preservation of property, namely, special search warrants under s. 462.32 *Cr. C*., which concerns movable and tangible property, and restraint orders under s. 462.33 *Cr. C*., which concerns immovables or intangible property such as bank accounts, are pre-trial measures that aim to prevent the wasting of illegally obtained property and to make it possible for that property to be forfeited after a conviction is secured.[[35]](#footnote-35)
4. For the purposes of Part XXI of the *Criminal Code*, relating to appeals of indictable offences, an order of forfeiture of the proceeds of crime is considered a sentence.[[36]](#footnote-36)
5. Although it is correct to say that forfeiture and a fine in lieu of a forfeiture order are technically part of a sentence within the definition of that word in s. 673 *C. Cr*., they are not considered a means to punish offenders, but a means to replace the proceeds of crime.[[37]](#footnote-37)
6. The purpose of the provisions of Part XII.2 (ss. 462.3 to 462.5) of the *Criminal Code*, which deals with the proceeds of crime, is to ensure that crime does not pay and to deter offenders by depriving them of their ill-gotten gains.[[38]](#footnote-38)
7. Forfeiture ordered in accordance with s. 462.37(1) *Cr. C*. stems from a conviction or a discharge.[[39]](#footnote-39)
8. The three applicants submit that they should be treated by the Court as though they have been acquitted and that, therefore, the applicable principles are those in *Collins*,[[40]](#footnote-40) where the Court of Appeal ruled that refusing to return money seized under the *Narcotic Control Act* to an acquitted person subjects that person to a fine for an offence of which he or she has been acquitted.
9. The Court notes that the Director of Criminal and Penal Prosecutions’ application for forfeiture specifies which assets are connected with each of the three applicants and that these assets are tainted by illegality, are offence-related property, or the proceeds of crime.
10. The three applicants argue that, by clinging to Manh Hung Nguyen’s guilty plea, the Crown leads the Court to punish the three applicants for his crime when he has no connection to a restraint order that concerns other persons.
11. In the Court’s view, this way of perceiving the approach ignores the Crown’s stated intention to allow the Court, at the end of the hearing on the application for forfeiture, to reach one of the following conclusions, taking into account the fact that the Crown does not invoke s. 16(1) CDSA or s. 462.37(1) Cr. C.

## (a) Is the Court satisfied beyond a reasonable doubt that this is offence-related property in respect of which the evidence does not establish to the satisfaction of the Court that it is related to the commission of the designated substance offence of producers of cannabis to which Manh Hung Nguyen pleaded guilty? (s. 16(2) CDSA)

## (b) Is the Court satisfied beyond a reasonable doubt that this is proceeds of crime in respect of which the evidence does not establish to the satisfaction of the Court that it is related to the commission of the designated substance offence of production of cannabis to which Manh Hung Nguyen pleaded guilty? (s. 462.37(2) Cr. C.)

