Breaking New Ground: The (Largely Unexplored) Power to make Ancillary Orders under the Criminal Code

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As we rely on an ever-expanding *Criminal Code*[2] to address difficult problems, Canadian courts have become the recipients of numerous additional statutory powers. These powers are only loosely related – and in that sense may be regarded as "ancillary" – to the core functions of a criminal justice system, namely, the prosecution and punishment of specific offences. Yet, ancillary powers have serious consequences for the persons to whom they relate. Courts must construct a coherent framework for using these powers in a way that respects both the intent of Parliament, and the courts' duty to uphold essential principles of criminal justice.

This article addresses two kinds of ancillary orders: orders respecting offence-related property; and orders appointing counsel on appeal.[3] Neither of these provisions has attracted much judicial attention. This means that with the exception of a few structural points this analysis relies on first principles, particularly with respect to appointing counsel on appeal.

I. Orders respecting Offence-Related Property under Sections 490.1 to 490.6 of the Code

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[2] R.S.C., 1985 C-46 as am. ["*Criminal Code*"; "*Code*"].
[3] This article draws heavily upon my presentation at the National Judicial Institute, "Court of Appeal of New Brunswick and Supreme Court of Prince Edward Island, Appeal Division Education Seminar: Ancillary Orders" in St. Andrews by-the-sea on September 15, 2006. I am grateful to the judges who attended and to my co- faculty, Professor Richard Bouchard of the Université de Moncton.

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Ancillary orders regarding offence-related property fall under the Code's Part XV – Special Procedure. Sections 490.1 to 490.6 of the *Criminal Code* relate to forfeiture. "Offence-related property" is defined in section 2 of the *Criminal Code* as any property, whether within or outside Canada that is used or intended for use in the commission of a *Code* indictable offence.

Sections 490.1 to 490.6 were enacted in 2001 as part of Bill C-34, known as the *Organized Crime Bill*. Bill C-34 also amended Part XII of the *Code* which deals with the "proceeds of crime". The distinguishing feature of sections 490.1 to 490.6 is their application to property which is *not*, itself, the proceeds of crime but which has been utilized in some way by an accused in the commission of a crime. One way, therefore, to understand offence-related property is to distinguish it from proceeds of crime. While it is not possible in this article to discuss the extremely complex framework attached to proceeds of crime, suffice it to say that that term encompasses a relatively narrow category of things while "offence-related property" describes a much larger category. Thus, sections 490.1 to 490.6 clearly extend the kinds of sanctions that may be imposed on those who engage in crime. An order of forfeiture constitutes "punishment" in the criminal law sense; and is included in section 673's definition of "sentence".

The offence-related property provisions contemplate three kinds of orders:

- Forfeiture following conviction
- Forfeiture *in rem*
- Declaration of an interest that is to remain unaffected by forfeiture

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The first and second category relate to an accused person who is subject to an order of forfeiture in respect of a proven or alleged criminal offence. The third category relates to third parties who would be negatively impacted by an order made under the first two categories.

1. Forfeiture following conviction (.490.1(1),(2))

> **490.1** (1) Subject to sections 490.3 to 490.41, if a person is convicted of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the court shall
> (*a*) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province and disposed of by the Attorney General or Solicitor General of that province in accordance with the law; and
> (*b*) in any other case, order that the property be forfeited to Her Majesty in right of Canada and disposed of by the member of the Queen's Privy Council for Canada that may be designated for the purpose of this paragraph in accordance with the law.

Example:

> *The defendant, Samuelsson, is convicted of dangerous driving causing bodily harm (s.24991)). At the time of his arrest S. was engaged in a street race and driving a 1999 Thunderbird. It is his first offence. The Crown applies for an order of forfeiture. The trial judge declines to make an order on the basis that, as Samuelsson is a first time offender, forfeiture would be excessively punitive. The Crown appeals.*

Conceptually, the most straightforward kind of forfeiture is one following conviction. It is triggered by a Crown application after the accused has been convicted of an indictable offence. There are two ways in which such an order of forfeiture may be obtained.

The first way, captured under s.490.1(1), requires a relationship between the offence of which the accused stands convicted and the property that is the subject of the order. Under s.490.1(1) the judge must be satisfied on a balance of probabilities of two things:

- that the property is *offence-related property* (s.490.1(1)(a)); and
- that the Code indictable offence was committed *in relation to* the property (s.490.1(1)(b))

Looking at the example, because Samuelsson has been convicted of dangerous driving and forfeiture is sought against the vehicle actually used in that offence, the judge need only be convinced on a balance of probabilities that the vehicle is, in fact, the one that was used. Note that s.490.1(1) says that the judge "shall" make an order of forfeiture. However, the mandatory wording is mitigated by the judge's discretion to decline to issue an order if its impact would be "disproportionate" (s.490.41(3), discussed below). Therefore, it appears that the trial judge's ruling in the above example is within the scope of his or her authority.

