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UNIFORM LAW CONFERENCE OF CANADA

WORKING GROUP ON SECTION 490 of the CRIMINAL CODE

FINAL REPORT

Presented by
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July 2024

Presented to the Criminal Section

1. INTRODUCTION

[1] At the August 2022 meeting of the Criminal Section of the ULCC, the following resolution was unanimously (26-0-0) adopted:

> *Working Group on Section 490 of the Criminal Code*
>
> Be it resolved that the Section 490 Working Group be reconstituted and provide a report to the Criminal Section at the 2023 annual meeting.
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> Il est résolu que le Groupe de travail sur l'article 490 du *Code criminel* soit reconstitué et présente un rapport à la Section pénale lors de la réunion annuelle de 2023.

As a result, the Working Group was reconstituted[1]. Unfortunately, a report for the 2023 annual meeting was not completed. The group refocused its efforts and presents this final report of the Working Group, for the 2024 annual meeting.

[2] There is interplay between the product of this Working Group and that which examined another aspect of Part XV of the *Criminal Code*: section 487. That report was submitted at the 2023 ULCC annual meeting[2] and should be considered in concert with this document[3]. The Working Group fully endorses the Final Report of the ULCC Working Group On Section 487 of the *Criminal Code* and supports the implementation of all the recommendations in the Report. In particular, the recommendations regarding computers and data should be implemented as soon as possible.

[3] The Working Group undertook a comprehensive reconsideration of section 490 of the *Criminal Code,* and related foundational parts of section 489.1. This law collectively addresses what happens to "things" seized during investigations under the jurisdiction of Parliament[4].

[4] A historic overview is helpfully discernable from a compendious summary outlined by the B.C. Court of Appeal:

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[1] The Chair is indebted to the work and documents generated by the previous iteration of the working group, which assisted in the generation of this report. The Chair would also like to thank Caroline Amor, Léa Blard and Lina Saad for their help in translating this report.

[2] https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2023/Section-487-Report-Search-Warrants.pdf

[3] After the submission of the final report the chair of the 487 group, Mr Matthew Asma, joined this working group.

[4] Provincial legislation exists for investigations flowing from non-Parliamentary authority, e.g. Section 24 of the B.C. *Offence Act*, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96338_01#section24; and section 158.2 - 159 of the Ontario *Provincial Offences Act*, https://www.ontario.ca/laws/statute/90p33#BK198

> The search and seizure provisions of the *Criminal Code* existed long before the *Charter*, and indeed are found in the first *Criminal Code*: see *Criminal Code,* 1892, s. 569; *The Criminal Procedure Act*, R.S.C. 1886, c. 174, ss. 51-52.
>
> Similar provisions requiring that seized items be brought before a justice for the purpose of making a detention order have been in the *Criminal Code* since its inception: see *Criminal Code,* S.C. 1953-54, c. 51, s. 432; *Criminal Code,* S.C. 1892, c. 29, s. 569(4).
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> …
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> Prior to the 1985 amendment (Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.)), all property was required to be brought before the justice to be dealt with according to law. The introduction of a report or return in Form 5.2 reduced the amount of time and inconvenience to the peace officer and the justice as a result of not requiring the actual items or things seized to be brought before the justice.
>
> …
>
> Prior to the Charter, the law of search and seizure focused on the property rights of an individual, relying in part on the law of trespass. When the police seized property under a warrant, they were required, at common law, to produce an inventory of items seized. When the Criminal Code was established in Canada, the police were required to bring items seized before a justice. This law continued until 1985 when, instead of bringing the things seized to the justice, the police were required, alternatively, to file a report.[5]

[5] Section 489.1 / 490 of the *Criminal Code* captures countless law enforcement actions daily. Yet it is cumbersome, time-consuming, challenging to understand and features palpable gaps. Despite these characteristics, the legislation has remained unchanged for some time. The above-mentioned 1985 amendment was the last significant[6] modification.

[6] Section 490 of the *Criminal Code* has been central to important litigation. Authoritative caselaw has determined that noncompliance has constitutional implications. On this point, the Supreme Court of Canada reasoned:

> With respect to the other *Charter* breaches found in the courts below, the officer could not explain why the police had detained the computer for months without respecting the reporting requirements in ss. 489.1 and 490 of the *Criminal Code*.

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[5] *R. v. Craig*, 2016 BCCA 154 (CanLII), https://canlii.ca/t/gpbj5, paragraphs 148 – 149 & 160

[6] The French version of s. 490(9) was amended in 2017; the English version was last amended in 2008 when the provisions of 490(17) were changed to allow for appeals to be brought at the provincial Court of Appeal level.

> Under s. 489.1, police must report a warrantless seizure to a justice "as soon as is practicable". Under s. 490(2), the seized item cannot be detained for over three months unless certain conditions are met. In this case, the police only made a report to a justice as required by s. 489.1 of the *Criminal Code* after the computer was searched and almost five months after it was initially seized. These reporting requirements are important for *Charter* purposes, as they mandate police accountability for seizures that have not been judicially authorized (see *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at paras. 82 and 84).[7]

[7] A *Charter* violation in relation to the oversight of things seized provisions of the *Criminal Code* can result in the exclusion of critical evidence on serious charges[8]. Section 490 is very important.

[8] The confusing nature of the law and need for statutory revision are stressed by a former Chief Justice of the Supreme Court of Canada:

> I add this. It is regrettable that an improper seizure of money which even today the Crown cannot say is connected to any crime, has occasioned so much expense and consumed so much energy. Both parties took the wrong procedures. Had the appellant brought an action for replevin or *Charter* review to the Court of Queen's Bench instead of his cross-motion under s. 490(2), things might have been otherwise. The fault of the Crown is even greater: first it seized the money, and then when an order was made for its return, followed a non-existent route of appeal. The point is not to cast blame, but to seek to improve this aspect of the administration of justice. Parliament may well wish to consider whether s. 490 should be amended to provide a clear route of challenge and appeal where it is alleged that property is seized in an unlawful manner.[9]

[9] Although McLachlin C.J.C. in *Raponi* focused on one component of section 490, its outdated nature calls for consideration of a wholesale revision. Investigative techniques have changed significantly since that last substantive modification of the law in the mid-1980s. As it stands, section 490 is ill-equipped to address all forms of evidence gathering. The particulars of this reality will be unpacked below, but it is most clearly shown by the myriad of issues that arise from the seizure of electronic devices.

[10] On top of needing modernization, several aspects of the legislation lack precision. Some of these uncertainties have been interpreted by the courts. Where appropriate, consideration should be given to codifying these judicial pronouncements into the legislation. Yet on certain points, there has not been uniform consensus among the judiciary. To the extent possible, resolution of such issues is important. The ambiguity of the legislation captures questions as fundamental as whether specific

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[7] *R. v. Reeves*, 2018 SCC 56 (CanLII), [2018] 3 SCR 531, https://canlii.ca/t/hwk3k, paragraph 63
[8] *R. v. Gill*, 2024 BCCA 63 (CanLII), https://canlii.ca/t/k3141, *R. v. Canary*, 2018 ONCA 304 (CanLII), https://canlii.ca/t/hrggw
[9] *R. v. Raponi*, 2004 SCC 50 (CanLII), [2004] 3 SCR 35, https://canlii.ca/t/1hgvw, paragraph 42

evidentiary acquisition engages the law, or not. Consideration should be given to the need for clarification regarding the interplay between orders under section 490 and those made in parallel civil proceedings[10]. James Mallet, Director Civil Forfeiture Office (Alberta) submitted a complementary perspective to this area of the law[11].

[11] The process from reporting through detention and return, or disposition, ought to be more efficient. The application of this objective must not be centred only on the goals of the state, but also consider those whose property has been taken by that entity. For example, the present regime delays the return of things seized to those entitled to that relief.

[12] There is a dichotomy between the goal of prosecuting crime and the interests of those whose property is seized, who are often the target of that very system. The effect of the law should not be to create an obstacle to holding those who break the law accountable so long as the process protects against abuse and maintains an appropriate level of accountability. Yet the milieu of seizure is not a purely bipolar one. There are other independent actors who may be directly and significantly impacted by a seizure of things. Witnesses, family members and businesses, for example.

[13] Any adjustment to section 490 must consider competing interests of law enforcement in investigating crime and those affected by the state's seizure of things. With respect to the latter, any modification of the current regime must carefully consider the associated *Charter* implications, particularly the right to be secure against unreasonable search and seizure. Revision of the process should protect the *Charter* interests of individuals and provide redress to those who have had their property seized. It is not, however, the recommendation of this Working Group that a court hearing a property detention application under s. 490 of the *Criminal Code*, be a court of competent jurisdiction to provide a *Charter*-based remedy.

[14] While the former Chief Justice urged Parliament to "consider" a challenge to things "seized in an unlawful manner", the hazards associated with permitting a complete scheme of summary applications to become a forum for pre-charge *Charter* constitutional redress was comprehensively considered in early 2024 and soundly rejected. The BC Supreme Court, following consideration of *Raponi,* made this telling comment:

> Applications for further detention of things seized are brought prior to the commencement of criminal charges. Such applications are commonplace and numerous in the court system. A system that would allow even a fraction of these

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[10] *R. v. Yadav*, 2022 BCPC 327 (CanLII), https://canlii.ca/t/jzcsb; *Crockford v. Keith*, 2015 BCPC 446 (CanLII), https://canlii.ca/t/gtpzj, *British Columbia (Director of Civil Forfeiture) v. Qin*, 2020 BCCA 244 (CanLII), https://canlii.ca/t/j9dcw

[11] See Appendix "A' at part 5 of this report. The Working Group has no comment on the content of this document.

> applications to be postponed indefinitely for months or even years while civil proceedings ground away, on an interested party's assertion of a *Charter* violation, would be a system operating contrary to the purpose of s. 490 and deliberately undermining the s. 490 scheme. It would force serious criminal investigations to halt, significantly undermining society's interest in the proper pursuit of such investigations and the proper administration of justice overall.[12]

[15] Central to any potential reforms to the provisions of section 490 is consideration of the purpose of the section. Should the law solely safeguard proprietary and related interests, or should it also contemplate privacy concerns? If the latter, to what extent and how? Does the section need to reflect both? Previously the purpose of the section was characterized as balancing proprietary rights with state interests:

> It is common ground that the overall objective of s. 490 of the *Code* is to achieve a fair balance between the property rights of individuals and the state's legitimate interest in preserving evidence during an on-going investigation into criminal activity.[13]

[16] However, more recently appellate courts have recognized privacy interests as part of the section's purpose:

> The regime in s. 490 invokes the court's supervisory powers to ensure that privacy and other *Charter*-protected interests are respected in the course of criminal investigations: *Okoroafor* at para. 18.[14]

And:

> With the advent of the *Charter*, the focus was no longer exclusively on property rights, but also on the privacy rights of the individual. It is important to note, however, that this was not a shift from excluding property rights, but <u>including</u> and emphasizing privacy rights.[15]

[17] The authoritative judicial comments on privacy dictate that revisiting any aspect of the present law must keep such perspectives at the forefront. It is noteworthy that while some seizures occur under the umbrella of prior judicial authorization, others are carried out pursuant to common law authority. The provisions apply in those circumstances[16]. The property detention scheme may then be the only venue where privacy concerns in relation to seized things can be considered by the courts prior to

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[12] *Further Detention of Things Seized (Re)*, 2024 BCSC 297 (CanLII), https://canlii.ca/t/k314k, paragraph 102
[13] *R. v. Classic Smokehouse and Leader Cold Storage,* 2012 BCPC 232 (CanLII), https://canlii.ca/t/fs0sn, paragraph 14
[14] *Further Detention of Things Seized (Re)*, 2019 BCSC 1345 (CanLII), https://canlii.ca/t/j1xf6, paragraph 16
[15] *R. v. Craig, 2016 BCCA 154* (CanLII), https://canlii.ca/t/gpbj5, paragraph 178
[16] *R. v. Backhouse*, 2005 CanLII 4937 (ON CA), https://canlii.ca/t/1jvwn, paragraph 108

charges being laid. Indeed, some investigations will never result in criminal charges, or similar proceedings. The ubiquitousness of mobile telephones both in society as well as the data it contains being found to be a "thing" by some courts seized raises acute concerns given the content of same. For example:

> …it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging.[17]

[18] Ensuing accountability for things seized by state authorities in the context of a criminal investigation is important to support investigations and prosecutions, to ensure that state authorities act consistently with *Charter*-protected rights, and to ensure public confidence in the criminal justice system and processes. At the same time, there are limits to the resources of law enforcement, the Attorneys General and the judiciary[18]:

> For provincial legislatures and Parliament, this may mean taking a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial. … Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced.[19]

[19] The need for efficient use of court resources has also been emphasized in contexts where the Supreme Court of Canada has sought to avoid multiplicity of peripheral proceedings on issues that could instead be dealt with at a trial.[20]

[20] This report will endeavour to identify the current deficiencies with the law. It will do so by individually examining each subsection. Issues within each will be highlighted, with some recommendations then outlined. There may be some overlap from one recommendation to another and some may be contingent on the acceptance of others.

[21] The problematic nature of some of the provisions is more acute than others, yet a general revision of the seized property reporting, and detention scheme in section 490 of the *Criminal Code* is overdue.

[22] There is a consensus amongst Working Group that the legislation can be improved. There are varying views across the Working Group as to the nature and extent of amendments required.

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[17] *R. v. Marakah*, 2017 SCC 59 (CanLII), [2017] 2 SCR 608, https://canlii.ca/t/hp63v, paragraph 35
[18] https://www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx
[19] *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, https://canlii.ca/t/gsds3, paragraph 140
[20] *Kourtessis v. M.N.R.,* 1993 CanLII 137 (SCC), [1993] 2 SCR 53, https://canlii.ca/t/1fs46, paragraphs 115 – 116; *R. v. Awashish,* 2018 SCC 45 (CanLII), [2018] 3 SCR 87, https://canlii.ca/t/hvqb5, paragraph 10

[23] Membership of the Working Group included:

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Matthew Asma	Crown Law Office (Ontario)
Erin Cassidy	Department of Justice Canada – Criminal Law Policy (Ontario)
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Melissa Insanic	York Regional Police (Ontario)[21]
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James Mallet	Director Civil Forfeiture Office (Alberta)
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[21] Ceased membership prior to the submission this final report.
[22] Ceased membership prior to the submission this final report.
[23] Ceased membership prior to the submission this final report.
[24] Ceased membership prior to the submission this final report.