1. Regarding the question relating to s. 16(2) *CDSA*, the offence-related property of which forfeiture is sought need not be related in any way to the offence to which Manh Hung Nguyen pleaded guilty.
2. Proof beyond a reasonable doubt that a designated substance offence under the *CDSA* was committed by means of or in respect of the property, or that the property was used in any manner in connection with the commission of such an offence, or that it was intended for use for the purpose of committing a designated substance offence suffices.[[41]](#footnote-41)
3. The same holds true regarding the issue relating to s. 462.73(2) *Cr. C*.[[42]](#footnote-42)
4. The proceeds of crime of which forfeiture is sought need not be related in any way to the offence to which Manh Hung Nguyen pleaded guilty. Proof beyond a reasonable doubt that the property was obtained or derived directly or indirectly from the commission of a designated substance offence or an act or omission that would have constituted a designated substance offence had it occurred in Canada suffices.
5. In *Croussette*,[[43]](#footnote-43) the Court of Appeal of Quebec noted that ss. 490.1(2) and 462.37(2) *Cr. C*. and s. 16(2) *CDSA* allow for the forfeiture of property even if it is not related to the offence, on the condition that the evidence establishes that it is, depending on the case, offence-related property or the proceeds of crime.
6. In *Vallières*,[[44]](#footnote-44) the Court of Appeal reiterated that, under s. 462.37(2) *Cr. C*., the Court has discretion to order forfeiture if it is nevertheless satisfied beyond a reasonable doubt that it is the proceeds of crime unrelated to the designated substance offence of which the accused is convicted.
7. In paragraph 135 of their application to dismiss, the three applicants submit that *Bebawi*[[45]](#footnote-45) noted [translation] “that forfeiture orders rendered under s. 462.37 *Cr. C*. are suspended as of right when the conviction is appealed” to argue that this shows that such a verdict is therefore a prerequisite to such an application for forfeiture.
8. This is not how the Court reads the excerpt concerned.
9. The Court notes that the Court of Appeal relied only on s. 462.37(1) *Cr. C*. and not on s. 462.37 *Cr. C*. in its entirety, because s. 689(1) *Cr. C*. provides only for suspension when the order is rendered pursuant to s. 462.37(2).
10. This is because, under s. 462.37(2), the Court is not satisfied that the property was obtained through the commission of the designated substance offence of which the offender was convicted or discharged, whereas under s. 462.37(1), the offender must have been convicted or discharged.
11. In this case, when it intends to establish that property constitutes proceeds of crime, the Crown invokes s. 462.37(2), and not s. 462.37(1) *Cr. C*.
12. At paragraph 151 of their application to dismiss, the three applicants submit that the forfeiture order that may be rendered under s. 16(2) *CDSA* is still the one set out in s. 16(1) *CDSA* and that in both situations, [translation] “the person concerned must have been either convicted of a designated substance offence or discharged”.
13. In so doing, the applicants appear to be adding a requirement that is not included in s. 16(2) *CDSA* in the case of co-accused of whom only one or some are convicted. The person convicted must be the same person who is the subject of the application for an order.
14. Accepting the applicants’ reasoning would mean that the following situation could occur. A and B are co-accused of production of cannabis in a residence owned by B. A is convicted. B is acquitted. A restraint order naming B as the person believed to be in possession of the property is rendered. The Crown cannot apply for the forfeiture of B’s residence, which the evidence shows was used by B for the storage of Schedule III and IV substances for the purpose of trafficking, because B was acquitted of the offence for which A was convicted.
15. The applicants take issue with some aspects of the reasoning of the Court of Appeal in *Vellone*.[[46]](#footnote-46)
16. For example, the applicants contest that in the case of an acquittal, whether or not resulting from a constitutional remedy, s. 16(2) *CDSA* can serve as a basis for an order of forfeiture of the residence.
17. They also take issue with the Court of Appeal’s statement that the application for forfeiture is more akin to a civil proceeding than a criminal one.
18. The Court notes that, at the time of their submissions, the applicants did not know that the Supreme Court of Canada would refuse leave to appeal in *Vellone*.[[47]](#footnote-47)
19. The Court of Appeal noted that the immovable owned by Mr. Vellone could very well have belonged to a third party who had never been the subject of criminal charges.[[48]](#footnote-48)
20. The applicants rely on *Collins*[[49]](#footnote-49) to argue that when an accused is acquitted, the property should be returned. In that case, the property was money.
21. The Court notes that Mr. Collins and his co-accused were all acquitted, that the money was related to offences of which they had been acquitted, and that there was no provision in the *Narcotic Control Act* at the time similar to s. 16(2) *CDSA*.
22. The applicants also submit *Perello*.[[50]](#footnote-50) Mr. Perello was charged and acquitted of possession of psilocybin, of possession of $55,000, and of having transported or otherwise disposed of $55,000 with intent to conceal or convert it knowing that it was obtained or derived as a result of the commission of an offence.
23. The Court dismissed the application for forfeiture for three reasons. The first was that the money was illegally seized during a roadside search of his vehicle. The second was that he was acquitted of the three offences. Last, the trial judge found that the seized funds could only be proceeds of crime if Mr. Perello had been involved in growing or selling marijuana.
24. The Court shares the judge’s view that it was it was simply not available to her to conclude on the same evidence that the money was tainted by illegality.
25. Because of these circumstances, that judgment provides no guidance to the Court, given the issues raised.
26. The Court of Appeal for Saskatchewan did not convict a co-accused. It had already decided that the property was not used in or obtained from the commission of an offence, and the judge had the same evidence to decide the issue of the disposal of the property.
27. The three applicants submit that they can never be acquitted given the stay of proceedings, and that this places them in a worse situation than before the stay of proceedings.
28. They are not in a worse situation than if they had property that had never been included in an indictment and the property had belonged to them.[[51]](#footnote-51)
29. Section 462.37(2) *Cr. C*. and s. 16(2) *CDSA* are therefore procedural vehicles available to the Crown to seek the forfeiture of the property.

