Inventory of Enforcement Problems arising from
s. 490 of the *Criminal Code*
and Preliminary Recommendations

General Comments:

All the subsections setting out a notice procedure should be reviewed and standardized with regards to the individuals who receive notice (for example the Attorney General of Canada or of a province), delays, and type of notice (written or verbal). This comment applies to subsection 490 (2) (7), (10).

It should be noted that the representative from defense bar adopts the general position that a peace officer should not have the power to return seized items without a hearing before a judge.

489.1(1) Restitution of property or report by peace officer

Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,
(a) where the peace officer is satisfied,
(i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and
(ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,
return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or
*(b) where the peace officer is not satisfied as described in subparagraphs (*a*)(i) and (ii),*
*(i) bring the thing seized before the justice referred to in paragraph (*a*), or*
(ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained
to be dealt with by the justice in accordance with subsection 490(1).

Recommended amendment:

1) Amend section to allow public officers, or certain public officers, to return the seized items. Public officer is defined in section 2 of the *Criminal Code.*

489.1(3) Form

A report to a justice under this section shall be in the form set out as Form 5.2 in Part XXVIII, "as soon as practicable", varied to suit the case and shall include, in the case of a report in respect of a warrant issued by telephone or other means of telecommunication, the statements referred to in subsection 487.1(9).

Recommended amendment/clarification:

1) Clarify the level of details required pursuant to Form 5.2 with regards to the objects seized.

490(1) Detention of Things Seized

*Subject to this or any other Act of Parliament, where, pursuant to paragraph 489.1(1)(*b*) or subsection 489.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,*
(a) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
(b) where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.

Recommended Amendments:

1) Clarify when a detention order is required.

There are a number of situations where it is unclear whether a detention order should be sought. For example, is a detention order required when data is copied during the execution of a search warrant, when the possession of the item seized is inherently illegal, when the items are provided on consent or have been abandoned?

2) Absence of an initial detention order

There is no procedure set out in s. 490 for cases where no initial detention order was sought.

3) Electronic data

The s. 490 regime was developed before electronic data became common. The regime does not readily apply to this type of data. For example, does subsection 490(13) apply to electronic data? Should s. 490 clearly indicate that it applies to electronic data or should a separate regime be created to deal with these "objects"?

4) Restitution of seized objects

When there is no issue with the identity of the owner and no charges are laid, could the procedure be simplified or more discretion be afforded to police officers? Would a report of restitution or an affidavit be sufficient to deal with the seized object? Should a procedure be set out in s. 490?

5) Costs

There are important costs associated with the detention of items pursuant to s. 490. Should the section set out a reimbursement procedure if the person from whom the items were seized is found guilty?

490(2) Further Detention

*Nothing shall be detained under the authority of paragraph (1)(*b*) for a period of more than three months after the day of the seizure, or any longer period that ends when an application made under paragraph (*a*) is decided, unless*
(a) a justice, on the making of a summary application to him after three clear days' notice thereof to the person from whom the thing detained was seized, is satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted and the justice so orders; or
(b) proceedings are instituted in which the thing detained may be required.

Recommended Amendments:

1) Increase the initial detention period.

Most investigations, where charges are not quickly laid, take much longer than 3 months. It is rare that investigations which involve any analysis of electronic devices will be completed within three months. In addition, often after seizing, accessing and searching a device for historical texts or messages, police must take further investigative steps. Almost invariably, the police require significantly more time than three months to receive and analyze this information.

The majority of those consulted recommended that the initial detention period set out in s. 490 be extended given the volume of potential evidence stored on modern electronic devices.

What would be an appropriate initial detention period? We received suggestions for an increase to six months, nine months and even one year. The subsection could set out an ongoing obligation on the police and Crown to return or otherwise deal with items seized that are not required for further analysis and/or for legal proceedings (subs. 490(5) and (9)).

2) Clarify the meaning of "summary application".

3) Clarify the meaning of "notice".

See the general comments at the beginning of the document. A consent form with notice and consent components could be developed for cases where a party does not wish to oppose the further detention order.

4) Clarify the onus of proof required for further detention.

Currently there is some case law supporting an onus that is "something less than a balance of probabilities": *R v Classic Smokehouse*, 2012 BCPC 232*; R v Miller* [1987] OJ No 2278 (Ont Prov Ct); *Director of Investigation and Research v Tele-Direct (Publications)*, (1986) 17 WCB 55 (Ont Prov Ct)].