The second way that property can be ordered forfeited is under s.490.1(2):

> **490.1** (2) Subject to sections 490.3 to 490.41, if the evidence does not establish to the satisfaction of the court that the indictable offence under this Act or the *Corruption of Foreign Public Officials Act* of which a person has been convicted was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that the property is offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.

This route applies where the judge is *not* satisfied on a balance of probabilities of the relationship between the *Code*-indictable offence and the property. In such a case, if the judge *is* satisfied beyond a reasonable doubt that the property is still offence-related property – albeit not necessarily with respect to the offence with which the accused stands convicted – the judge "may" make an order of forfeiture. Note that this provision on its face grants the judge discretion in whether to issue the order. Going back to the previous example of a s.249(1) conviction, a possible application of section 490.1(2) would be in the following situation:

> *The Thunderbird used in the street race is destroyed. The Crown discovers that the accused may also have owned the second vehicle in the race. A 911 call was made on the night in question, complaining about the street race and including a description of a car that matches the accused's second vehicle. The Crown also has evidence that Samuelsson routinely loaned out car for street racing.*

Sometimes, the property has been the subject of a conveyance and is no longer in the accused's possession. Where a conveyance or transfer occurred after seizure or an order of restraint, the court may set aside the transaction unless it was made for valuable consideration to a person acting in good faith (s.490.3).[4] This provision offers some protection for truly innocent purchasers, regardless of the accused's intentions, but it also gives courts the power to set aside fraudulent conveyances intended to frustrate an order of forfeiture.

[4] *Criminal Code,* s.490.3: A court may, before ordering that offence-related property be forfeited under subsection 490.1(1) or 490.2(2), set aside any conveyance or transfer of the property that occurred after the seizure of the property, or the making of a restraint order in respect of the property, unless the conveyance or transfer was for valuable consideration to a person acting in good faith.

Section 490.1(3)[5] grants a right of appeal from a forfeiture order following conviction. The appeal is treated as one against sentence. A sentence appeal, of course, requires leave, although in some courts the question of leave is dealt with at the appeal itself. Applying a similar analysis as that found in sentence appeals, an appellate court should refuse to vary unless the order is demonstrably unfit which can occur if the judge at first instance errs in principle; fails to consider a relevant factor; or inappropriately emphasizes certain factors over others.[6]

Because of the narrow parameters in section 490.1, the only question on appeal appears to be whether the order should have been issued. Generally, appellate courts will focus on whether the judge correctly applied the test set out in s. 490(1) and (2), for example whether the judge correctly articulated and applied the correct standard of proof; or whether the judge properly interpreted a relevant factor in applying the correct standard of proof to the facts (such as whether the offence was committed "in relation to" the property.)

2. Forfeiture *in rem* (s.490.2)

> **490.2** (1) If an information has been laid in respect of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act*, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2).
>
> (2) Subject to sections 490.3 to 490.41, the judge to whom an application is made under subsection (1) shall order that the property that is subject to the application be forfeited and disposed of in accordance with subsection (4) if the judge is satisfied
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> (*a*) beyond a reasonable doubt that the property is offence-related property;

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[5] *Criminal Code*, s.490.1(3): A person who has been convicted of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act*, or the Attorney General, may appeal to the court of appeal from an order or a failure to make an order under subsection (1) as if the appeal were an appeal against the sentence imposed on the person in respect of the offence.

[6] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90.

> (*b*) that proceedings in respect of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* in relation to the property were commenced; and
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> (*c*) that the accused charged with the offence has died or absconded.

As the name suggest, orders of forfeiture *in rem* apply against property where the person to whom the property relates is not amenable to justice. In the circumstance where the accused has been charged but not convicted because he or she has died or absconded, section 490.2 still permits an order to be made.

The order is, again, triggered by a Crown application. The Crown must demonstrate, first, that the accused has died or absconded. Where the accused has absconded the Crown must show the court that an information was laid; a warrant of arrest was issued; and reasonable but unsuccessful attempts to locate the accused have been made for a minimum of six months.