2. CURRENT PROVISIONS AND ASSOCIATED RECOMMENDATIONS

2.0 Section 489.1

[24] The gateway to section 490 is section 489.1 of the *Criminal Code.* Section 489.1 mandates the return of a thing seized or reporting to the court regarding the seizure and detention after a broad array of seizures:

> **489.1 (1)** Subject to this or any other Act of Parliament, if a peace officer has seized anything under a warrant issued under this Act, 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)** return the thing seized, on being issued a receipt for it, to the person lawfully entitled to its possession and report to a justice having jurisdiction in respect of the matter and, in the case of a warrant, jurisdiction in the province in which the warrant was issued, if the peace officer is satisfied that
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> > > **(i)** there is no dispute as to who is lawfully entitled to possession of the thing seized, and
> > >
> > > **(ii)** the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
> >
> > **(b)** bring the thing seized before a justice referred to in paragraph (a), or report to the justice that the thing has been seized and is being detained, to be dealt with in accordance with subsection 490(1), if the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii).
>
> Person other than peace officer
>
> (2) Subject to this or any other Act of Parliament, if a person other than a peace officer has seized anything under a warrant issued under this Act, under section 487.11 or 489, or otherwise in the execution of duties under this or any other Act of Parliament, that person shall, as soon as is practicable and so that the thing seized may be dealt with in accordance with subsection 490(1),
>
> > (a) bring the thing before a justice having jurisdiction in respect of the matter and, in the case of a warrant, jurisdiction in the province in which the warrant was issued; or
> >
> > (b) report to the justice referred to in paragraph (a) that the thing has been seized and is being detained.

Form

(3) A report to a justice under this section shall be in Form 5.2, varied to suit the case.

[25] Three things should be reexamined in this foundational provision:

(a) A plain reading of the law dictates that the reporting responsibility, unlike the corresponding application for detention, cannot be delegated.

(b) The obligations that flow from circumstances where something is seized but returned.

(c) A reporting duty that can be carried out permissibly in two ways, by paper form or physically presenting the thing seized.

(a) "a police officer has seized anything… the peace officer shall" / "a person other than a peace officer… that person shall"

[26] The law arguably requires that the seizing individual be the person who executes the reporting obligation. This is not always practical. There are circumstances where several officers dealing with the same investigation will seize things concurrently. This is illustrated by numerous seizures by various officers at a large crime scene or at multiple locations. Some investigations have exhibits numbering in the hundreds of thousands[25]. The generation of multiple reports in such circumstances is convoluted for the police, the courts and those who may have an interest in the things seized. There may be a benefit for more flexible language to be used to make it clear that the person reporting does not need to be the same person as the one who physically seized the object.

[27] Further, the initial seizing officer may not be the one who makes the determination that detention is required. For example, an officer can be directed to seize something on grounds formulated by another officer. This component of section 489.1 was interpreted by the Ontario Superior Court of Justice to be more flexible than a conservative reading would suggest:

> It is plain that Parliament contemplated that the seizing officer be responsible for making a report of his or her seizure, but that a broader list of individuals could appear before the justice seeking detention. But I see nothing in s.489.1(1)(b) that requires the seizing officer to either physically write the report, or to physically present the report to the justice. In my view, an officer complies with s.489.1(1)(b) when the officer prepares an internal report of the seizure and

[25] *R. v Pickton*, 2020 BCSC 1200 (CanLII), https://canlii.ca/t/j95qp, paragraph 9

> detention, and another officer, in accordance with his or her responsibilities, reviews the internal report, physically fills out the report form and presents it to the justice. The seizing officer also complies with the section when that officer reports his seizure to an officer in charge of the seizures in the investigation, and that officer in turn prepares the internal report that is provided to the officer who physically fills out the form and presents it to the justice. In addition, I see nothing wrong with the report being signed by the person who actually prepares it.
>
> My approach does not strain the language of s.489.1(1)(b), facilitates Parliament's intention that seized items be returned to their rightful owners when not required for an investigation or as evidence, and gives appropriate recognition to the need to manage criminal investigations efficiently.
>
> To interpret the provision otherwise would be unworkable. First, in most investigations, more than one officer is engaged in the execution of a search warrant. Generally speaking, the officer who seizes a particular item is not the officer who detains it or who causes it to be detained. If the seizing officer must personally prepare and present a report, then presumably so must the officer who decides to detain the item. If several officers seize things in the execution of a single search warrant, then each of them would also have to prepare and present reports. In a large fraud investigation, where dozens of officers often participate in the execution of simultaneous warrants, one could imagine literally hundreds of officers preparing and presenting reports in the same case. As well as resulting in the needless expenditure of time and money, this would hardly facilitate Parliament's intention that seized items be returned to their rightful owners when not required for an investigation or as evidence.
>
> The purposes of the reporting requirement would be much better served in the case I have postulated by a single officer in charge of the case providing a single report for each search warrant, ensuring that everything seized is recorded, and categorized according to its nature and the location of seizure. This would ensure that the justice is able to properly understand the nature and extent of the search and the things seized, and exercise the jurisdiction in s.490 responsibly.[26]

[28] Subsection 490(1) permits the application to detain be brought by a variety of actors. The latitude in this respect could be mirrored by modifying the current specification of who must make the initial report after a police seizure.

[29] A similar flexibility should be incorporated into seizure by non-state actors. When police seek the assistance of a private third party to facilitate the seizure of something, (e.g. when expertise is needed), the corresponding reporting obligation

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[26] *Chief of Police v. Justice of the Peace*, 2007 CanLII 40542 (ON SC), https://canlii.ca/t/1t2s4, paragraphs 15 – 18

should be permitted to be completed by a police officer who eventually takes control of the thing in question. Arrests made by privately employed security agents would be another situation where non-state seizure would occur.

[30] It was recognized within the Working Group that this aspect of the legislation may not be consequential in current practice. On many investigations, a designated exhibits officer who oversees exhibits is the one making the report. Nonetheless, this would benefit from clarification.

[31] Separate seizures related to a single investigation and the detention of such things may need to be the subject of independent scrutiny and have unique considerations. It is important to maintain flexibility, an aspect of which can be enhanced with minor modifications to the present wording of the legislation within its enabling provision.

Recommendation 0.1: The Working Group recommends clarifying that the reporting obligation may be done by someone other than the officer or person who seized the thing in the first instance.

(b) "return the thing seized, on being issued a receipt for it to the person lawfully entitled to its possession and report to a justice"

[32] This obligation is broad. Strict adherence to the current law commands a significant burden for the police, and to some extent the courts.

[33] For instance when the police apprehend a shoplifter, seize stolen merchandise from them incidental to that arrest and then return the goods to the obvious rightful owner, the current law requires that the officer:

> - draft documentation - "the receipt" - to provide to a representative of the business;
>
> - compose a "report" that would then have to be provided to a judicial officer.

[34] Nonetheless, the provision is intended to protect peace officers who return things seized by ensuring that they receive a receipt for the return. In addition, the provision provides for judicial oversight of things seized by ensuring that the court receives a report regarding the return of the thing seized.

[35] Similarly, the quick return of things to the person from whom it was seized is commonplace. Virtually every person who is arrested for contravening the *Criminal Code* will be searched and their personal effects seized from them, particularly if they are held in custody at a station or detachment. Upon subsequent release, the detainee's personal effects are often returned to them. So too if the police arrest a person and seize a possession from them incidental to a search (like personal identification), photograph that item and then return it before releasing the person on an appearance notice. The

same can arguably be said of inventory searches of impounded motor vehicles[27]. In such situations the dictates of the current provision would require these seizures to be documented with a receipt - which could delay release - and subsequent report.

[36] Some Working Group members considered that there was ambiguity as to who was required to issue the receipt and observed that there is no guidance as to the form that a receipt should take. There was discussion in the Working Group regarding the burden on police and the importance of efficiency but also the importance of police accountability and judicial oversight. The Working Group agreed that further consideration of these objectives and possible solutions would be necessary.

Recommendation 0.2: The Working Group recommends eliminating the need to report warrantless seizures to a justice when what is seized has been returned prior to any detention order being made.

(c) "bring the thing before a justice"

[37] Under the current regime a seized thing can be brought before the court to fulfill the reporting requirement. A justice physically presented with an object may have difficulties associated with detaining the thing, even though doing so would be mandated if the legal basis for detention were made out. Firearms and electronic devices that require a source of power are two examples.

[38] The option of physically presenting a seized thing to the court is likely very rare. It used to be the only vehicle for reporting a seizure but may no longer be essential, in favour of form-based accounting.

Recommendation 0.3: The Working Group recommends eliminating the option of bringing a seized thing before a justice.

2.1 Section 490(1)

[39] If a thing seized is not returned, subsection 490(1) requires one of two things: a return order or the court-sanctioned detention of the thing. Detentions orders are valid for up to three months from the date of seizure:

> 490 (1) 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,

[27] *R. v. Caslake*, 1998 CanLII 838 (SCC), [1998] 1 SCR 51, https://canlii.ca/t/1fqww

> (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
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> (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.

[40] There are several elements of this provision that can be improved, or which should be examined:

(a) Knowing what is exempt by operation of statute is challenging.

(b) The present requirement to report the seizure of "anything", while comprehensive, may be too broad.

(c) The circumstances of when evidence that is collected needs to be reported and ordered detained.

(d) The unnecessary physical presentation to a justice of seized things.

(e) The utility of obtaining a court order to return a thing reported as seized.

(f) The character and scope of the initial application for detention.

(g) The association between "reasonable care" and necessary damage to the thing.

(a) "Subject to this or any other Act of Parliament"

[41] The *Criminal Code* is a large statute. Those who seize something may have a challenging time locating what is excused, dependent upon or conditional to the requirement to report and / or obtain an order to detain. For example, things seized under the authority of a production order issued under the *Criminal Code* are exempt by section 487.0192(4).

[42] A second, more convoluted example is when a court makes an order under s. 487.05, 487.055 or 487.091 to obtain DNA by warrant or authorization, s. 487.057 of the *Criminal Code* applies:

Report of peace officer

487.057 (1) A peace officer who takes samples of bodily substances from a person or who causes a person who is not a peace officer to take samples under their direction shall, as soon as feasible after the samples are taken, make a written report in Form 5.07 and cause the report to be filed with

(a) the provincial court judge who issued the warrant under section 487.05 or granted the authorization under section 487.055 or 487.091 or another judge of that provincial court; or

(b) the court that made the order under section 487.051.

Contents of report

(2) The report shall include

(a) a statement of the time and date the samples were taken; and

(b) a description of the bodily substances that were taken.

Copy of report

(3) A peace officer who takes the samples or causes the samples to be taken under their direction at the request of another peace officer shall send a copy of the report to the other peace officer unless that other peace officer had jurisdiction to take the samples.

[43] Although this section does not explicitly take the results of DNA orders outside of the broad parameters of section 490, the section requires a report in a prescribed form (5.07) that is not the one associated with property detention reports (Form 5.2.). DNA seizure reports must be filed with a "judge". It makes little sense to require an officer seizing DNA to file one report with the judicial officer who granted the order, and then another with a justice that would then take the seizure down the path of property detention orders. This implicit exclusion has support in the caselaw:

> Although ***Arason*** and ***Re:Church of Scientology*** are both more recent cases than ***Guiller*** and are, of course, binding on this court unless they should be distinguished because of the different section of the ***Criminal Code*** involved, the decision in ***Guiller*** is useful, because it provides a basis for comparing the significance of a report to a judge required by s. 487.057(1) to the return required under s. 487(1)(e). In respect of the latter return or report, the statutory scheme, particularly s. 490, requires continued involvement on the part of the justice in determining whether matters seized should be detained and in dealing with applications for a return of things seized. In the case of the seizure of samples

> of bodily substances under DNA warrants there is no further role for the issuing justice to play in the statutory scheme.[28]

[44] A last example of the current lack of clarity from the *Criminal Code* is section 320.28 that allows for the taking of blood. The section mandates:

> **Retained sample**
>
> **(8)** A person who takes samples of blood under this section shall cause one of the samples to be retained for the purpose of analysis by or on behalf of the person from whom the blood samples were taken.
>
> **…**
>
> **Release of retained sample**
>
> **(10)** A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction shall, on the summary application of the person from whom samples of blood were taken under this section, made within six months after the day on which the samples were taken, order the release of any sample that was retained to the person for the purpose of examination or analysis, subject to any terms that the judge considers appropriate to ensure that the sample is safeguarded and preserved for use in any proceedings in respect of which it was taken.

[45] Collectively, section 320.28(8) and (10) appear to dictate an exemption from the reporting and detention order obligations under s. 490(1) of the *Criminal Code.*

[46] While the *Criminal Code* is extensive, it pales in comparison to the considerable scope of all federal legislation. Nonetheless that entire body of law may contain exemptions to the obligations under the commencing provisions of section 490(1) as "Acts of Parliament". Such may not be readily apparent, but flow from necessary implication.

[47] An illustrative example of this is the *Customs Act*. Particularly section 110(1)[29] which prescribes things seized under it as forfeit in certain instances. There are other *Customs Act* seizures that do not deem the thing as forfeit. Seizures that result in deemed forfeiture are dealt with in other parts of the *Customs Act* in a way that would conflict with an order made under section 490.

[48] A second non-*Criminal Code* example is the *Controlled Drugs and Substances Act*. Section 13(1) and (3) appear to exempt seizures of "a controlled substance, precursor or chemical offence-related property" from section 490. Rather section 12.1

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[28] *R. v. Dauphinee*, 2004 BCSC 187 (CanLII), https://canlii.ca/t/1gfqh, paragraph 13
[29] https://laws-lois.justice.gc.ca/eng/acts/c-52.6/page-19.html#h-141627

seemingly contemplates a report of such a seizure being sent to the Minister of Health and filed with a justice, but without an apparent need to seek an order for its detention.

[49] The current language of section 490(1) puts the seizing individual on notice that there may be other relevant considerations and some indication of where the answer to that may be located. Setting out exemptions in one place may lead to the conclusion that in their absence, the provision of section 490 applies. A set list of exemptions may require continual revision of that which is excluded moving forward. This would favour keeping the legislation in its current form.

[50] On the other hand, the provision in question has been repeatedly been characterized authoritatively as a "comprehensive scheme"[30]. If section 490 is to be complete and include everything that is necessary, logically what the law says needs to be done should be comprehensively outlined in one place, as much as possible. That the reporting obligation is to be done "as soon as practicable" reinforces the benefits of precision.