5) Consider setting out circumstances where an *ex parte* process is acceptable.

In certain circumstances, it can be very difficult to serve a notice on a person from whom the thing detained was seized. An *ex parte* process would be very useful in those circumstances.

490(3) Idem

More than one order for further detention may be made under paragraph (2)(a*) but the cumulative period of detention shall not exceed one year from the day of the seizure, or any longer period that ends when an application made under paragraph (*a*) is decided, unless*
(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, on the making of a summary application to him after three clear days' notice thereof to the person from whom the thing detained was seized, is satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period and subject to such other conditions as the judge considers just, and he so orders; or
(b) Proceedings are instituted in which the thing detained may be required.

Recommended Amendments:

1) Consider the increase of further detention orders to 18 months or 2 years.

2) Recommend that the detention remain under the jurisdiction of a justice of the peace or the provincial court.

It is not clear why it is necessary for a superior court judge to hear applications for further detention orders. It would be more practical if provincial courts or justice of the peace had jurisdiction to issue these orders. However, if there is a reason to limit a provincial court's jurisdiction, it should be considered whether further detention applications pursuant to s. 490(3) could be made before a justice of the peace.

3) Recommend that a process to protect the integrity of the investigation be built into subsection 490(3).

If an application for further detention is contested, the police officers are required to prepare an affidavit to justify further detention of the items seized that may be required as evidence or for forfeiture. This often requires very careful drafting in order not to jeopardize an investigation in its early stages. In order to obtain a further detention period, the crown may be required to present additional evidence which may jeopardize the integrity of the investigation.

The investigation may involve an active Part VI authorization, or the intention to apply for a Part VI, confidential informants and/or an ongoing undercover police operation. Things may have been seized pursuant to a warrant where there is a s. 487.3 sealing order.

In cases where the ongoing investigation may be jeopardized (and perhaps in other circumstances), should this subsection set out a procedure for sealed *ex parte* applications?

4) Reconsider the "complexity" criteria.

The concept of complexity has been the object of many judicial pronouncement, including by the Supreme Court of Canada in ***R v Jordan***. Investigations comprising a large volume of documents/evidence may not be deemed "complex". Nevertheless, it may take more than a year to access and analyze the evidence. Should the "complexity" criteria be replaced by another one such as the interests of justice?

490(3.1) Detention without application where consent

*A thing may be detained under paragraph (1)(*b) *for any period, whether or not an application for an order under subsection (2) or (3) is made, if the lawful owner or person who is lawfully entitled to possession of the thing seized consents in writing to its detention for that period.*

Recommended Amendment:

1) Consider an amendment to require that consents be filed with the court where the report to a Justice was made. A form with the following elements could be adopted:

- I have the authority to deal with the seized property/ I am the lawful owner.
- I voluntarily consent to the further detaining the seized items.
- I understand that my consent cannot be revoked and that items will be detained until (state period) or until the conclusion of proceedings.

490(4) Where accused ordered to stand trial

When an accused has been ordered to stand trial, the justice shall forward anything detained pursuant to subsections (1) to (3) to the clerk of the court to which the accused has been ordered to stand trial to be detained by the clerk and disposed of as the court directs.

490(5) Where continued detention no longer required

Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor, or the peace officer or other person having custody of the thing seized, determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), the prosecutor, peace officer or other person shall apply to
(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered its detention under subsection (3), or
(b) a justice, in any other case,
who shall, after affording the person from whom the thing was seized or the person who claims to be the lawful owner thereof or person entitled to its possession, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, make an order in respect of the property under subsection (9).

Recommended Amendments:

1) Can money seized go to defense counsel in accordance to an agreement between the parties? Is that consistent with the provision? Should a process similar to the one set out in s. 489.1 of the *Criminal Code* be replicated here?

2) What are the differences between a "person who claims to be the lawful owner", a "person entitled to its possession" and a "person from whom the thig was seized"? These concepts are also mentioned in subs. 490 (2), (3.1) and (11). Should definitions be added to s. 490?