# 4) Does the stay of proceedings for unreasonable delay prevent the Crown from seeking the forfeiture of the property?

1. The three applicants submit that the doctrine of estoppel should apply with respect to the remedy ordered.
2. *Vellone*[[52]](#footnote-52) did not make such a finding. On the contrary, it held that because the circumstances of the forfeiture were different from those of the trial, the judge was correct to conclude that she could reassess the criteria to exclude the evidence under 24(2) of the *Canadian Charter* because the doctrine of estoppel did not apply in this case.
3. The fact that the three applicants in this case benefited from a remedy under s. 24(1) of the *Charter* rather than s. 24(2), does not, in the Court’s view, allow it to apply the doctrine of estoppel here.
4. The stay of proceedings for unreasonable delay rendered by Dupras J. does not apply in the context of an application for forfeiture.
5. The three applicants are no longer accused within the meaning of s. 11 of the *Canadian Charter of Rights and Freedoms* at the stage of the disposal of the property seized once the matter has concluded. It is no longer a matter of judging them.
6. The main purpose of the forfeiture of offence-related property is to take that property out of circulation, not to punish the person who committed the offence.[[53]](#footnote-53)
7. All of the arguments of the three applicants concerning the prejudice they have already suffered due the delays in fact invite the Court to ignore the possibility that the property may constitute property obtained by crime under s. 491.1 *Cr. C*., non-chemical offence-related property under s. 16(2) *CDSA,* or the proceeds of crime under s. 462.27(2) *Cr. C*.
8. The Court therefore does not find that the presumption of the applicants’ right to possession must lead it to reach this conclusion.
9. To the extent that *Gray*,[[54]](#footnote-54) submitted by the applicants, must be read as establishing that a stay of proceedings for unreasonable delay entails as an automatic consequence the cancellation of all proceedings or quashing of orders related to the indictment, including of any warrant or restraint order, or any detention or continuation order, etc., the Court does not share that view.
10. The stay of proceedings for unreasonable delay does not prevent the Crown from seeking the forfeiture of the property.

**CONCLUSION**

**FOR THESE REASONS, THE COURT:**

**GRANTS IN PART** the application to dismiss the application for forfeiture;

**DECLARES ITSELF** without jurisdiction to dispose of the things seized pursuant to section 490 *Cr. C*.

**DISMISSES** the application to dismiss the application for forfeiture based on s. 491.1 *Cr. C*. and ss. 462.37(2) *C. Cr.* and 16(2) *CDSA*.