The Crown must demonstrate, second, that the property is offence-related property beyond a reasonable doubt; and, third, that criminal proceedings were commenced in respect of the *Code*-indictable offence to which the property relates. The effect of the third condition is that, unlike a forfeiture following conviction, it will always be necessary to draw a link between the offence with which the accused stands charged, and the property which is the subject of the order.

The provision with respect to setting aside a conveyance or transfer of the property (s.490.3) applies here as well.

Section 490.6 gives anyone “aggrieved” by an order of forfeiture *in rem* the right of appeal.

> **490.6** Any person who, in their opinion, is aggrieved by an order made under subsection 490.2(2) may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI, and that Part applies, with any modifications that the circumstances require, in respect of such an appeal.

Because orders of forfeiture *in rem* operate in the absence of a final disposition with respect to the offence to which the property has a connection, the *Code* appears to treat such orders as dispositive. Thus, an appeal from forfeiture *in rem* is treated as though it were an appeal against conviction or against a judgment or verdict of acquittal. This means that where the appeal is based on something other than a pure question of law leave is required.

Despite the *Code*’s use of the word “aggrieved”, it is consistent with the overall framework of the provisions – as well as the reference to the right of appeal against “conviction….or acquittal” – to assume that both the Attorney General *and* any other party with an interest in the property have the right to appeal. That said, there is some overlap between persons other than the accused affected by an order of forfeiture *in rem*, and persons with an interest in the property who may seek a declaration of interest not affected by forfeiture (s.462.42(4), discussed below)). It would appear, for example, that the class of persons able to invoke s.462.42(4) may have a free-standing right of appeal against an *in rem* order by fitting themselves into the category of someone who “is of the opinion that he or she is ‘aggrieved’ by an order of forfeiture”.

Pursuant to section 686 of the *Code* (with appropriate modifications), the chief considerations for courts of appeal considering appeals against forfeiture *in rem* are whether the order (or, possibly, refusal to grant the order) is unreasonable or cannot be supported by the evidence; whether the trial court made an error of law; or whether there was a miscarriage of justice.

In addition, pursuant to the "curative proviso" of section 686(1)(b), the court of appeal may dismiss the appeal even in the face of an error or irregularity if it concludes that no substantial wrong or miscarriage of justice has occurred.

3. Notice (s.490.4)

Under section 490.4 both types of forfeiture orders discussed thus far are subject to notice provisions designed to protect third parties who have a "valid" interest in the property and for whom forfeiture might work a hardship. The word "valid" is not defined; the provision does not, for example, make reference to the kinds of interests that are often protected through such mechanisms as personal property security legislation or through financial arrangements regarding real property.[7] One can expect, though, that property interests recognized in non-criminal contexts will be useful to criminal courts as they determine what "valid" means. One can also expect that courts will require some demonstration by initiating Crown attorneys that reasonable efforts have been made to identify such parties. The specific periods and methods of dissemination vary according to jurisdiction, but the notice period must be "reasonable", and must set out the offence

[7] See, for example, *Personal Property Security Act*, S.N.B. 1993, c. P-7.1.

charged and a description of the property. It is the court that is responsible for ensuring the notice is given.

Section 490.4(3) states that a person who is the "lawful owner" of or is "lawfully entitled" to part or all of the property is eligible for an order of "restoration" regarding property that has already been subject to an order of forfeiture. The following persons may *not* claim such an order:

a. any person charged with a *Code*-indictable offence; and
b. any person whose interest in the property was acquired from a person described in subparagraph (a) under circumstances giving rise to an inference that the transfer was effected in order to frustrate an order of forfeiture.

The exclusion in (a) is broad enough to cover any criminal charge no matter how remote from the matter at hand. The use of the word "charged" as opposed to "convicted" may provide a basis to read down the exclusion to render it more similar to the exclusion in section 490.5(1) which relates to convictions for the indictable offence in relation to which the forfeiture process has been initiated. Because the word "charged" indicates that the focus of the exclusion is someone currently in the criminal justice system, it seems to be more in keeping with the provision's overall purpose to read the section narrowly. A narrow approach also would be consistent with the requirements of non-complicity in s.490.4(3)(b). However, this is a matter for future judicial interpretation.

There are two categories of property delineated section 490.4: dwelling homes, and everything else.

(a) Dwelling homes (s.490.41)

Example

The accused has been found guilty for possession of marijuana for the purpose of trafficking. He was charged after police executed a search warrant on his home, which sits on approximately 5 acres of land. Over 70% of the area inside the home was being used to support the defendant's grow-operation. Power was produced by a generator housed in a large outbuilding. The accused is a widower with a 16-year-old daughter. The two have been living in the house since the girl was five years old. The house is close to the daughter's school, friends and activities. The girl will testify as to the hardship she will encounter if the house if forfeited.