490(6) Idem

*Where the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required, the prosecutor, peace officer or other person shall apply to a judge or justice referred to in paragraph (5)(*a*) or (*b*) in the circumstances set out in that paragraph, for an order in respect of the property under subsection (9) or (9.1).*

Recommended Amendments:

1) The words "proceedings have not been instituted" should be clarified. Does it refer to "were proceedings ever instituted?" or does the phrase "have not been" relate to the point in time when the application is made?

2) Usually, if the search warrant was obtained from a superior court, all other related proceedings are made before the same court. It should be made clear that, irrespective of who acted as a Justice of the Peace to obtain the warrant and the form 5.2 report, (Superior Court, Provincial Court or Justice of the Peace), the return applications can be presented to a justice of the peace.

3) Consideration should be given to adding to the English version he following words"… may be required, the prosecutor, peace officer or other person **having custody of the things seized…** shall apply…" to be consistent with French version.

490(7) Application for Order of Return

A person from whom anything has been seized may, after the expiration of the periods of detention provided for or ordered under subsections (1) to (3) and on three clear days' notice to the Attorney General, apply summarily to
(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or
(b) a justice, in any other case,
*for an order under paragraph (9)(*c*) that the thing seized be returned to the applicant.*

Recommended Amendments:

See the general comments at the beginning of the document.

490(8) Exception

A judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or a justice, in any other case, may allow an application to be made under subsection (7) prior to the expiration of the periods referred to therein where he is satisfied that hardship will result unless such application is so allowed.

Recommended Amendments:

1) Consider adding a definition or a series of criteria to define hardship.

2) Amend the section to prescribe a reverse onus in certain circumstances, such as when seized items are documents.

490(9) Disposal of things seized

Subject to this or any other Act of Parliament, if
(a) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or
(b) a justice, in any other case,
is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall
(c) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person; or
(d) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession,
and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person, and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

Recommended Amendments:

1) Consider amending s. 490 to allow for applications to be made to forfeit offence-related property.

Subsection 490(9) applications for forfeiture do not apply to offence-related property. As a result, if charges are not laid or if a person is acquitted, there is no avenue to seek forfeiture of property that was used for an illicit purpose, but is not illegal to possess. In many cases, management orders had been granted and the items seized remain under the care of the Seized Property Management Directorate indefinitely. Sometimes, the Crown will seek forfeiture, even though there are no provisions to make such orders. If the parties agree to forfeit certain items, can the person consent to a forfeiture order by agreeing for the purposes of this order that possession of the property is unlawful?

2) Clarify whether "proceedings" include civil forfeiture proceedings.

Some courts have interpreted proceedings to include civil forfeiture proceedings: *Regina v. Correa*, (August 23, 2011), Vancouver Registry 158692 (BCPC); *Regina v. Struss*, (March 9, 2011), Chilliwack Registry 46612 (BCPC); *Regina v. Espadilla*, (March 20, 2014), Surrey Registry 198102-3 (BCPC).

3) Admissible Evidence

According to the *R v West*, 2005 CANLII 30052 (Ont. C.A.), the standard of proof is beyond a reasonable doubt and hearsay evidence is not admitted, unless it meets the reliability and necessity criteria. Should this subsection be amended to allow the introduction of hearsay evidence?

490(9.1) Exception

Notwithstanding subsection (9), a judge or justice referred to in paragraph (9)(a) *or (*b*) may, if the periods of detention provided for or ordered under subsections (1) to (3) in respect of a thing seized have expired but proceedings have not been instituted in which the thing may be required, order that the thing continue to be detained for such period as the judge or justice considers necessary if the judge or justice is satisfied*
(a) that the continued detention of the thing might reasonably be required for a purpose mentioned in subsection (1) or (4); and
(b) that it is in the interests of justice to do so.

490(10) Application by lawful owner

Subject to this or any other Act of Parliament, a person, other than a person who may make an application under subsection (7), who claims to be the lawful owner or person lawfully entitled to possession of anything seized and brought before or reported to a justice under section 489.1 may, at any time, on three clear days' notice to the Attorney General and the person from whom the thing was seized, apply summarily to

(a) a judge referred to in subsection (7), where a judge ordered the detention of the thing seized under subsection (3), or
(b) a justice, in any other case,
for an order that the thing detained be returned to the applicant.

Recommended Amendments:

1) Should the subsection set out criteria to justify the return of the object seized?