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1. *Vu* v. *R.*, 2017 QCCQ 14782. [↑](#footnote-ref-1)
2. *R.* v. *Vu*, 2019 QCCA 1709. [↑](#footnote-ref-2)
3. *R.* *v.* *Raponi*, 2004 SCC 50 at paras. 30–31; *Fleming (Gombosh Estate) v. The Queen*, [1986] 1 SCR 415 at 439 and 440. [↑](#footnote-ref-3)
4. *Guimont* v*.* *R.*, 2020 QCCA 1759 at para. 8; *R. v. Mac,* 1995 CanLII 2071 (ON CA) at para. 27; *Fleming (Gombosh Estate) v. The Queen*, [1986] 1 SCR 415; *R. v. Collins*, 1983 CanLII 3566 (QCCA). [↑](#footnote-ref-4)
5. *R. v. Mac,* 1995 CanLII 2071 (ON CA) at 13 and 14; *Fleming (Gombosh Estate) v. The Queen*, [1986] 1 SCR 415 at 443–447. [↑](#footnote-ref-5)
6. *Centre Chabad* v*.* *Autorité des marchés financiers*, 2018 QCCS 2575 at para. 103. [↑](#footnote-ref-6)
7. *R.* *v.* *Raponi*, 2004 SCC 50 at para. 30. [↑](#footnote-ref-7)
8. *Canada (Procureur général)* v. *Vincent*, 1996 CanLII 5776 (QC CA) at 5 and 6. [↑](#footnote-ref-8)
9. *Lagiorgia v. Canada,* [1987] 3 FC 28(FCA). [↑](#footnote-ref-9)
10. *R.* v*.* *Garneau*, 2019 QCCS 2514 at paras. 36–39 and 43–45; *R.* *v.* *Scott*, 2015 MBCA 43 at para. 18. [↑](#footnote-ref-10)
11. *Canada (Attorney General). v. Taylor,* 2011 NLCA 72 at para. 49. [↑](#footnote-ref-11)
12. *Ibid.* at para. 48. [↑](#footnote-ref-12)
13. *R. v. Spindloe*, 2001 SKCA 58 at paras. 113 and 113. [↑](#footnote-ref-13)
14. *Guimont* v. *R.*, 2020 QCCA 1759 at paras. 3, 4, 8, 26, and 31. [↑](#footnote-ref-14)
15. *9141-2023 Québec inc.* v. *R.*, 2021 QCCS 386 at paras. 58–65 and 69. [↑](#footnote-ref-15)
16. *Ibid.* at paras. 70 and 191. [↑](#footnote-ref-16)
17. *Guimont* v. *R.*, 2020 QCCA 1759. [↑](#footnote-ref-17)
18. *9141-2023 Québec inc.* v. *R.*, 2021 QCCS 386. [↑](#footnote-ref-18)
19. *Echostar Corporation* v. *Service de poursuites pénales du Canada*, 2009 QCCQ 4827 at para. 38. [↑](#footnote-ref-19)
20. See to the same effect *R*. v. *Robert* *Vienneau*, 2010 NBCP 5 at para. 19. [↑](#footnote-ref-20)
21. *R.* v. *Garneau*, 2019 QCCS 2514 at paras. 34 and 35. [↑](#footnote-ref-21)
22. *Desjardins* v. *R.*, 2010 QCCA 1947 at paras. 26. [↑](#footnote-ref-22)
23. *R.* *v.* *Spindloe*, 2001 SKCA 58 at para. 120. [↑](#footnote-ref-23)
24. *Echostar Corporation* v. *Service de poursuites pénales du Canada*, 2009 QCCQ 4827 at para. 38. [↑](#footnote-ref-24)
25. *Gagnon* v. *R.*, 2013 QCCA 1744 at paras. 108–110. [↑](#footnote-ref-25)
26. *Gagnon* v. *R.*, 2013 QCCA 1744. [↑](#footnote-ref-26)
27. *Ibid.* at paras. 111,112 and 117. [↑](#footnote-ref-27)
28. *Supra* note 22 at para. 111. [↑](#footnote-ref-28)