The theory of the Crown's case is that the house was an integral part of the grow-op, and that the size of the property added "a layer of concealment." The Crown also argued that the daughter was "complicit" in the grow-op, since there is no way she could have been unaware of the marijuana plants growing in the home.

Where the property is a dwelling-house, notice must be given to anyone living in it; and any immediate family member[8] of the person subject to the forfeiture order. The daughter in the above example qualifies on both counts. The daughter, then, has the right to be heard and to have her interests considered by the judge before the order is made.

In considering an order of forfeiture against a dwelling-house, section 490.41(4) requires the judge to consider:

- the impact of an order on an immediate family member for whom the house is his or her principal residence; and
- whether the family member appears innocent of any complicity.

The above considerations apply *only* to "immediate family members." Others who reside in the dwelling-house are entitled to notice, but not to these special considerations.

(b) Other property (s.490.41(3)

[8] The *Code* does not define "immediate family member". Interesting questions may arise with respect to certain classes of family members, such as grandparents.

With respect to *all* property, including a dwelling home, the court shall consider whether there are innocent lawful owners; and may order the restoration of the property to them if:

- the court determines that such a person is the lawful owner or is lawfully entitled to possession of all or any part of the property; and
- the person appears innocent of any complicity.

Example

> *Return to the first example involving street racing. This time the car is co-owned by Samuelsson's wife. She argues that forfeiture of the car would cause her hardship. The trial judge, finding that the wife "must have been" complicit in the street-racing, grants the order.*

The Court may also decline to make an order of forfeiture (or revoke an order of restraint) if the impact of the forfeiture would be "disproportionate", which is assessed in regard to:

- the nature and gravity of the offence related to the order
- the circumstances surrounding the commission of the offence
- the criminal record, if any, of the person charged with or convicted of the offence

Returning to the grow-op example, the judge must consider the impact of an order of forfeiture on an immediately family member for whom the home is a principal residence. It is clear that the impact on the accused's daughter would be significant. However, the judge must also consider whether she appears "innocent of any complicity." The Crown intends to argue that the girl was "complicit" in the grow-op, but the foundation for this argument is that she "must have known" that it was going on. It is unclear whether this would be enough to demonstrate "complicity", particularly on the part of a dependent teenager. It seems unreasonable to expect a 16-year-old girl to take aggressive steps

against her father in respect of his illegal activities. However, that is a question of fact for the judge.

Under s.490.1(3) both the Crown and the accused may appeal from the initial decision concerning the forfeiture following conviction. Given that they are treated as appeals against sentence, a decision will only be disturbed if it is "manifestly unfit" or otherwise reflects an error of law such as a mistaken interpretation of section 2's definition of "offence-related property". There is little recourse for either party in the event that they simply disagree with the judge's factual conclusions.

4. Orders declaring interest unaffected by forfeiture (s.490.5)

> **490.5** (1) Where any offence-related property is forfeited to Her Majesty pursuant to an order made under subsection 490.1(1) or 490.2(2), any person who claims an interest in the property, other than
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> (*a*) in the case of property forfeited pursuant to an order made under subsection 490.1(1), a person who was convicted of the indictable offence in relation to which the property was forfeited,
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> (*b*) in the case of property forfeited pursuant to an order made under subsection 490.2(2), a person who was charged with the indictable offence in relation to which the property was forfeited, or
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> (*c*) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (*a*) or (*b*) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,
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> may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4).

Example

Assume the same facts of street racing where the Thunderbird is destroyed but the Crown brings an application with respect to the accused's second vehicle. The trial judge agrees that the vehicle is offence-related property and grants the order. She then hears that the car was subject to an agreement between Samuelsson and his elderly parents. The car is in S.'s name, but the parents, who have mobility problems and require the use of it, pay for its insurance and maintenance.

Section 490.5 gives third parties the right to apply for an order recognizing and protecting their interest in property which has already been the subject of a forfeiture order. Anyone may apply unless he or she stands convicted of the offence in relation to which the property was forfeited; stands charged with the offence in relation to which the property was forfeited *in rem*; or has acquired title from a person referred to in (a) or (b) in circumstances indicating that the transfer was in order to frustrate the forfeiture.