[51] Clarity is desirable. Yet avoiding an on-going maintenance of law issue is recognized as are risks that an attempt to provide a comprehensive list could be, or could become, incomplete. What is exempted from the reporting and detention provisions of the *Criminal Code* by operation of law elsewhere could be articulated as a non-exhaustive list.

(b) "anything"

[52] The term is not defined in the section. Its usual and ordinary meaning would cast a wide net and is conceptually difficult to apply. DNA samples, swabs of surfaces, fingerprints, bodily fluids, bodily impressions, and data are each "anything". However, it is difficult to reconcile the balance of the section in application to such items. For example, how such things can be returned. The current legislation requires the use of court resources and publicly funded legal counsel to make application for detention and return of things that have no value whatsoever (e.g. a Tim Hortons cup and lid[31]). Determining value, however, can be challenging and there is a subjective aspect to it as well. What would be deemed worthless by most, may not be the person from whom it was seized. A distinction can be drawn between those things for which it may be better to specifically exempt from the class of "anything", and those for which the involvement of the judicial apparatus or government resources may be better suited to when the detention of such things is opposed. A modification in this respect will be explored later in this report.

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[30] *Winnipeg (City) v Caspian Projects Inc et al,* 2021 MBCA 33 (CanLII), https://canlii.ca/t/jf5p, paragraph 28

[31] *Further Detention of Things Seized (Re)*, 2024 BCPC 50 (CanLII), https://canlii.ca/t/k3tkf, paragraph 28

[53] There is a conflict in the Caselaw on whether copied data is a thing that is subject to a reporting requirement. In British Columbia it is [32] in Ontario it is not. [33]. The advent of cryptocurrency and non-fungible tokens also raises special and complex issues.

[54] Regarding data and digital seizures, there should be a specific search, seizure, detention, and retention regime created for such things[34]. This is consistent with both the report of the ULCC Working Group on section 487 of the *Criminal Code* as well as Bill C-47. The former makes the recommendation as to data, and the latter does for digital assets, though it leaves unanswered the questions as to the relationship between the new section 462.321 and section 490[35]. It is notable that section 462.321 and section 462.32, like section 489.1, permits return to be done without the court's involvement when there is no dispute as to lawful entitlement to possession and before any report to a justice has been filed with the court. This is notable because in both contexts Parliament has allowed that restitution of seized property or assets can be made without a court's prior approval.

[55] Finding an alternative definition to "anything" is challenging. Rather than attempting to use another term, the section could include exemptions for "things" for which it would make little sense to engage the process, or which a specific scheme is required.

[56] The possibility of including things that are unlawful generally or unlawful for the person from whom it was seized to possess could be included on such a list. However, this approach raises the issue of how that determination would be made, and by whom. Certain things are unquestionable illegal, but for others, their character may not be clear and indeed could be the issue at trial. For example, an alleged prohibited weapon is seized where the status of the object as such may be in dispute. Or images that are suspected to constitute child pornography, may in fact not be such in law, for various reasons.

[57] The utility of creating such a list was questioned within the Working Group. There was a suggestion that outlining traits of property that would be exempt would be better as a specific itemization would not contemplate the advent of new things in the future. Cloud-based storage and artificial intelligence are but some areas for which the future of search and seizure may yet go in unknown directions. The prospect of any such list as being non-exhaustive was identified and such would address maintenance of law concerns.

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[32] *R v. Bottomley*, 2022 BCSC 2192 (CanLII), https://canlii.ca/t/jxx06
[33] *R. v. Robinson*, 2021 ONSC 2446 (CanLII), https://canlii.ca/t/jf57h
[34] The Working Group of s. 487 has unpacked this issue in their report.
[35] https://www.parl.ca/DocumentViewer/en/44-1/bill/C-47/royal-assent

Recommendation 1.1: The Working Group examining whether things that are exempt from the requirements of the section be clearly outlined within the section itself. Potentially this could be articulated as a non-exhaustive list and specific consideration should be given to exempting copies of data and bodily samples. The seizure and management of data and digital assets should be addressed with a new specific procedure as described in the Final Report of the ULCC Working Group on Section 487 of the *Criminal Code*.

(c) "seized"

[58] The term "seized" is not defined in the section. The word has legal meaning, but what it implies relative to the detention of things seized provisions of the *Criminal Code* lacks clarity. This can result in uncertainty as to when the provisions related to the detention of things seized is applicable.

[59] Resolving the question of what is meant by "seized" in the context of section 490 of the *Criminal Code* centres on whether the judiciary should be informed of and/or involved with the supervision of all things gathered by the investigators during a criminal investigation.

[60] Juxtaposing the articulation of "seized" in section 490 with similar legislation is indicative of a focused application to a particular form of evidentiary acquisition. For instance, the *Controlled Drugs and Substances Act*[36] expresses obligations after a specified individual "seizes, finds or otherwise acquires" certain things. This obligation implies a broader requirement than what the *Criminal Code* requires.

[61] In the context of s. 8 of the *Charter*, the Supreme Court of Canada has defined "seizure":

> In Dyment, at p. 431, I observed that the essence of a seizure under s. 8 of the Charter is the taking of something from a person by a public authority without that person's consent. In my opinion, it is clear that the "taking" of a bodily fluid sample need not be directly from the person whose rights are affected (and from whom the sample originated), or even (as in Dyment) from the medical staff who extracted the sample, in order to constitute a seizure sufficient to invoke the protection of s. 8. The protection of s. 8 necessarily extends to a state seizure where the "taking" is from the immediate possession of another person who is lawfully in possession of the bodily sample.[37]

Sopinka, J. (dissenting in part) in another case said:

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[36] *Controlled Drugs and Substances Act,* SC 1996, c 19, https://canlii.ca/t/5657m, s. 12.1
[37] *R. v. Colarusso*, 1994 CanLII 134 (SCC), [1994] 1 SCR 20, https://canlii.ca/t/1frw6

> A starting point in attempting to determine what the framers of the Charter meant by the word "seizure" is the statement of Marceau J. (dissenting on this point) in Ziegler v. Hunter, 1983 CanLII 3009 (FCA), [1984] 2 F.C. 608 (C.A.) In his view, a seizure is "the taking hold by a public authority of a thing belonging to a person against that person's will" (p. 630).[38]

[62] The above definitions were articulated through the lens of the *Charter.* While the detention of things seized provisions of the *Criminal Code* predate its promulgation, they have come to be interpreted in light of *Charter* interests as well as property considerations. A considerably more historic definition is:

> There is no reason to give to the meaning of the word "seizure" in the Act anything different to its ordinary meaning which is, a forcible taking possession.[39]

[63] The definition from this Alberta ruling was mentioned in a subsequent judgment from the same province noting "I do not take that definition as being the only definition for what may be construed to be a seizure in substance."[40] However the definition from almost 100 years ago was cited in the Federal Court of Canada:

> In my view, the exclusion by this Court of lawfully obtained evidence, about to be filed in another court, would bring the administration of justice into disrepute. Again, plaintiffs insist that they are not attacking the seizure of the documents but their "retention" and "use". Yet, the Charter is silent as to the retention and use of property. In fact, property rights as such are not protected by the Charter. … There are no words in section 8 of the Charter that would protect the right of a Canadian citizen to be secure against unreasonable "retention" or "use". The plain meaning of the word "seizure" is the forcible taking possession. [See: Pac. Finance Co. v. Ireland, [1931] 2 W.W.R. 593 (Alta. C.A.); Re Attorney-General of Nova Scotia and Pye (1983), 7 C.C.C. (3d) 116 (N.S. C.A.)] "Retention" is something else. "Use" is something else again. The distinction is quite clear in the Criminal Code [R.S.C. 1970, c. C-34] of Canada: for instance, something may be "seized" under section 445 and "detained" under section 446.[41]

[64] The B.C. Court of Appeal mentioned a particular foundation for the mid-1980 amendment to the section:

> In the Law Reform Commission of Canada Working Paper 39, Post-Seizure Procedures (1985), the Commission highlighted the need that all things seized

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[38] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 SCR 425, https://canlii.ca/t/1fsz8
[39] *PACIFIC FINANCE Co. v. IRELAND,* [1931] A.J. No. 53.
[40] *General Motors Acceptance Corp. of Canada v. Isaac Estate*, [1992] A.J. No. 1083
[41] *JIM PATTISON IND LTD v CANADA*, [1985] FCJ No 58, [1984] 2 FC 954

> be accounted for before an independent authority to ensure they are subject to safeguards and controls (at 15).
>
> …
>
> The Charter protects against unreasonable search or seizure. In my view, a seizure does not end with the picking up of things. The requirement for a return to a justice is the ongoing judicial supervision of things seized—both under a warrant, pursuant to a warrantless search, and pursuant to a common law search: Backhouse. This is the only public record of what was in fact seized, whether the items were named in the warrant, whether they were seized as found in plain view, and what was seized outside of a warrant. As noted, there can be a significant invasion of privacy after the picking up of the items—including DNA testing, forensic testing, copying and other examinations. Thus, the privacy interests are continuing.[42]

[65] In turn that Working Paper outlined:

> These last two stages of the appropriation process occur after a seizure of things has been carried out. "Seizure"' is not defined in the present Criminal Code. In attempting to establish the parameters within which the proposed post-seizure procedures would operate, we have adopted the conceptual notion of seizure developed in the Search and Seizure Working Paper. For our purposes therefore. a seizure will be regarded as an acquisition of an object made pursuant to a power to perform an intrusion.[43]

[66] While the above definitions circumscribe scenarios where the gathering or collection of items is exempt from reporting and detention obligations, the use of the word is not necessarily indicative of such. For instance, a broad use of the term can be found at the highest level. In finding that "initial privacy interest in the evidence was abandoned", the Supreme Court of Canada's narrative into this situation described: "The items **seized** by the police included…"[44]

[67] An authoritative text had this to say on the matter:

> We frequently speak of "consent searches" or "consent seizures," but this language is not entirely accurate. The authorities suggest, that when police officers take something from someone with their permission, they are not engaged in any sort of seizure activity at all.[15] Rather, a police officer who engages in a "consent seizure" is simply receiving evidence from a member of

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[42] *R. v. Craig*, 2016 BCCA 154 (CanLII), https://canlii.ca/t/gpbj5, paragraphs 179 & 181
[43] http://www.lareau-law.ca/LRCWP39.pdf
[44] *R. v. Patrick*, 2009 SCC 17 (CanLII), [2009] 1 SCR 579, https://canlii.ca/t/231wj, paragraphs 2 & 3

> the public. There is no reason for any judicial supervision. The language of s. 489.1 does not stretch this far. As such, no return is needed.[45]

[68] A Provincial Court judge reasoned in the following way on this point:

> Dictionary definitions of "seizure" describe capturing something using force, or confiscating or impounding property by warrant or legal right. Previously decided cases have described a seizure for s. 8 purposes as "taking of a thing from a person by a public authority without that person's consent," see *R. v. Dyment*, [1988] 2 SCR 417, at 431, *R. v. Colarusso*, [1994] 1 SCR 20, at 58, *R. v. Law*, [2002] 1 SCR 227, at para. 15, or being required to produce something including information pursuant to state compulsion. The term "seizure," whether as defined in previous jurisprudence or the dictionary, implies an element of compulsion somewhere along the line. This is the case whether the police originally seized the item, see for example *R. v. Morelli*, [2010] 1 SCR 253, or a third party did and provided it to the police, see for example *Colarusso*, *Dyment*, *R. v. Cole*, [2012] 3 SCR 34.
>
> There is no element of compulsion here. Rather, the provision of information was voluntarily made in the context of cooperative interjurisdictional policing. The value of such cooperation was described in *Wakeling* at paragraph 57 as, "Multi- jurisdictional cooperation between law enforcement authorities furthers the administration of justice in all of the jurisdictions involved," and at the trial level in *Mehan* at paragraph 30, "Such cooperation between foreign investigative agencies is essential to combatting transnational crime and should be encouraged."
>
> With this context, it is difficult to see how the voluntary handover of the material at issue by the U.S. to Canadian authorities could be a seizure by the Canadians so as to activate the reporting and detention regime once the material was in Canadian hands. However, even if it could, in my view, there is not a reasonable basis to conclude in all likelihood that the seizure was of material for which the applicant had a *Charter*-protected s. 8 privacy interest. This is because he did not have a *Charter*-protected interest when it was seized. It is therefore improbable that he developed one simply through the provision of the material from a U.S. law enforcement agency to a Canadian one.[46]

[69] Some in the group were adamant that the provision should not apply to abandoned items or items obtained by consent highlighting the large volume of work associated with this. A definition of “seized” could help resolve questions whether the requirement to report exists, or not. Like the considerations above with respect to the

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[45] *Hutchison’s Search Warrant Manual 2020*, p. 356

[46] *R. v. Alexander et al,* (unreported) 20 December 2021, B.C. Provincial Court, paragraphs 20 – 22

requirement being "subject to" other law, the obligation to report things that are "seized" should be as clear as possible.

[70] There was no consensus within the Working Group about the need for a statutory definition of what constitutes a seizure. Arriving at one all-encompassing and also functional definition may be challenging. Advances in technology and police techniques may aggravate this issue. It was also suggested that given that "seized" is a legal term, that any such definition would need to track the common law and the *Charter*.

[71] Further, a statutory definition could have wider and potentially unanticipated consequences for the law of search and seizure generally. It was highlighted that doing so could cause difficulty both presently and, in the future, given that the term seizure has application in multiple contexts. While concerns about wider and potentially unintended consequences could be mitigated by specifying the applicability of the definition to the section in question, other challenges, such as elaborating a definition that tracks the common law, the *Charter*, is sufficiently comprehensive but also useful, would remain. Moreover, a definition may not be necessary to address the actual problem identified.

[72] An alternative that does not have potentially far-reaching consequences is a list exempting police from the obligation to report and / or seek an order for detention. In the following examples where there is no forcible taking by agents of the state, there is merit in careful consideration of a specified exemption from the obligation to report:

- the collection of a discarded, abandoned, or ownerless thing (e.g. a rock or a leaf) on public property,

- the voluntary relinquishment of a thing by the sole owner to the police (e.g. when a cooperative witness provides evidence that will assist an investigation),

- a thing purchased by the police (e.g. in an undercover capacity).