29. *R.* *v*. *Spindloe*, 2001 SKCA 58 at para. 115. [↑](#footnote-ref-29)
30. *R.* *v.* *Marriott*, 2001 NSCA 84 at para. 14; *Directeur des poursuites criminelles et pénales* v*.* *9007‑0855 Québec inc.*, 2015 QCCS 4027 at paras. 140, aff’d with respect to the forfeiture judgment in *Denis v*. *R.*, 2018 QCCA 1033 at paras. 221 and 222. [↑](#footnote-ref-30)
31. *Directeur des poursuites criminelles et pénales du Québec* v*.* *Lacelle*, 2013 QCCQ 10269. [↑](#footnote-ref-31)
32. *R.* *v.* *Trac*, 2013 ONCA 246 at paras. 101 and 102. [↑](#footnote-ref-32)
33. *Guimont* v*.* *R.*, 2020 QCCA 1759. [↑](#footnote-ref-33)
34. *9141-2023 Québec inc.* v*.* *R.*, 2021 QCCS 386 at paras. 68, 70 and 191. [↑](#footnote-ref-34)
35. *Quebec (Attorney General) v. Laroche*, 2002 SCC 72 at para. 26. [↑](#footnote-ref-35)
36. Definition of “sentence” in s. 673 *Cr. C*.; *Quebec (Attorney General) v. Laroche,* 2002 SCC 72 at para. 33. [↑](#footnote-ref-36)
37. *R. v. Schoer*, 2019 ONCA 105 at para. 93. [↑](#footnote-ref-37)
38. *Bebawi* v*.* *R.*, 2020 QCCA 1397 at para. 19; *R.* *v*. *Rafilovich*, 2019 SCC 51 at paras. 2 and 88. [↑](#footnote-ref-38)
39. *Bebawi* v. *R.*, 2020 QCCA 1397 para. 26. [↑](#footnote-ref-39)
40. *R. v. Collins*, 1983 CanLII 3566 (QCCQ) at 378. [↑](#footnote-ref-40)
41. *Vellone* v*.* *R.*, 2020 QCCA 665 at paras. 18 and 19, leave to appeal to SCC refused, 39281 (4 March 2021). [↑](#footnote-ref-41)
42. *Vellone v.* *R.*, 2020 QCCA 665 at paras. 18 and 19, leave to appeal to SCC refused, 39281 (4 March 2021). [↑](#footnote-ref-42)
43. *Croussette* v*.* *R.*, 2017 QCCA 1040 at para. 8. [↑](#footnote-ref-43)
44. *Vallières* v*.* *R.*, 2020 QCCA 372 at para. 213, leave to appeal granted (24 September 2020) and hearing on the appeal set down on the roll of 24 August 2021. [↑](#footnote-ref-44)
45. *Bebawi* v*.* *R.*, 2020 QCCA 1397 at para. 32. [↑](#footnote-ref-45)
46. *Vellone* v. *R.*, 2020 QCCA 665 at paras. 18 and 19, leave to appeal to the SCC refused, 39281 (4 March 2021). [↑](#footnote-ref-46)
47. *Ibid.* [↑](#footnote-ref-47)
48. *Ibid.* atpara. 41. [↑](#footnote-ref-48)
49. *R. v. Collins*, 1983 CanLII 3566, (QC CA) at 378. [↑](#footnote-ref-49)
50. *R.* *v.* *Perello*, 2007 SKCA 8. [↑](#footnote-ref-50)
51. *Vellone* v*.* *R.*, 2020 QCCA 665 at para. 41, leave to appeal to the SCC refused, 39281 (4 March 2021). [↑](#footnote-ref-51)
52. *Vellone* v. *R.*, 2020 QCCA 665 at para. 49, leave to appeal to the SCC refused, 39281 (4 March 2021). [↑](#footnote-ref-52)
53. *Ibid.* at para. 41. [↑](#footnote-ref-53)
54. *R*. v*.* G*ray*, 2000 CanLII 28557 (NB BR) at 74. [↑](#footnote-ref-54)