One can expect that most applicants under section 490.5 will either have security or other financial interests in the property (such as mortgagees); or enjoy a particular relationship with the offender.

Looking at the above example, as there do not appear to be any facts disentitling S's parents, they could apply for an order declaring their interest in the car unaffected by forfeiture. The judge can issue an order declaring interest unaffected if satisfied that the applicant is not ineligible, and appears innocent of complicity or collusion; *and* that the applicant exercised reasonable care in being satisfied the property was unlikely to have been used in connection with an unlawful act.

Under s. 490.5(5) either party may appeal from a decision regarding an order declaring interest unaffected. The appeal is described as analogous to an appeal under Part XXI, and is not further specified as being the same as an appeal from sentence or conviction. Section 490.5(5) simply states that modifications "as required" will be made to the relevant sections.

The best guide for an appellate court faced with an appeal of a section 490.5(4) proceeding is section 686(1) which states that the court may allow an appeal where:

> (a) the [decision] should be set aside on the basis that it is unreasonable or unsupported by the evidence;
> (b) the decision is based on an error of law; or
> (c) on any ground there was a miscarriage of justice (for example, the party kept relevant information from the court).

As discussed earlier in this article, section 686(1) sets out various circumstances in which the court may dismiss the appeal even if it finds that an error or irregularity occurred.

II. ORDERS RESPECTING THE APPOINTMENT OF COUNSEL FOR UNREPRESENTED APPELLANTS – S.684

The second ancillary power discussed in this article is the power under section 684 to appoint counsel for unrepresented litigants in appeals:

> **684.** (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
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> (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

> (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

Section 684 of the *Criminal Code* states that, in any appeal, or a matter preliminary or incidental to an appeal, a court of appeal or judge may assign counsel to act on behalf of an accused if it appears desirable in the interests of justice that the accused should have legal assistance; and it appears that the accused has insufficient means to obtain that assistance.

A number of judges including the Chief Justice of Canada[9] and the former Chief Justice of Ontario[10] have expressed their concern at the increasing numbers of persons forced to navigate the legal system (in both criminal and civil matters) without the assistance of counsel. While much attention has focussed on trials, lack of assistance by counsel clearly is an issue in appellate proceedings as well.[11]

The issue of unrepresented appellants is reflective of an endemic problem with legal aid service across the country. It is not possible in this article to discuss that issue,[12] but

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[9] Beverley McLachlin, (Remarks of the Right Honourable Beverley McLachlin, P.C. presented at the Empire Club of Canada, March 8, 2007) online: SCC <http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges_e.asp>.

[10] R. Roy McMurty, (Remarks by The Honourable R. Roy McMurty at the AGM of the Association of Community Legal Clinics of Ontario, May 11, 2007) online: ACLCO <http://www.aclco.org/f/Website_McMurtry_speaker_notes(pictures_incl).pdf>.

[11] Unrepresented accused are to be contrasted with "self-represented" accused who elect to appear without counsel. The focus in this article is on the former, although some of the principles may overlap.

[12] For a discussion of this issue in the New Brunswick context see: New Brunswick Department of Justice and Consumer Affairs, "If there were legal aid in New Brunswick… A Review of Legal Aid Services in New Brunswick" by Dr. J. Hughes & E.L. MacKinnon, (New Brunswick: Department of Justice and Consumer Affairs, 2008).

clearly the details and parameters of legal aid services have a profound impact on the number and kinds of appeals in which accused are unrepresented.

Obtaining a sense of the problem's scope is challenging because s.684 has not attracted much case law. This could be a sign that most indigent accused in appeals have some access to counsel where warranted, or it could indicate that appellate courts are reluctant to appoint counsel. Alternatively, it could be that orders are being made but not reported.

To date, all of the reported decisions dealing with s.684 concern appeals of a trial verdict or judgment. There are no decisions as yet concerning the appointment of counsel in an appeal of an ancillary order. However, the wording of section 684 is certainly broad enough to cover such circumstances.

As no Supreme Court decisions have issued with regard to this section, none of the cited cases are binding in either Prince Edward Island or New Brunswick. Nonetheless, I suggest that the principles articulated in the following cases (in particular *Bernardo*, *Johal*, *Innocente* and *Grenkow*)[13] should be persuasive for judges in the Altantic region,

In virtually all of the reported cases, courts have acknowledged that the broad statutory appeal rights set out in section 675 of the *Code* mandate a certain approach to the question of how best to maintain and promote the interests of justice in an appeal.