[73] An important consideration is the power imbalance that is inherent in the state's acquisition of things from individuals. Also relevant is the need to maintain flexibility to reflect that the courts continue to recognize a reasonable expectation of privacy in things taken from third parties and the issue of consent seizure for jointly owned property:

- A computer provided by a spouse[47] or employer[48];

- Text messages on another person's phone[49];

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[47] *R. v. Reeves*, 2018 SCC 56 (CanLII), [2018] 3 SCR 531, https://canlii.ca/t/hwk3k
[48] *R. v. Cole*, 2012 SCC 53 (CanLII), [2012] 3 SCR 34, https://canlii.ca/t/ft969
[49] *R. v. Marakah*, 2017 SCC 59 (CanLII), [2017] 2 SCR 608, https://canlii.ca/t/hp63v

- A video of the interior of a taxi provided by a company[50];

- A video of a yard provided by a landlord[51];

- An I.P. Address[52].

[74] It is notable that for the last and most recent example of an I.P. address, the judicial authorization through which the police would typically obtain it would be exempt from the obligations under s. 490[53]. In other words, there is precedent for the police acquisition of something cloaked with privacy interests to be outside the present property report and detention scheme.

Recommendation 1.2: The legislation should be revised to achieve greater clarity around when a seizure does or does not trigger the obligations under sections 489.1 and 490. Drafters should consider either specifying what kinds of seizures are not subject to the section 489.1/490 scheme, or better defining what kinds of seizures come within the scheme. Computers and data should be addressed in accordance with the recommendations in the Final Report of the ULCC Working Group on Section 487 of the *Criminal Code*.

(d) "is brought before a justice or a report in respect of anything seized is made to a justice"… "detain the thing seized"

[75] As previously articulated, the physical bringing of a thing seized before a justice to have them detain the thing is an archaic remnant that is presently rarely, if ever, used. Positioning a justice as a pre-charge custodian of seized things raises several concerns. The volume of exhibits can be vast, raising storage capacity issues. The maintenance of seized things is something for which a justice may be ill-equipped to address. For instance, electronic devices which may need to be kept in a certain state to facilitate data extraction. There may also be safety concerns, such as whether such entities are capable of handling firearms or other dangerous things.

[76] The physical bringing of the thing before a justice is, as practical reality, something most seizing entities simply would refrain from doing. Though a small point, the alternative option adds words throughout section 490, making it less readable.

[77] Given its lack of use, logistical issues that would arise if it were, and that it makes the provision verbose, the physical presentation of a detain thing can be eliminated. The prescribed Form 5.2 should function as the only method for reporting seizures.

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[50] *R. v. Groff,* (unreported), 1 May 2023, B.C. Provincial Court.
[51] *R. v Biring*, 2021 BCSC 2654 (CanLII), https://canlii.ca/t/js24z
[52] *R. v. Bykovets*, 2024 SCC 6 (CanLII), https://canlii.ca/t/k358f
[53] Section 487.0192(4)

[78] Very exceptional circumstances might exist where the thing seized cannot remain in the possession of the seizing entity. Solicitor-client or other privilege would be one such example but is already covered by the discrete legal mechanism permitting the specification of the physical location as outlined in the prescribed Form 5.2. Unique seizures such as explosive devices as well as aircraft, seacraft or other vehicles that could not be retained under police custody can similarly be addressed on the prescribed Form 5.2, which already can be "varied to suit the case".

Recommendation 1.3: The Working Group recommends that the option of bringing the seized thing before a justice be repealed.

(e) 490(1)(a) and (b):

"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

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".

[79] Something returned under s.489.1 prior to reporting does not require a section 490 order to be returned. However, once a thing seized is reported, it can only be returned by a court order under section 490(9). The scheme provides bookends that can be characterized as "Order In / Order Out".

[80] The inclusion of mandatory court order to permit the return of a thing seized brings challenges and benefits. It can frustrate the expedient return of personal property to those entitled to possess it. As a practical matter, it may not be a law that is adhered to invariably. But as it stands, it is mandatory. In addition to the time required by both the applicant and the judiciary, the obligatory court order associated with the return of seized property negatively impacts the rightful possessor as well. That is because a return order cannot be perfected for 30 days because of section 490(12).

[81] After the detention is authorized, once whatever required investigative steps are complete, if the owner is known the police should be able to return the property to that person quickly. Whether such should be possible without a court order was a topic of disagreement within the Working Group. One perspective maintained that a return order

is an important mechanism of court supervision and police accountability. The converse opinion underscored the delays and workload inherent in this step. The workload component should recognize the reality that adherence to the requirement that there be a court order authorizing return is often disregarded. True compliance with the obligation at law will significantly increase the burden on both the police and the court adjudicating such applications. The permissive ability to return absent an order could be limited to exceptions such as if there are grounds to question who is entitled to possess it.

[82] The perspective of the best evidence possible being available for trial proceedings was stressed. A concern was raised within the Working Group that if a person (e.g. a suspect or accused) wishes to have their own expert examine a thing after the police have completed the investigative avenues for the item. Such an exercise on the part of a suspect or accused would obviously be frustrated if the thing were returned, especially to someone other than the person who is exposed to criminal jeopardy. An illustrative example of this can be discerned through the facts of *R. v Berner*:

> The trial judge reasoned that the police, having conducted their inspection and having retrieved the SDM, had no further need of the vehicle. They were required by s. 490 of the *Criminal Code**[1]* to return the vehicle to its owner within three months of its seizure. They handed possession of the vehicle to ICBC because Ms. Berner had previously signed a release. ICBC destroyed the vehicle with Ms. Berner's consent. The police were not involved in the decision to sell the vehicle for scrap.

In *obiter* commentary the Court of Appeal characterized reasoned:

> … the destruction of the vehicle before Ms. Berner was charged with any offence relating to it is disturbing.[54]

[83] The obligations of the police to preserve or safeguard evidence in the context of the possibility of independent analysis outlined elsewhere in the *Criminal Code*. For example, sections 320.28 (8) and (10) as outlined above. The consideration of the requirement to preserve evidence for potential independent analysis beyond where such is already a statutory requirement should be considered with careful circumspection.

[84] The police will typically not be privy to what things potential accused persons may wish to have analyzed given that the nature of any defence strategy will usually remain unknown. For that matter, who the charged person may eventually be is something that can remain unknown, sometimes for years or decades. The detention of things seized solely for potential future analysis by accused persons is likely something that should be specified specifically within the *Criminal Code*, as it is already with certain things like samples taken from a person. Of note, samples have no financial value whereas many seized things often do.

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[54] *R. v. Berner*, 2012 BCCA 466 (CanLII), https://canlii.ca/t/fttg9, paragraphs 94 & 98

[85] Where the thing is returned to the suspect, such concerns about the potential loss of evidence are reduced to a significant extent. Issues with respect to continuity of the thing seized could be mitigated by having the thing in question returned to the contemplated expert or some independent third party.

[86] A cautious approach must be taken in citing the preservation of potential evidence as a basis for detention. An assertion by the police that all investigative steps necessary have been completed but cite the possibility that the thing may be needed in the future for some unknown purpose, could lead to prolonged or even indefinite detention. The suspects may not be known at the time, or even what things they may wish to be analyzed or for which purpose. This could result in the things seized being kept from their rightful owners. Mobile phones are a common thing to which this would apply.

[87] When data is copied from the device, the original – typically quite expensive – hardware may be able to be returned to the owner. The requirement to obtain an order with its month-long wait period before perfection can unnecessarily delay the return of a thing which has tremendous value (on several levels) to most people. A motor vehicle is another thing that is commonly seized and where the evidence-deriving process from the police perspective typically comes to a determined conclusion and other than potential third-party analysis, ought to be returned quickly. The preservation of potential evidence is a justification that could become *carte blanche* for the indefinite detention of all seized things.

[88] The motor vehicle example raises a special consideration, the storage expenses associated with the retention of exhibits. Securing a motor vehicle occupies space and has a cost that may be borne by the government, or potentially the owner of the vehicle. In either case, there is a financial burden associated with detention that should be considered.

[89] The court-mandated return of a thing seized is featured elsewhere in the section, though its first articulation is within section 490(1). There, a return order is required unless the basis for detention is made out. Given the current state of the law, this rarely if ever occurs. The problematic aspect of the obligation is not particularly manifest in the circumstances of a denied request for detention, such rarely occurs, but rather when the purpose of the detention has passed. This will be unpacked in greater detail below.

[90] The cross-investigative purpose that may apply to some items was identified as a further aspect to be considered in this context. Similarly, items that may be of interest to different police forces. For example, a firearm identified as being used in one offence, and suspected of being involved in a second in another province.

Recommendation 1.4: The Working Group recommends s. 490 continue to outline a proactive duty to return the thing to the lawful owner once the purpose for the detention has concluded consider whether such may be done without court order, unless there is the basis for a forfeiture order, or the owner is unknown or there is reason to question who that person may be, in which case an application be made for a disposition order.

(f) "satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a)"

[91] In many provinces, the prescribed report Form 5.2 has been modified to include the related application under s. 490(1) of the *Criminal Code* for the initial detention order. Harmonizing the report with the application for detention is practical, if the current report / application for detention process is to continue. Yet the utility of this process should be examined. The initial application for a detention order suffers from deficiencies for both the individual and the state.

[92] For the interested party, the application does not require any notice, nor does it feature a mechanism for challenging the factual or legal basis for the resulting order. Such orders can deprive individuals of property for up to four months (the three-month detention period and the 30-day delay accompanying return orders). The only recourse at present for affected individuals would be to apply under s. 490(8) which requires demonstrated "hardship" or through a petition for judicial review. Notably, the "hardship" application cannot seemingly be brought by the lawful owner.

[93] The current law also does not specify how the seizing entity is to discharge the onus of "satisfying the justice" of the need for detention. Including the application on the form prescribed by the *Code* can help resolve this. Presently the initial detention order request is based on nothing more than marking a box on a boilerplate form or completing very minimal and vague information. The propriety of this standard has been upheld[55].

[94] In British Columbia, the modified Form includes a generic application at the bottom of the 5.2 Report that does not provide a specific reason why the thing is "required" to be detained. The same is true of that utilized in Prince Edward Island. In Nova Scotia, the evidence of the legal prerequisite of "required" is done by marking one of three boxes. This makes any judicial weighing of the factual basis for the order an superficial exercise, which effectively results in a largely unchallengeable deprivation of property for three months.

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[55] *Further Detention of Things Seized (Re),* 2023 BCSC 421 (CanLII), https://canlii.ca/t/jw8h1; *R. v. Kawecki*, 2014 ONSC 3584 (CanLII), https://canlii.ca/t/g7g5w

[95] In many instances the person from whom the thing is seized will have no interest in challenging the detention of things from them. The object may have no value, be stolen, or be unlawful to possess. Furthermore, the initial period of detention permitted at the outset of three months can often be inadequate. A longer period of detention, perhaps six months, better reflects the complex realities of many police investigations. and the investigative tasks that must be completed in a post-*Jordan* prosecutorial environment prior to proceedings being commenced.

[96] Uncoupling the report from the requirement for a court order to detain a thing seized was a concept suggested within the Working Group. That is to say that the police document for what they have taken via report, without always requiring a judicial application to keep the thing. This could be accomplished by granting investigators the ability to keep a thing for a specified duration upon reporting its seizure. The automatic authority to detain could be made subject to a dispute or challenge being registered to establish what is currently required in 490(1), that the seized thing be required for one of the listed purposes. This approach ensures accountability for the seizure of seized things and a level of judicial supervision, while reserving adjudication when such is requested by the entity affected.

[97] Accountability for the seizure is ensured with the report. At the same time, codifying an authority to detain upon reported seizure would reflect the reality of what occurs *de facto* in many cases given the minimal basis upon which a 490(1) order is granted.

[98] Because of the property and privacy interests potentially at stake, an option to request judicial scrutiny of that which is reported as seized may strike a fair balance between those interests, judicial economy, and those of law enforcement. If an interested party, duly informed of that which is taken from them, and advised of a prescribed period of its detention requests a judicial consideration of a basis for proposed detention, a meaningful inquiry can be crafted. In such circumstances, the state could be required to specify some particularized basis for the detention of each item or collection of items sought to be detained greater than the conclusory assertion presently provided as the basis for a temporary deprivation of property. Regarding the nature of the optional hearing contemplated the legal issue could be focused on whether the court is satisfied the test for detention in 490(1). This would be analogous to what occurs when proceedings are instituted with Crown reliance on 490(2)(b) or (3)(b) and a challenge to that reliance is advanced. A hearing can be held, if necessary, in which the police/Crown seek to prove that the things are needed for the proceeding. An illustrative example is *R. v. Find-a-Car Auto Sales & Brokering Inc*:

> Judicial supervision is essential in every step when dealing with property seized in execution of a search warrant. In the instant case, proceedings have been instituted against an individual other than the Applicant or its principal Mr. Ryan O'Connor. I hold that it is incumbent upon the Crown to satisfy Justice of the Peace Marchand that the proceedings that have been instituted against the third

party may require the items seized from the Applicant to be further detained for the purpose of the proceedings against the third party. To that end, Justice of the Peace Marchand will be exercising an important supervisory function as contemplated by s. 490 of the Code in determining whether the items may be required for the effective prosecution of the third party. The determination of whether the items "may be required" imports the element of articulable causation between the seized items and the proceedings instituted. While the threshold is not high, it nonetheless exists. In the average case the articulable causation will be manifest, but in cases involving multiple parties, it may not be. It is incumbent upon the justice of the peace to determine the issue.

I reject [the Crown's] submission that the mere fact that charges have been laid against the third party no longer necessitates supervision by Justice of the Peace Marchand. Were that the case, the Code would simply read, "unless proceedings are instituted" and would not employ the words "in which the thing detained may be required". Some entity must determine that the seized items may be required and I hold that the entity is the justice of the peace who issued the warrant and the original detention order.