2) See the general comments at the beginning of the document. A copy of the written notice should be served on the custodian who is in possession of the seized objects.

490(11) Order

Subject to this or any other Act of Parliament, on an application under subsection (10), where a judge or justice is satisfied that
(a) the applicant is the lawful owner or lawfully entitled to possession of the thing seized, and
(b) the periods of detention provided for or ordered under subsections (1) to (3) in respect of the thing seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4),
the judge shall order that
(c) the thing seized be returned to the applicant; or
(d) except as otherwise provided by law, where, pursuant to subsection (9), the thing seized was forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant, the applicant be paid the proceeds of sale or the value of the thing seized.

Recommended Amendments:

1) This subsection seems harsh especially if the order to return or forfeit has been made in good faith, the crown has complied with all the applicable criteria, and had no knowledge of the person claiming to be the lawful owner or to be lawfully entitled to be in possession. Should it be further clarified to take in consideration such factors?

2) This measure underscores the importance of the notice provisions under subsection 490 (10).

3) Clarify whether “proceedings” include civil forfeiture proceedings.

490(12) Detention pending appeal, etc.

Notwithstanding anything in this section, nothing shall be returned, forfeited or disposed of under this section pending any application made, or appeal taken, thereunder in respect of the thing or proceeding in which the right of seizure thereof is questioned or within thirty days after an order in respect of the thing is made under this section.

490(13) Copies of documents returned

The Attorney General, the prosecutor or the peace officer or other person having custody of a document seized may, before bringing it before a justice or complying with an order that the document be returned, forfeited or otherwise dealt with under subsection (1), (9) or (11), make or cause to be made, and may retain, a copy of the document.

Recommended Amendment:

1) Clarify whether s. 490 applies to copies of documents seized. More specifically, is a detention order required for photocopies?

490(14) Probative force

Every copy made under subsection (13) that is certified as a true copy by the Attorney General, the person who made the copy or the person in whose presence the copy was made is admissible in evidence and, in the absence of evidence to the contrary, has the same probative force as the original document would have if it had been proved in the ordinary way.

Recommended Amendments:

1) Consider whether the requirement "…in whose presence the copy was made…" is still useful. Consider whether copying under someone's supervision and control would be appropriate.

2) Clarify the requirement "certified as a true copy". What does this certification requirement entail? Could the section set out a presumption according to which electronic/photo static copies can be relied on, in the absence of evidence to the contrary?

490(15) Access to anything seized

Where anything is detained pursuant to subsections (1) to (3.1), a judge of a superior court of criminal jurisdiction, a judge as defined in section 552 or a provincial court judge may, on summary application on behalf of a person who has an interest in what is detained, after three clear days' notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

Recommended Amendments:

1) Consider whether this subsection should be used by law enforcement agencies to access documents seized by another agency. Is subs. 490(15) the appropriate mechanism to allow the sharing of documents? If so, should the procedure be made more explicit with regards to the notice to interested parties, factors to be considered to allow the sharing of the information (for example the requirement to demonstrate reasonable grounds) and conditions on the extent of the information sharing to protect privacy? What would happen to the information shared if the search is declared in violation of s. 8 of the *Charter*?

2) Clarify whether copies are subjected to the procedure set out in subsection 490(15).

3) See the general comments at the beginning of the document. A copy of the written notice should be served on the custodian/investigator who detains the items.

490(16) Conditions

An order that is made under subsection (15) shall be made on such terms as appear to the judge to be necessary or desirable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

490(17) Appeal

A person who feels aggrieved by an order made under subsection (8), (9), (9.1) or (11) may appeal from the order
(a) to the court of appeal as defined in section 673 if the order was made by a judge of a superior court of criminal jurisdiction, in which case sections 678 to 689 apply with any modifications that the circumstances require; or
(b) to the appeal court as defined in section 812 in any other case, in which case sections 813 to 828 apply with any modifications that the circumstances require.

Recommended Amendments:

1) Define the term "aggrieved party". For example, does a person need to have a proprietary interest in the property? Or will another type of interest, such as an investigative interest, suffice?

2) Should an appeal be permitted for the other subsections as well?

490(18) Waiver of notice

Any person to whom three days' notice must be given under paragraph (2)(a) or (3)(a) or subsection (7), (10) or (15) may agree that the application for which the notice is given be made before the expiration of the three days.