[13] *R. v. Bernardo,* 121 C.C.C. (3d) 123, 12 C.R. (5th) 310, 105 O.A.C. 244, [1997] O.J. No. 5091. [*Bernardo*]; *R. v. Johal,* 2001 BCCA 436, 155 C.C.C. (3d) 449, 156 B.C.A.C. 11, 255 W.A.C. 11, 85 C.R.R. (2d) 290, [2001] B.C.J. No. 1404; *R. v. Innocente,* 2004, NSCA 18, 221 N.S.R. (2d) 357, 697 A.P.R. 357, 183 C.C.C. (3d) 215; *R. v. Grenkow* (1994), 127 N.S.R. (2d) 355, 355 A.P.R. 355 (N.S.C.A.).

Essentially, the inquiry may be reduced to the consideration of two principles. First, would the absence of counsel render the accused unable to effectively participate in the appeal? Second, would the absence of counsel for the accused render a court unable to properly decide the appeal?

A general guideline for interpretation may be found in the following passage by Justice David Doherty in *R. v. Bernardo*:

> Justice demands that an accused who appeals under s. 675 be afforded a meaningful opportunity to establish the merits of the grounds of appeal advanced by that appellant. That same interest also insists that the court be able to fully and properly exercise its broad jurisdiction at the conclusion of the appeal.[14]

A preliminary consideration is whether the appeal is "arguable". If the appeal is obviously without merit, then there is no compromise to the interests of justice if the accused remains unrepresented. The appellate court is not to inquire "too deeply" into the merits, but must nonetheless satisfy itself that the appeal is sufficiently strong to make appointing counsel a worthwhile endeavour.

Once the court has satisfied itself as to merit, it must then consider whether the accused can effectively advance the grounds of appeal having regard to two factors: the complexity of the argument; and the appellant's ability to make arguments in support of the grounds of the appeal.

With respect to "complexity of the argument" the court should consider:

- the grounds of appeal
- the length and content of the trial record
- the relevant legal principles

[14] *Bernardo, ibid.,* at para. 20.

• the application of those principles to the facts of the case

In *R. v. M.(A.)*[15], a 1996 Ontario case referenced in *Bernardo*, because of the "uncomplicated" nature of a sentence appeal the court declined to appoint counsel for an 18-year-old defendant. In *R. v. Baig*[16] the British Columbia Court of Appeal held that even the presence of constitutional issues would not necessarily require appointment of counsel if the accused had sufficiently ability to argue those issues. In *R. v. LeCompte*,[17] however, the Ontario Court of Appeal held that a two-week trial encompassing some six days of evidence did militate in favour of appointing counsel.

With respect to the question of ability, I suggest that a court consider:

- how well the applicant understands the written word
- how well the applicant comprehends the applicable legal principles
- how well the applicant can relate the principles to the facts
- how well the applicant can articulate the argument as a whole

Education level and language facility seem to be key. In *Lecompte,* a 37-year-old francophone with a grade-7 education and only a moderate grasp of English was deemed to be at a disadvantage without counsel. However, in *Baig,* where the accused held a Ph.D. and had an excellent grasp of English (though it was only a second language), he was deemed sufficiently competent to proceed without counsel.

Section 684 raises some interesting issues with respect to ancillary orders, particularly where an order is challenged by a third party, for example, an order under

[15] *R. v. M. (A.),* 30 O.R. (3d) 313, 92 O.A.C. 381, [1996] W.D.F.L. 2546.
[16] *R. v. Baig* (1990), 58 C.C.C. (3d) 156 (B.C.C.A.).
[17] *R. v. LeCompte* (1997), CarswellOnt 1046 (Ont. C.A.).

section 490.5 declaring interest unaffected by forfeiture. It may be that the "interests of justice" criterion discussed in previous s.684 cases should be modified to reflect the different circumstance where the appellant is not someone accused or convicted of a crime. However, I suggest that the court *should* consider the potential impact of forfeiture as something that can engage the interests of justice in a way so as to merit the appointment of counsel for an accused who is indigent and ill-equipped to proceed without representation. The relative newness of the ancillary orders provisions may require analogies to other areas of criminal law and general knowledge of broader criminal principles and procedures. Indeed, it is reasonable to say that an appeal concerning these provisions could actually be *more* difficult for someone without legal training than a conventional criminal appeal.

Ancillary orders are an important discretionary power available to criminal courts. Though unusual in some respects, they should be approached along the same lines as cases involving criminal offences and procedure. Such an approach will ensure principled consistency, promote fairness and reflect the commitment to justice that undergirds the criminal justice system.