…

Having held that Justice of the Peace Marchand must determine whether the proceedings instituted against the third party justify the detention of the property seized in Kingston as they "may be required" for the prosecution of the third party in Trenton, I would also hold that a hearing would normally not be necessary. Let me provide a simple example. If a search warrant were directed to an individual's apartment and drugs were seized as a result thereof, following which the individual occupying the apartment were charged, no hearing would be required pursuant to s. 490(2)(b). In such a case, an affidavit filed by a police officer to the effect that proceedings have been instituted against the individual would be sufficient for the purposes of the subsection. Alternatively, a letter from Crown counsel, who is an officer of the court, would suffice. But, as is the case here, where numerous individuals are targeted in the Information to Obtain the Search Warrant, and one individual is charged, some justification of seizures made from another individual or entity must be offered to satisfy the requirement of continued detention of items seized. Should the affidavit from the police officer or the letter from the Crown be insufficient to satisfy the requirements of the section, the Justice of the Peace may require a hearing before him to satisfy himself that the items seized should be retained as they "may be required" in the proceedings involving the person, or persons, charged. The holding of a hearing would depend upon the complexity of the investigation.[56]

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[56] *R. v. Find-A-Car Auto Sales & Brokering Inc*., 2007 CanLII 36822 (ON SC), https://canlii.ca/t/1st50, [2007] O.J. No. 3332 (S.C.J.), 2007 CanLII 36822. paragraphs 11-12 and 16

[99] The degree to which a more comprehensive consideration for the purpose of detention at the outset is in the interests of justice may be dependent on the stage of the proceedings. A thing detained under the umbrella of a police investigation may require more to satisfy the court that its detention should be ordered than if formal criminal charges were laid.

[100] For a matter at the investigative stage, there may be greater need to demonstrate initially what the determined evidentiary value of the thing is or what steps will be taken to discern that question than would be the case once a charge is laid. For the latter, the public interest is engaged on a somewhat different level that is more determinative of the necessity requirement. This is consistent with the current structure of the provision where the need to seek further orders is obviated in cases where proceedings have commenced. In other words, the ability to request scrutiny of a detention may be circumscribed, or eliminated in the case where a charge is laid.

[101] It was emphasized that some police investigations may have a vast number of things seized such that the determination of the basis for detention may be a taxing exercise. The solution to this lies with the current requirement that the initial report be made "as soon as practicable". This is an obligation with a degree of flexibility:

> The applicant has the onus of establishing on a balance of probabilities that a s. 489.1 report was not made "as soon as practicable": R. v. Eddy, 2016 ABQB 42 at para. 55. "As soon as is practicable" means without unreasonable delay: R. v. Kift, 2016 ONCA 374 at para. 10. It does not mean "as soon as possible": Eddy, at para. 52. What is "practicable" is a contextual and fact-specific inquiry; Eddy at para. 51; Kift at para. 10. In determining what is "practicable", the complexity of an investigation, the workload and schedule of the police officer, as well as the number and nature of items seized are all relevant considerations: Eddy at paras. 52-54; R. v. Wichert, 2015 ONCJ 700 at paras. 154-155, 157. In R. v. Butters, 2014 ONCJ 228, aff'd 2015 ONCA 783, the court stated that "the inquiry is into a state of facts, not into the officer's intent" regarding whether the report were filed as soon as practicable: para. 57.
>
> …
>
> With respect to the standard to be applied, there must be a reasonable measure of consideration given to the realties of the circumstances. No hard and fast number of days should be set by the court, but the evidence should establish that the officer moved with all reasonable dispatch to file the report in a timely way, given that the authorities make clear that the obligation is an important element of judicial oversight over items that have been items that seized and are being detained by the state. Matters such as the complexity of the investigation, the

> workload and schedule of the police officer, and the number and nature of items seized may well be relevant to the enquiry.[57]

[102] Investigators would likely have an interest in utilizing the thing seized for investigative purposes, so the turnaround timeframe for any process permitting a challenge to the initial detention ought to be very short and allow investigators to examine the thing in question while the detention application is pending. For example, if a crime of violence is committed and the police seize evidence that will help them identify the perpetrator (for instance CCTC footage), the police should be able to access the evidence notwithstanding the potential pending application to get a court order authorizing its detention.

[103] Placing the onus on the interested party to take some action and for which opting not to do so bring about proprietary deprivations has parallels in existing law. Section 24(1) of the *Controlled Drugs and Substances Act* requires notice be given with 60 days of the seizure of certain things, and the failure to do so resulting in forfeiture under section 25[58]. Similarly, section 138 of the *Customs Act* allows for third parties affected by things seized as forfeit to apply for relief from forfeiture[59]. There is a corresponding obligation to be notified of that entitlement to make a section 138 application outlined in section 110(4). But the onus is on the third party to act, and default in acting crystallizes a legal result.

[104] Should the permissible initial duration of a detention order be modified from the current three months, or detention absent action become the default result, the cogency of requiring that interested parties be provided documentation of all seizures - whether by warrant or not - becomes more manifest. Some within the Working Group advocated for keeping the detention in the first instance fixed at three months citing concerns that such a change would be confusing and cumbersome. If the initial period of detention remains at three months, such may not be as important given that the person will typically know the date of seizure and will be duly informed thereafter of any application for further detention. As will be explored later in the report, there may be certain circumstances where such notice would have profound implications on the viability of investigation or personal safety and, as such, a circumscribed provision for judicially approved dispensation of notice should be provided.

[105] Since January 2023, section 487.093 of the *Criminal Code* now imposes an obligation on a person who executes a warrant to provide a notice in Form 5.1 setting out the location of the court where a thing seized will be brought (although rarely done) or where the Form 5.2 can be obtained. It may be prudent to require the service of a similar Form upon warrantless seizures as well, especially if detention becomes

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[57] *R. v Flintroy*, 2019 BCSC 110 (CanLII), https://canlii.ca/t/hzn2z, paragraphs 45 & 47, *R. v. Canary*, 2018 ONCA 304 (CanLII), https://canlii.ca/t/hrggw, paragraph 47
[58] https://laws-lois.justice.gc.ca/eng/acts/c-38.8/page-4.html#h-94822
[59] https://laws-lois.justice.gc.ca/eng/acts/C-52.6/page-21.html#docCont

automatic, subject to a challenge for justification being registered. Information in this respect can be outlined on Form 5.1.

[106] There are significant proprietary and privacy interests that flow from the initial detention period. Consequently, giving optional recourse to those affected by an order under s. 490(1) can strike a balance between competing interests. Many would likely have no interest in participating in this process, and thus conceptually it would be efficient to require the person affected to opt-in to the application, which otherwise results in the order taking effect. If an opt-in system were devised, it would need to be clearly conveyed and easy to facilitate. Information in this respect may be articulated on the Form to be provided to the person affected (e.g. Form 5.1) as a Notice of Seizure and Detention. As mentioned above, the Working Group does not suggest that the nature of the challenge that can be brought be an affected person is in the realm of *Charter*-based relief. Legislation can guide whether an adjudicative system should be a forum for *Charter* relief, or not[60]. Rather that the focus be on whether the statutory test is satisfied, specifically that the seized thing is required for an investigation or proceeding.

[107] An alternative to permitting some form of optional standing in the first instance would be to expand the ability to challenge the validity of an initial order after-the-fact. Making the initial order conditional on further application being made does have its drawbacks. In particular, taking certainty away from investigators who may be reluctant to expend the cost associated with some investigative steps if there is a possibility that the legal foundation for taking that step could be undermined in the future. This would appear to be a remote possibility, however. If the thing being is analyzed, it would likely meet the test of satisfying the judicial officer that its detention is required for the purpose of an investigation.

Recommendation 1.5: The Working Group recommends considering whether the police be lawfully allowed to detain all seized things upon reporting its seizure – potentially for longer than three months, possibly six months - while permitting an affected party to challenge or request judicial scrutiny of the initial detention order, especially if the duration of it were to be increased from the current three months.

(g) "… taking reasonable care to ensure that it is preserved until the conclusion of any investigation…"

[108] There are occasions when in order to derive evidence from seized thing, significant or irreparable damage may be done to it. Extraction of data, safes or things hidden in motor vehicles are some examples. Another quite common technique involves DNA analysis; it may be that part of something is removed for a small part to be analyzed for DNA. For example, the police may cut part of the fabric from the seat of a car for a

[60] *R. v. West*, 2005 CanLII 30052 (ON CA), https://canlii.ca/t/1lhd8, paragraph 49

laboratory to attempt to find genetic material on it. It is questionable whether the current language of the legislation permits such an act.

[109] In the context of considering different federal legislation, the Ontario Court of Appeal reasoned:

> The collectors also submit that the evidence-gathering provisions of the Act do not authorize the kind of destructive testing that was performed by M. Perrault. They suggest that such testing would not even be permissible under a search warrant. As to the latter point, I think the collectors are simply wrong. Once things have been seized under a warrant, it is not uncommon that destructive testing takes place. For example, holes will be cut in an article of clothing to allow for DNA testing of any biological residue and documents may be subjected to chemical fingerprinting processes that can result in permanent harm to the document. As far as the risk of damage, the collectors were in no worse position because the Attorney General of Canada proceeded by way of an evidence-gathering order rather than a warrant. Production of a record or thing contemplates that they will be examined and, depending on the nature of the thing produced, some testing performed. It is within the power of the judge to attach suitable conditions to protect the things from destructive testing, but I cannot read s. 18 as precluding the possibility that the thing produced may be damaged.[61]

[110] There is presently no explicit permission in the legislation to subvert the duty of care of preservation to that of the acquisition of evidence. The present wording could be modified to clarify that this obligation relates to taking reasonable care to ensure that evidence is preserved or requiring specific authority at the front end through judicial approval. The ability of a property owner to secure compensation for seized things that are destroyed or damaged in the evidence-gathering process can be considered but an invitation to seek damages could complicate what is supposed to be a summary and efficient procedure. Civil Courts already provide a legal mechanism for improper harm to property.

Recommendation 1.6: The Working Group recommends that consideration be given to confirming that the statutory obligation on police to preserve detained things nevertheless permits reasonable examination and analysis of the things, including reasonable destructive testing, except as otherwise governed by law or by court order.

[61] *Canada (Attorney General) v. Foster*, 2006 CanLII 38732 (ON CA), https://canlii.ca/t/1q1b0, paragraph 37

2.2 Section 490(2)

[111] Subsection 2 provides authority to extend the initial order made under subsection 1, or alternatively a situation where there is no need for such an order because proceedings have been instituted:

> Further detention
>
> (2) 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.

[112] There are four things in relation to this mandatory court application for an extension of a detention order that would benefit from review:

(a) the need to bring such applications after three months in every case;

(b) the nature of detention order extension applications;

(c) the notice prerequisite;

(d) the legal implications in relation to a commenced hearing.

[113] Several of the issues with section 490(2) are mirrored in section 490(3), which utilizes much of the same language.

(a) "for a period of more than three months after the day of the seizure,"

[114] The legislation currently limits the initial period of detention to three months. This time frame does not reflect present-day realities of police investigations and criminal prosecutions. Very often, things seized need to be analyzed to determine their evidentiary value. Forensic analysis of things has complicated criminal investigations and takes time.

[115] It is important to underscore the distinction between investigative steps that are time-consuming given their inherently complicated nature and wait times that are generated owing to resource allocation. Care needs to be taken to ensure that inadequately funded investigative agencies does not become a conduit to unnecessarily

long detention. Yet the finite resources of government are a reality for which criminal investigations are not immune.

[116] Furthermore, given the hard limit to bring a person to a trial within a reasonable time created by the Supreme Court of Canada in *R. v. Jordan*[62], criminal proceedings are often not instituted as quickly as they were historically. While this is a decision made by the police or Crown prosecution, it is the result of significant change in the paradigm of criminal justice. The relevancy to section 490 of the change to the law under section 11(b) of the *Charter* was not without disagreement within the Working Group.

[117] As mentioned above, a conceptual model that can be explored is the granting of the lawful authority to detain seized property for a specified period, absent an interested party electing to contest the matter. If the model were adopted, articulating a 180-day period prior to the need to secure court authority for further detention could be considered.

[118] If the current structure that invariably requires an order at the outset is maintained, a possible modification to the current regime would be to permit, upon presentation of a proper evidentiary foundation to grant a discretion to make a longer order at the outset. That is allowing the duration of the foundational order under s. 490(1) to be for longer than three months. For example, if blood is seized and the seizing officer is aware that the workload at the laboratory results in a minimum of four months before the required analysis can be done. This example is one that manifests resources allocations.

[119] A second example of the inadequate duration of the initial order based on complexity alone is encrypted electronics. It is not uncommon for investigators to possess an electronic device that is password protected but for which access may be possible. That access is facilitated by tools that can attempt to bypass the encryption but may need time to do so[63].

[120] It could be with the authority of the judicial officer making the initial detention order to consider a request for the duration to be long enough to permit the investigative step or investigation to conclude. This would not preclude a renewal application to be made if more time ended up being needed but would aim to prevent superfluous applications. If there were jurisdiction to grant a longer foundational order for detention, such should need to be satisfied on case-specific evidence that would justify a longer duration. A modification of the invariable three-month foundational order may overly complicate matters for law enforcement and has been specifically cited as a reason to keep one initial period of detention.

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[62] *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, https://canlii.ca/t/gsds3

[63] See: "44 nonillion" in *In the Matter of an Application Pursuant to s. 490(3) of the Criminal Code for an Order for the Further Detention of Things Seized*, 2023 ONSC 6899 (CanLII), https://canlii.ca/t/k1lcd

[121] Conversely, the three-month detention period is often ordered by default when a shorter period is warranted[64]. For example, if something is seized and only needs to be copied, an order measured in weeks may be more appropriate. Granting more time than would be reasonably required can encourage complacency whereas a shorter timeframe can encourage expediency.

[122] It was emphasized within the Working Group that police already struggle with managing things seized within the three-month period. Another variable hurdle at the outset may be an additional burden on investigators. Others within the group have objected to variability unless it were only at the discretion of the officer requesting detention to submit initially for a longer period and not permit a shorter period.

[123] An additional factor to consider is the possibility of various durations of the detention to be made per item, as opposed to one blanket period (currently three months) that applies to each item subject to the initial order. For instance, police may seize one thing which they simply wish to carefully photograph, a process that could take a matter of days. Yet in the same investigation seized an encrypted mobile device for which they are aware the process to by-pass the security software would take at minimum six months. One three-month order may not be appropriate for either item. Again, consideration however must be given to placing more burdens on investigators to track multiple but consequential dates.

[124] In other parts of the *Code*, longer periods of detention are ordered. Section 462.35 relating to special warrants and retraining orders provides for an initial six-month detention order, As mentioned above, if the duration for foundational order for detention under section 490(1) is increased from its current three-month length, the interests of justice in allowing the person so affected some opportunity to be heard increases.

[125] A fair balance of competing interests that could also maximize efficiency of scare judicial and investigative resources would be to provide for a default period of detention which is automatically extended to a longer period unless an interested party wishes to challenge it. For instance, a 30-day detention that extends to 6 months unless a dispute is filed or registered, although it was highlighted within the Working Group that 30 days might be too short.

Recommendation 2.1: The Working Group recommends the period of detention provided for initially be more flexible as warranted by the circumstances of the case, if a different period of detention is made out in specific and objectively justifiable evidence.

[64] The standard form in British Columbia only contemplates a three-month order.

(b) "a justice, on the making of a summary application to him"

[126] The term summary application is not defined. It should be replaced with a clear statement as to the nature of the hearing and the evidentiary basis upon which such needs to be based. As it stands, it is now quite common for these applications to take multiple court appearance (e.g. four[65]), involve reserve judgments and multiple affidavits[66]. In practice, "summary" is not synonymous with quick or easy.

[127] Caselaw has outlined that the evidence in support of these applications can be tendered by affidavit and that the affidavit may contain hearsay[67]. This is reasonable and should be codified.

[128] Recognizing the open court principle[68] and the recommendations to appellate remedies outlined below, there would be some benefit to making the extension applications for detention orders an on-record application except where it is justifiable to proceed *ex parte* and / or *in camera*. Presently in some jurisdictions[69] non-contested hearings for 490(2) extensions are heard off-record as over the counter, in chambers or desk orders. In others, such applications are always on record[70].

[129] There is no statutory recourse to appeal the result of a detention order. If there is to be (which is recommended below) a record of the basis for the result would be critical. Further applications that are heard off record without being featured on publicly available court lists do little to encourage the transparency of the judicial system. Yet mandating on record hearings would increase the volume of matters already before a busy court.

[130] Transforming the current regime to limiting detention order extension applications exclusively to circumstances where the issue is contentious could limit the impact on judicial resourcing if such applications were mandated to be on the record hearings.

[131] The legislation specifies the male gender and while neutral language would be more appropriate such is beyond the scope of this Working Group and section 33 of the *Interpretation Act* states:

> Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations.

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[65] *R. v. H.G. and I.O.I.C. Inc*., 2022 BCPC 298 (CanLII), https://canlii.ca/t/jv1kh
[66] *Further Detention of Things Seized (Re)*, 2024 BCPC 50 (CanLII), https://canlii.ca/t/k3tkf
[67] *R. v. Classic Smokehouse and Leader Cold Storage,* 2012 BCPC 232 (CanLII), https://canlii.ca/t/fs0sn
[68] See: *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII), https://canlii.ca/t/jgc4w
[69] British Columbia and Ontario
[70] Quebec

Recommendation 2.2: The Working Group recommends considering extension applications be specified as on-record, open Court hearings – unless a demonstrated basis to proceed *ex parte* / *in camera* is established - that can be brought by way of affidavit based-evidence where information reliability obtained second-hand be admissible.

(c) "after three clear days notice thereof to the person from whom the thing detained was seized,"

[132] The nature of the notice, and what is required to be provided is not outlined in the statute. It should be. The caselaw has considered this aspect of the property detention regime[71].

[133] Personal service on the person can be a cumbersome procedure and is beyond what is necessary in the circumstances. However, the Court should be satisfied that the person has actual notice of the hearing. There will be also cases where the respondent cannot be found or is taking steps to avoid being notified. In these situations, a mechanism to apply in advance of the hearing for substitutional notice should be crafted, which is not currently in the legislation. [134] There are certain circumstances when providing notice to the person from whom the thing was seized would jeopardize the investigation, break an existing court order or imperil the safety of someone. The caselaw has recognized this gap in the legislation[72] in some provinces and rejected it in another[73]. A response which fills this gap to permit in certain scenarios for 490 applications to be conducted *in camera* and *ex parte* would be appropriate if it can be justified as necessary and in the interests of justice.

[135] *Ex parte* and *in camera* hearings must be the exception and need to meet a sufficiently rigorous threshold in view of the interests at stake, the right to be heard and the open court principle. Consideration of whether other less blunt tools could accomplish the same goals ought to be part of the equation. For instance: publication bans, sealing orders, or redaction.

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[71] *Further Detention of Things Seized (Re)*, 2021 BCSC 1323 (CanLII), https://canlii.ca/t/jh580
[72] *Further Detention of Things Seized (Re)*, 2018 BCSC 2506 (CanLII), https://canlii.ca/t/j0r4x, *Re: Section 490 Application - Without Notice*, 2022 ABPC 100 (CanLII), https://canlii.ca/t/jp1db, *Application to extend period of detention of items seized*, 2021 NSPC 51 (CanLII), https://canlii.ca/t/jtnlb, *Further Detention of Items Seized (Re)*, 2023 ONSC 6870 (CanLII), https://canlii.ca/t/k1l1v
[73] *R v G.D.*, 2023 SKKB 179 (CanLII), https://canlii.ca/t/k0418

Recommendation 2.3: The Working Group recommends that the form and content of the notice requirement for extension Orders should be specified, and a mechanism to bring the applications with substitutional notice as well as *ex parte and / or in camera* should be outlined.

(d) "or any longer period that ends when an application made under paragraph (a) is decided" & "proceedings are instituted in which the thing detained may be required."

[136] The current provision appears to allow an existing order for detention to continue once an "application [is] made". The Courts have interpreted what is required to give effect to this provision:

> In my view, it is clear from the various authorities that an Application of Further Detention of Things Seized under s. 490(2) must be perfected prior to the expiration of the current detention period or jurisdiction will be lost under s. 490(2). Furthermore, in my view, for an application to be perfected under s. 490(2), the following must take place prior to the expiry of the current detention period:
>
> a) The Application must be filed and a returnable date given for a court appearance before a justice. Section 2 of the Criminal Code defines justices as "justice means a justice of the peace or provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction".
>
> b) There must be three clear days' notice given to the opposing party with respect to the returnable date.
>
> c) The returnable date must be prior to the expiration of the detention period. In this case, the current detention period was 90 days.
>
> d) The returnable date must be before a justice.
>
> e) The matter must be spoken to in Court, as per Mr. Justice Riley in Further Detention of Things Seized (Re), 2021 BCSC 1323, "however briefly". There is no suggestion by Mr. Justice Riley that a hearing such as a contested hearing must actually commence.
>
> Once all of the above is done, then the application is seen to be perfected and all of this must take place prior to the expiry of the current detention period. Again, in this case, the initial detention period was 90 days. [74]

[74] *R. v. H.G. and I.O.I.C. Inc.*, 2022 BCPC 298 (CanLII), https://canlii.ca/t/jv1kh, paragraphs 22 – 23

[137] Yet on this area of the law there is not a consensus amongst the courts:

> The Crown argues that the application has been properly bought under s. 490(3). All that is required for the provision to be operative is that notice be provided prior to the expiry of the last detention order. In this case, the Crown filed notice six days prior to the expiry of the prior detention order.
>
> I would note that, on this issue, the wording in s. 490(3) is far from clear. The language in question is emphasized in the subsection as set out below:
>
> …
>
> In Further Detention of Things Seized (Re), 2021 BCSC 1323 at para. 109, Riley J. commented on the subsection as follows:
>
> > Since the prior detention order expired before the application was perfected and spoken to in court, the s. 490(3) application was brought out of time. To be clear, the approach I have described herein accounts for the phrase "or any longer period that ends when an application made under [this subsection] is decided" as set out in s. 490(3). That language effectively provides that where the application process begins before the expiry of the existing detention order, the detention order continues until the application for an extension is decided. But, in my view, the application process does not begin until the application for further detention is perfected and spoken to in court, however briefly; the application does not have to be decided, but it has to be perfected [emphasis added].
>
> The difficulty I have with this interpretation is that it does not accord with the actual wording of s. 490(3). The subsection simply does not contain a condition that the application process must begin before the expiry of the existing detention. In fact, the section is so poorly worded that I am unable to say that this can even be inferred from the language that is used.[75]

[138] Recently specific disagreement has manifested in the BC Provincial Court on what is required to commence a property detention application such that the order sought to be renewed does not lapse. The practice in that province is for section 490 applications to generally be returnable at the court registry in the first instance, and if the matter is not contested, a Justice of the Peace will determine the application off record. If the

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See also: *R. v. Thériault et al, 2015 NBPC 9* (CanLII), https://canlii.ca/t/gm75s, paragraph 27; *R. v. Newport Financial Pacific Group S.A.*, 2003 ABPC 80 (CanLII), https://canlii.ca/t/5bml, paragraph 126(11)

[75] *In the Matter of an Application Pursuant to s. 490(3) of the Criminal Code for an Order for the Further Detention of Things Seized,* 2023 ONSC 6899 (CanLII), https://canlii.ca/t/k1lcd, paragraphs 8 - 11

matter is contested, it is then referred to a Provincial Court judge for adjudication. It will frequently not be possible to accommodate that on record hearing on the same date. The conflict is summarized in this way:

> There appear to be 2 lines of cases in British Columbia regarding whether or not the Applicant speaking to a Justice of the Peace at the court registry on the initially scheduled hearing date constitutes the commencement of the hearing. In *R. v. H. G.* 2022 BCPC 298 Judge Lee held that the matter must be spoken to in court before the expiry date "however briefly". The application may be adjourned from that appearance before a Justice to a date after the expiry date for continuation.
>
> In *R. v. B. M.* 2024 BCPC 25 Judge Malfair stated at para. 11: I am satisfied the application was filed, made returnable, and spoken to before a justice of the peace ... before the three-month detention period expired ... Those aspects of the s. 490(2) application were perfected ...
>
> In contrast, Judge Patterson in *R. v. Booth* 2021 BCPC 169 and in *R. v. Skejeie*, 2023 BCPC 97 finds that the actual hearing needs to commence within the 3 month time frame, otherwise the court loses jurisdiction unless an application is brought under S. 490(9.1).[76]

In view of the disagreement within the judiciary and the expressed quality of the existing provision, what is required to commence a hearing such that a subsisting order does not lapse should be clarified. If the moving party has done everything required to bring the application before the court prior to the order sought to be renewed lapsing but matter does not proceed (e.g. because of court time or for the respondent to seek counsel) the applicant ought not be prejudiced. In such circumstances, there should be an explicit statutory override specifying that the existing order should continue to run notwithstanding the fact that the order to be renewed has a specified expiration date. It bears mentioning that in some locations securing a court hearing date in short order can be challenging as a result of judicial unavailability.

[139] The current provision of the *Criminal Code* obviates the need for court order if proceedings are instituted. Most commonly, this is the case when a charge has been laid. Caselaw has interpreted the provision to include applications for forfeiture[77], though that may not be perfectly clear as will be explored laterally. A specific list in legislation of

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[76] *In the Matter of an Application,* (unreported), 15 May 2024, B.C Provincial Court. See also *In the Matter of An Application* (unreported), 23 February 2024, B.C. Provincial Court

[77] *Further Detention of Things Seized (Re)*, 2022 BCSC 2283 (CanLII), https://canlii.ca/t/jvf9b; *Lepage v. R.*, 2013 QCCS 2016 (CanLII), https://canlii.ca/t/fxhlf, paragraph 25, *R v Koehler*, 2023 ONSC 3560, *R. v. Soares*, 2020 ONCJ 243 (CanLII), https://canlii.ca/t/j7pkd, *R. v. Wedderburn*, 2013 ONSC 4707, *R. v. Scott*, 2015 MBCA 43 (CanLII), https://canlii.ca/t/ghhb7

what constitutes a proceeding could be beneficial, perhaps as a non-exhaustive list, but this engages maintenance of law issues.

[140] The statute does not contemplate what should occur if proceedings are instituted after a hearing into an application for further detention has commenced but before it has concluded. The legislation should answer the scenario of a detention hearing being underway, and a charge subsequently brought that makes the things seized necessary for that proceeding. A recent superior court decision has found that in such circumstances, the pending application for further detention becomes moot[78].

[141] The thing sought to be detained in a pending application could, in the intervening period, be made an exhibit at a bail, sentencing or even trial. Having the order subsequently denied would cause significant problems. Further, caselaw has found that a commenced application for return of seized property can be defeated by the laying of a charge[79]. In the specific circumstances of a proceeding being instituted the legislation should make it clear that action renders the pending application for an order for further detention unnecessary.

Recommendation 2.4: The Working Group recommends considering a definition or non-exhaustive list of "proceedings". The consequences of proceedings being commenced while an application for further detention is on-going should be clarified so that when an application is brought for the renewal of an order prior to this order expiring, the order continues to run until a decision is made on the application.

2.3 Subsection 490(3) and (3.1)

[142] The subsection currently:

> Idem
>
> (3) 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

[78] *Further Detention of Things Seized (Re)*, (unreported) 26 April 2024, BC Supreme Court
[79] *R. v. Garneau,* 2019 QCCS 2514 (CanLII), https://canlii.ca/t/j15vh, paragraph 42

> warranted for a specified period and subject to such other conditions as the judge considers just, and the judge so orders; or
>
> (b) proceedings are instituted in which the thing detained may be required.
>
> Detention without application where consent
>
> (3.1) 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.

[143] Several of the problematic aspects of section 490(2) are replicated in section 490(3): the nature of a "summary application", the issues pertaining to notice as well as those associated with a detention order continuing to run in relation to "an application made". There are however several discrete matters worthy of consideration:

(a) the unique legal threshold.

(b) the need to maintain the superior court as the venue for post-year detention applications.

(c) uncertain qualities of the consent provisions of the section.

(a) "complex nature"

[144] The legal test under 490(3) was summarized in this way:

> The key point in considering detention beyond one year under s. 490(3) – as distinct from detention up to one year under s. 490(2) – is the concept of complexity. Under s. 490(3), the judge must be satisfied that further detention is warranted having regard to the complex nature of the investigation. All of this is helpfully explained by Holmes A.C.J. in Re: Further Detention and S.B. at para. 8.
>
> The concept of complexity has been discussed at length in the case law. The issue is the complexity of the investigation, not the complexity of potential charges. The sheer size of the investigation, or the sheer volume of material in issue, is not necessarily enough to make the investigation complex in nature: Re: Further Detention and S.B. at para. 9, citing Canada Revenue Agency v. Okoroafor, 2010 ONSC 2477 at para. 26–27 and Re: Moyer (1994), 1994 CanLII 7551 (ON SC), 95 C.C.C. (3d) 174 (Ont. Gen. Div.) at p. 177. In assessing complexity, the court may consider "what work is yet to be done, the estimated time for completion,

> and whether the work should reasonably have been done earlier": Re: Further Detention and Choudhurry at para. 29.
>
> In Re: Tran, 2004 BCSC 339, the Court described the concept of complexity as "something intricate and composite, something requiring analysis and reflection before moving forward to results and always considering the implications". Holmes J., as she then was, went on to set out a non-exhaustive list of factors that can be indicative of complexity at para. 30 of the decision in Re: Tran. I will not repeat that list of factors here, but I nevertheless consider it to be helpful and I have taken it into account in my analysis.
>
> To my way of thinking, I would not necessarily regard the notion of complexity as a binary concept, as in an investigation either being complex or not complex. There will, I expect, be some investigations that are manifestly not complex. A straightforward allegation of theft or assault with one or two witnesses to the crime comes to mind. However, when it comes to investigations that are more involved, there may well be degrees or levels of complexity. Certainly to justify further detention for a specified period of time under s. 490(3), the investigation must have elements of complexity, something beyond a run of the mill criminal investigation such that the police are unable to successfully complete the investigation, and either obtain approval for charges, or otherwise return the seized things within one year of the date of seizure.[80]

[145] Although one year is a bit of an arbitrary number, it may be prudent to retain a higher standard to retain seized property at a certain point in time. Such would encourage diligence on the part of those with possession to ensure that related processes conclude expeditiously. Yet the focus on complexity can frustrate the retention or things that may be essential to a criminal investigation. A thing seized on a serious crime may be critical to an investigation that is not complex, as that term has been interpreted by the courts.

[146] Most police agencies have many items that are retained on files where the investigation has reached an impasse but may be revived in the future pending further information or technological developments. This is especially true for homicides and so-called "cold cases"[81]. In such circumstances, granting the court an authority for an indefinite period of detention should be an option, when weighed with other factors which should be permissible consideration. For example, the current test forestalls considerations that may be important to the individual whose property and privacy interests are at stake, a focus on the overall "interests of justice" which is the test under s. 490(9.1) may be a more appropriate form of analysis.

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[80] *Further Detention of Things Seized (Re),* 2021 BCSC 1323 (CanLII), https://canlii.ca/t/jh580, paragraphs 119 – 122

[81] For example: *Further Detention of Things Seized (Re)*, 2022 BCSC 1803 (CanLII), https://canlii.ca/t/jssj0

[147] The interests of justice test articulation of the analysis may cast the net so wide as to permit submissions relating to the propriety, *Charter*-wise, of the search and seizure in the first instance. This is something which had been rejected by the courts under the present regime[82]. Allegations regarding the propriety of the underlying search or seizure could be specifically excluded from consideration in an "interests of justice" inquiry.

[148] The current "complexity"-centred barometer fails to consider the changing nature of police investigations, timelines for analysis of things seized and the limited resourcing of same, which is currently not a valid consideration[83]. Factors could be specifically enumerated to assist the court in what could be considered in an inquiry beyond a year that focuses on the interests of justice could include:

- the complexity of the investigation writ large;

- complexity specific to the thing in question (e.g., attempting to by-pass encryption on a mobile phone);

- the diligence of investigators in relation to the thing;

- insufficient resource allocation on the part of investigators;

- how much longer the thing may be required;

- the seriousness of the offence under investigation in recognizing that such files are often reopened many years after the last active investigative step;

- the financial value of the thing and as thing that may be singularly required for any number of reasons (e.g. work purposes, familial requirements, sentimental value etc…)

- the privacy interests associated with the thing.

[149] The interest of justice could also inform the duration of the order sought with circumstance dictating a spectrum from very brief to indefinite.

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[82] *Further Detention of Things Seized (Re)*, 2024 BCSC 297 (CanLII), https://canlii.ca/t/k314k,
[83] *Canada Revenue Agency v. Nathaniel Okoroafor,* 2010 ONSC 2477 (CanLII), https://canlii.ca/t/29jl3, at paragraphs 19 – 24

Recommendation 3.1: The Working Group recommends the post-year detention application be focused on the overall interests of justice rather than complexity including flexibility in the length of the order. Consideration should be given to providing that property can be detained indefinitely in investigations that are unresolved and where no person asserts an interest in having it returned. Indefinite orders should be subject to review by anyone asserting a valid interest in the thing.

(b) "a judge of a superior court of criminal jurisdiction or a judge as defined in section 552…"

[150] Historically it might have been very rare for a year to pass without a criminal charge being laid, but such is now more commonplace. While the requirement for a higher threshold to detain is sensible, the need to bring the matter before a higher level of court should be reconsidered. This is particularly the case given the forthcoming recommendation insofar as appellate remedies are concerned.

[151] Superior Courts are fewer in number and generally more challenging to access geographically. Remote appearances could help to solve that specific issue, but the manner of appearance is typically within the discretion of the court to manage its own procedural affairs. For example, the British Columbia Supreme Court has dictated that 490 applications are to be conducted in person[84].

[152] Keeping the entirety of the property detention inquiry in the lower court could permit the same judicial officer who made previous orders to seize themselves of all future applications. This would permit the maintenance of familiarity with the investigation generally, the basis for previous extensions and other issues that may have been raised in previous adjudication.

[153] In Quebec by virtue of section 552, a judge of the Court of Quebec has jurisdiction to make an order under section 490(3), vesting concurrent jurisdiction in both trial-level Courts in that province. The utility of preserving this situation was highlighted by members of the group from that province. Others situated elsewhere in Canada have suggested other reasons to allow for such applications to be made in superior court, for instance if the seizure was done in the first instance by Supreme Court order. Granting both levels of court concurrent jurisdiction over property detention applications may resolve the issue.

[84] https://www.bccourts.ca/supreme_court/documents/COVID-19_Notice_No.51_Method_of_Attendance_for_Criminal_Proceedings.pdf, p. 2

Recommendation 3.2: The Working Group recommends that the provincial and superior courts have concurrent jurisdiction on the post-year detention application and that each court has discretionary authority to transfer the application to the other court if it is related to proceedings instituted or ongoing in the other court.

(c-1) [from 490(3.1)] **"whether or not an application for an order under subsection (2) or (3) is made,"**

[154] It is unclear whether consent can be provided in the case of a lapsed detention order. This poorly worded provision leaves open interpretation both for and against the statutory authority for an owner or legal possessor to provide consent to detain after a section 490 detention order has expired because a renewal application has not been made. The renewal application is important, but human error can result in situations where the application is not made prior to the underlying order running out of time. This situation is distinct from a renewal order being sought and denied by the presiding judicial officer.

[155] There is a myriad of reasons why the owner or the person entitled to possession would want to consent to an item being detained in the first place. They may be a victim of crime and wish to assist police. They may not wish to incur the costs associated with attending a court application. They may wish to avoid, for personal reasons, having a public court record created in relation to themselves. All of these would apply after an order has expired. The authorities should make every effort to adhere to the prerequisites for judicial supervision of seized things. Yet if the owner or legal possessor wishes to excuse the error, the consideration of judicial economy dictates that such resources can be better served elsewhere. The perspective of the propriety of the dispensation of a legal requirement after the fact was expressed given that there are more than personal interests at stake. A counter perspective explained that regularizing a detention where the authority had lapsed would not necessarily foreclose a *Charter* claim alleging illegal detention during the lapse. It would make the system work more efficiently in circumstances where there is no actual dispute about continuing the detention, and it would encourage resumption of compliance.

[156] The current legislation arguably does not account for circumstances where the temporal period of consent to detain under section 490(3.1) lapses and no further consent is provided. The legislative gap should be filled so that it is clearly possible to seek an extension order by way of court application following a period of consent detention if the consent is not renewed. It would be best if the application in question were brought under the relevant application as if the consent to detain were an order authorizing detention. For example, if the section 490(3.1) consent took the detention of the seized thing to a year post-seizure, the application for further detention ought to be brought by way of section 490(3). One possible solution might be for subsection 490(3.1) to deem that the things are detained pursuant to the written consent as though an order had been made with respect to them.

Recommendation 3.3: The Working Group recommends considering whether consent be available in the case of lapsed detention orders and the path for applications for orders for detention be following a period of consent be clarified.

(c-2) "if the lawful owner or person who is lawfully entitled to possession of the thing seized consents in writing".

[157] The legislation presently fails to give a clear answer to consent issues when, owing to the present language, more than one person may fit the definition of the entity with authority to consent. There may be more than one owner, or one person lawfully entitled to possession. Those entities may not be the same person. For example, spouses may collectively own the same computer[85], or a company may provide an electronic device to an employee[86]. These entities may be of adverse interest in criminal proceedings and the issue of reasonable expectation of privacy is apparent.

[158] The issue is more easily reconciled if section 490 were, as it was originally intended, a scheme designed only to protect property interest. Vesting the consent power solely with the owner of the thing would go some way to simplifying the issue. Yet recent caselaw suggests, the provision captures privacy concerns, it would seem that "all" persons – law who could be so affected - lawful owners and possessors - ought to be required to consent to the detention. The insertion of "all" may provide the desired clarity.

[159] The circumstances of a victim of homicide or where the thing is seized from a young person also raise unique and complicated aspects for this area of consent.

[160] It is very common for the police to gather things from a dead person. Whether this amounts to a "seizure" from the deceased person, or not, is a characterization open to debate, but the state is taking control of property that does not belong to them. The family of that person will typically have an interest in the police solving the offence. The same family may wish to avoid being notified (which would include the affidavit in support) of a court application pertaining to the detention of things from their loved one. The opposite of both these propositions may also be true.

[161] Yet determining who is the lawful owner or person lawfully entitled to possession of a thing seized from a deceased person may be a challenging exercise, depending on their testamentary status. What is more, those entitled to ownership or possessory rights of an estate may themselves have competing interests. Victims of homicide are frequently related to their perpetrator. The executor of the estate has duties to carry out that would make them ill-suited to be the person to provide consent. Notwithstanding the fact that the family of those who are killed may wish to consent to

[85] *R. v. Reeves,* 2018 SCC 56 (CanLII), [2018] 3 SCR 531, https://canlii.ca/t/hwk3k
[86] *R. v. Cole*, 2012 SCC 53 (CanLII), [2012] 3 SCR 34, https://canlii.ca/t/ft969

detention, there are several obstacles to reforming the law in such a way to make such a conduit workable in practice.

[162] Similar issues are manifested with things taken from young people. A telling example is the mobile phone, which is frequently the conduit through which young people are made the victim of crime. Is there any point at which the parent of the young person should be singularly positioned to provide consent? For example, the nine-year-old possessor of a phone. Such a person is likely uncapable of understanding the form of legal consent to detain a seized thing. Yet the same nine-year-old may well have a privacy interest in their mobile device. Consequently, like the circumstances of the family of a homicide victim, those in relation to things seized from young persons are likely too complicated to permit a clear and comprehensive consent provision.

[163] The current section 490(3.1) lacks a requirement that the consent be filed with the Court. It may be wise to do so, however the utility of this has been questioned within the group as an unnecessary process. It does appear to feature in the Form 5.2 in some provinces[87]. The consent form could be standardized as a prescribed form and the ability to submit it electronically should be given consideration.

[164] The provision does not contemplate the withdrawal of consent as is permissible in other search and seizure scenarios. A mechanism for taking back consent would favour property owner's autonomy and agency, but at the same time could frustrate complex investigative techniques undertaken *bona fides*. For example, efforts to forensically analyze under consent detention may have to be restarted at great time and expense if the consent were suddenly and unexpectedly withdrawn. It may make sense to include a measure to bring an application in the specific circumstances of a withdrawn consent that would include a specific, reasonable short time frame and that would permit ongoing processes to continue in the interim period.

[165] Finally, a person endorsing a 490(3.1) may be making a statement against interest. It would be in accordance with the principles of fundamental justice that such consent ought not be admissible at trial to prove possession of the thing in question. The inadmissibility of the consent form should be included in the legislation and on the form itself.

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[87] See for example the Nova Scotia and Prince Edward Island versions of the Form: https://www.courts.pe.ca/sites/www.courts.pe.ca/files/Forms%20and%20Rules/Initial_Report_To_A_Judge_Form.pdf

https://courts.ns.ca/sites/default/files/forms/NSPC%20Criminal%20Forms/NSPC_Form_5.2_Report_to_a_Judge_or_Justice_January_2023.pdf

Recommendation 3.4: The Working Group recommends clarifying more precisely whose consent must be obtained and who would be so positioned in the case of a deceased person or a young person. Consent should be evidenced on a prescribed form which may be in electronic format. Consideration of whether the consent be filed with the court should be undertaken, but the group is not unanimous on that point. Consent to detain should deemed inadmissible as evidence of possession in all future criminal prosecutions.

(c-3) "to its detention for that period"

[166] One can only consent to further detention, not relinquishment. In some circumstances the person in question will have no interest in ever getting back the seized thing or may wish to surrender their claim to it (including circumstances of joint ownership). Bodily fluids and worthless objects are two examples.

[167] The consent provision should be expanded to include the ability - of a person legally positioned to do so - to relinquish any and all interests in a seized thing. An order in the first instance under s. 490(1) is always required. An alternative to the decoupling of reporting from detention suggested previously in this report may be to permit exemption by consent at the outset.

[168] Some individuals may not want the object but would be opposed to a wholesale relinquishment of the thing to the Crown, with concerns that it could be used without restriction. In such cases, a more limited consent that would include a provision for its destruction when it is no longer needed for the purpose for which it was seized may be advisable.

[169] The current structure of section makes a section 490(9) disposition order mandatory in any case where the foundational order under 490(1) is made. This requirement applies to those items covered by a 490(3.1) consent. If a relinquishment option is added to the consent provisions of the *Criminal Code*, the utility of a disposition order would be superfluous.

[170] This consideration centres upon the degree of comprehensiveness warranted for the judicial supervision of seized things. Is it absolute? An argument maintaining the desirability of a final order rests in part on the fact that supervision provides a check on authority. Yet, evidence in support of exception can be found within this part of the legislation already, where consent at present brings the thing outside that supervision.

[171] In a system of finite resources, the courts need not concern themselves with possessory issues that are not controversial as between law enforcement and the private citizen whose property and privacy issues are at stake. With the consent provision, Parliament has already carved out an exception to the judicial supervision of seized things. It is noteworthy that there is no limit to the duration of the period of consent

detention. An indefinite consent would bring the thing outside the scheme of judicial supervision already.

Recommendation 3.5: The Working Group recommends allowing the consent provisions of s. 490 of the *Code* to allow for the voluntary exemption from section 490 and / or the absolute relinquishment of proprietary interest in seized things, consent that is limited to the investigation in question with a provision for its destruction. In such situations, there could be an exemption to the requirement for a disposition order.

2.4 Subsection 490(4)

[172] The subsection currently outlines a disposition power in relation to seized things in specified circumstances. The practical application of this authority is frustrated by a lack of clarity, which has led to its uneven application. This is the overarching issue manifested in this provision.

> When accused ordered to stand trial
>
> (4) 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 of the court and disposed of as the court directs.

[173] In some parts of Canada[88] this section is frequently used once charges are laid particularly in response to a request for return. In other parts of the country, this section of the legislation serves little apparent purpose. This discrepancy may be explained by the wording which references to an "order to stand trial" as well as a direction to "forward anything detained". The former uses the language of section 548 in relation to the order made post preliminary inquiry. This latter seems to reference situations where things seized are physically brought to the court in tangible form (which as mentioned above is rarely ever done) and detained and then physically transferred, rather situations of being reported or made an exhibit at a preliminary inquiry.

[174] The disposition of exhibits - as distinct from seized things more generally - in some places is addressed through the Rules of Court[89]. As will be explored below in relation to 490(9), there is utility in making clear that the court's management of seized things should continue post-charge and include powers of return, forfeiture, sale or destruction, as the case may be. The authority should include those things that are not physically before the court but also cover those that have been ordered detained. The interplay between this power and that of the court over exhibits should also be clarified. So too should the impact of both an appeal period, and the prospect for post-trial

[88] Alberta
[89] See: Rule 4(5) of the Criminal Rules of the Supreme Court of British Columbia, https://laws-lois.justice.gc.ca/eng/regulations/SI-97-140/FullText.html?wbdisable=false

preservation of certain things. Post-conviction exoneration based on the examination of things well after the fact is very real[90].

[175] As it stands, what is provided for in section 490(4) requires significant modification. At present the subsection confers final authority of disposition without any procedural or legal guidance. Which party carries the responsibility for such applications should be outlined. The Crown would likely be best positioned to do so, although the holder of the non-trial exhibits would typically be the police. This in turn raises the contemplation of what notice may be required to be given to those with an interest in the thing at issue, what the burden of proof may be, and what evidence is required to discharge it.

[176] A more pragmatic approach would be to harmonize this aspect of property detention law with what currently is provided for in section 490(9). This is the component of the legislation which deals with a final order in many other circumstances. There should be a single subsection that deals generally with the order concluding the detention of things. Such a power should exist during both the investigative state, and after proceedings have commenced as well as concluded.

Recommendation 4.1: The Working Group recommends clarifying section 490(4) by incorporating post charge dispositive authority elsewhere in the legislation to provide for a single concluding order over seized things by way forfeiture, destruction, sale, return or preservation.

2.5 Subsection 490(5)

[177] If it is determined during a running order that a detained thing is no longer required, the *Code* mandates that an application be brought to the level of Court that authorized the detention.

> Where continued detention no longer required
>
> (5) 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

[90] http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Milgaard/20-Chapter18.pdf

> (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).

[178] There are a couple of components of this law that are worth examining:

(a) As articulated elsewhere in this report, the necessity or lack thereof of the mandatory requirement in every case to obtain a court order prior to returning a seized thing.

(b) The way parties with an interest in a thing seized are provided their audience in a return hearing needs clarification.

(a) "make an order in respect of the property under subsection (9)."

[179] As mentioned above, the obligation to obtain a court order before returning licit property to the rightful owner when there are no grounds to question who that might be may be unnecessary in some circumstances. The *Criminal Code* allows police to make other important decisions – perhaps more important decisions than returning property – when deciding whether to hold an arrested person for bail, or to release them at the scene, or from the police station[91]. The requirement to return a thing reported as seized and detained could be expressed within the provision, as it is presently in s. 489.1.

[180] Perhaps a police officer who is satisfied that there can be no possible dispute about who should get a thing back should be able return it without court order, as they currently can prior to there being a detention order. Filing documentation or a report that such has occurred could provide transparency such that the supervisory function of the court is still engaged, though in a less active manner. Alternatively, the authority to return could also form part of the order in the first instance whereby the police document from whom they have seized the thing and at that time acquire approval from the court to return the item to that person once the purpose of detention has concluded. An anticipatory order for destruction upon reporting in certain cases like bodily fluids may

[91] Section 498 – section 501 of the *Criminal Code*

be warranted if such things are not exempted from the detention order requirements as recommended elsewhere in this report.

[181] The need for the police to obtain an order in every case before returning property can delay individuals getting back their property and creates work for the police and the court may not be necessary. Rather, providing for easy to submit documentation showing that a thing has been returned provides for accountability. The involvement by the court in the form of an adjudicated order may better be left for those cases where the destination of the return is in doubt or disputed in some manner.

Recommendation 5.1: The Working Group recommends considering the scope and purpose of section 490(5). Options for reform could include allowing non-controversial return, streamlining the requirement for a return order, or incorporating the order to return the property no longer required or preauthorizing its destruction in certain cases into the detention order itself.

(b) "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"

[182] Unlike other parts of the section where notice is specified as three clear days, this section provides no guidance on this point. Further, the mechanics of "affording… an opportunity" to those that can make a "claim" of ownership makes the provision even more opaque. It is challenging to understand how the court that is tasked with ensuring compliance with the prerequisite of having to "afford the opportunity" can be satisfied of it having been done.

[183] The subsection may imply some proactive obligation on the part of the lawful owner or person lawfully entitled to possession to bring themselves before the court as some form of intervenor. Yet if there is no obligation to notify such a person that an application is being made, it would create a very challenging obligation on that person's part to discern when such an application may be made.

[184] The form and timing of notice should be clearly outlined if the provision is to be maintained. The Ontario Court of Appeal case of *Floward Enterprises Ltd. (H. Williams and Co.) v. Winberg Estate*[92] illustrates the issues that can arise from the lack of statutory clarity about notice requirements in section 490 of the Criminal Code.

[92] *R. v. Floward Enterprises Ltd. (H. Williams and Co.)*, 2017 ONCA 448 (CanLII), https://canlii.ca/t/h433v

[185] The stipulation "if known" suggests that some insight on the part of the police detaining the object concerning who the owner may be is already contemplated by the section. This is supportive of the suggestion made elsewhere in the report of deferring to judgment on the part of the seizing authorities to seek independent adjudication when it is known that the recipient of to-be-returned property is controversial or in dispute.

Recommendation 5.2: The Working Group recommends the notice provisions in the context of applications for the return of a seized thing should be clarified with a view of ensuring an ability of possible claimants to be heard. Reform to the subsection can consider whether such applications should be required only where it is known or believed that there is some issue concerning the legal entitlement to the possession of the thing.

2.6 Subsection 490(6)

[186] The subsection currently compels an application be made for a final order when the authority to detain lapses:

> Idem
>
> (6) 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).

[187] As with s. 490(5), it is likely unnecessary for a discrete application to permit the return of a seized thing after a detention order has expired. Unless the person with control of the detained thing is not satisfied with who that person is, the obligation to return can be built into the legislation with a report filed that this has been done, or alternatively made part of the order made in the first instance.

[188] Furthermore, the bifurcations into separate subsections of the obligation to apply when an order has expired [490(6)] and circumstances when the thing is no longer needed [490(5)] is difficult to comprehend, especially with the unclear wording of "in the circumstances set out in that paragraph…" 490(5) and (6) could easily be harmonized into a single directive to seek court approval for return when there detaining authority has reason to doubt who the *bona fides* possessor is, whether during an order or after it has expired.

Recommendation 6.1: The Working Group recommends creating a single subsection dictating the requirement to obtain an order to return the property, with consideration of the need for one when there are no grounds to question who should get the thing back. The provision must continue to make clear that the application shall be made when it is no longer required or after detention has lapsed, whichever occurs first. In the alternative the judicial authority to return may be able to be incorporated into the detention order in the first instance. Standing to apply for an order under subsection (9.1) should be retained in a separate provision.

2.7 Subsection 490(7)

[189] The subsection currently allows for certain persons to apply for a return order upon the expiration of a detention order:

> Application for order of return
>
> (7) 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.

[190] This provision is largely duplicated later in the section under s 490(10). That latter section contemplates an application by the lawful owner or person lawfully entitled to possession. If the legislation is to retain a provision to allow for a post-detention order application for return, it would be more logical for there to be a single provision under which any *bona fides* person can seek that remedy.

[191] However, if the initial order for detention mandates its return upon the police being satisfied that the thing is no longer required, or upon expiration of an order, such an application should not be required in the ordinary course. Rather it should be crafted to require compliance with the obligation to return upon expiration of the order if this has been overlooked or refused.

[192] A mechanism to compel return with the discretion to order costs may encourage compliance and provide a safeguard if the police overlook their duties. Some members of the group strongly objected to this proposal, highlighting the problematic nature of

this including the issue of how and when the determination that the thing is not required would be made as well as logistical issues pertaining to its return. Jurisdictions where the Crown is tasked with laying criminal charges add a further layer of complication if that entity determines a need for a thing for that process independent of the police. Further the entity against whom such an order could be made – the Crown or the police – may be challenging to discern. Civil courts may be the more appropriate venue for such a proceeding.

Recommendation 7.1: The Working Group recommends merging section 490(7) and (10), into a single return application that can be brought by both owners and person from whom the thing was seized.

2.8 Subsection 490(8)

[193] The subsection currently permits an exceptional application for return prior to the expiration of the detention order:

> Exception
>
> (8) 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 the application is so allowed.

[194] The concerns with this subsection are three-fold:

> (a) Having both the Provincial Court and Superior Court involved with different stages of the same court-supervisory process.
>
> (b) The considerations relevant in hardship-based applications ought to be outlined in greater detail, including who may advance such claims.
>
> (c) The implications of permitting the underlying basis or validity of the underlying seizure to be challenged during property supervision administration.

(a) "A judge of a superior court"

[195] Consistent with the balance of the overview of the section, as outlined above the Court in the first instance should typically be the Provincial Court, with concurrent jurisdiction of the Superior Court to ensure such that each court has the discretionary authority to refer the matter to the other in certain circumstance. For example, if proceedings are instituted or ongoing at the other court level. Permitting all proceedings to occur at one level can avoid circumstances where detention and return applications cannot be heard concurrently:

> That leaves for consideration the cross-application for return of some or all of the seized items. I agree with counsel for the Attorney General of Canada that this application was not ripe in this court. In other words, this court did not have jurisdiction to deal with that application, unless and until an order had been made by this Court under s. 490(3). That has now been done[93].

Recommendation 8.1: The Working Group recommends amending section 490(8) to provide that the provincial and superior courts have concurrent jurisdiction, and that each court has discretionary authority to transfer the application to the other court if it is related to proceedings instituted or ongoing in the other court. .

(b) "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"

[196] The term hardship is not defined, nor are any other criterion that the court is to apply.

[197] Enumerated considerations in the legislation could help assist future applications brought under this section, yet maintaining judicial flexibility on a case-by-case basis may also be beneficial. This can be balanced by making the permissible criteria of hardship and a non-exhaustive list.

[198] In referencing subsection 7, such applications for hardship-based may be limited to being brought by the "person from whom anything was seized". This description may not invariably capture the owner of the seized thing. This is another reason to merge the applications contemplated by 490(7) and (10).

[199] There may be judicial economy in forestalling hardship applications made proximate to orders made for detention, yet in cases of established hardship the possibility of unfairness or irreparable harm may supersede this consideration.

Recommendation 8.2: The Working Group recommends considering amending section 490(8) to clarify the considerations the court is to apply in allowing a hardship-based application. A reluctance to do so was expressed which highlighted judicial flexibility on the matter. The harmonization of all return application would allow for the owner of the property to bring a hardship-based application.

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[93] *Further Detention of Things Seized (Re)*, 2024 BCSC 817, https://www.bccourts.ca/jdb-txt/sc/24/08/2024BCSC0817.htm, paragraph 14

(c) "before the expiration"

[200] As mentioned above, quite some time ago the Supreme Court of Canada telegraphed that the provisions should be amended to contemplate seizures that were unlawful. Presently recourse to such would be done via Superior Court application either by way a replevin action[94], to quash the authorizing warrant[95] or to challenge detention order in the first instance[96]. The lawfulness of a seizure can also be raised during a forfeiture application[97].

[201] The highest court in the country has specifically suggested some form redress be built into the property detention provisions to challenge the underlying lawfulness of the seizure. Those wronged by state action that deprives them of property, or privacy, are rightfully entitled to seek redress. However, creating such a provision would be very challenging, and could create a volume of litigation far better suited to trials on the merits.

[202] Distinguishing between cases where charges are laid and thus where a remedy can be sought in relation to the seizure, and those without charges such that there is no venue to challenge the seizure would be difficult. This is because it is close to impossible to identify cases where no charges will ever be laid.

[203] A distillation of the competing factors was considered by the court:

> The Respondent argues that permitting certiorari review of search warrants to vindicate an applicant's reputational concerns alone will open the door to many such applications being brought in the future. While I agree that this (sic) a factor that should be considered, I am not persuaded that allowing the Applicant's certiorari application to proceed will necessarily lead to a flood of similar applications. I reach this conclusion for three main reasons.
>
> First, many persons who believe their rights have been infringed and their reputations damaged by an unreasonable search will nevertheless conclude that it is not worth the expense of bringing a free-standing application to challenge the issuance of the warrant. Free-standing applications to quash warrants by search targets who are ultimately never charged are relatively rare, even though such claims are not currently barred by Zevallos.
>
> Second, would-be litigants who do not follow the Applicant's course and limit their claims to requests for declaratory relief will continue to run the risk that the court will characterize their application as an improper attempt to compromise

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[94] *R. v. Raponi,* 2004 SCC 50 (CanLII), [2004] 3 SCR 35, https://canlii.ca/t/1hgvw
[95] *Lemare Lake Logging Limited v. British Columbia (Forests and Range)*, 2011 BCSC 903 (CanLII), https://canlii.ca/t/fm6m2
[96] *Further Detention of Things Seized (Re),* 2023 BCSC 421 (CanLII), https://canlii.ca/t/jw8h1
[97] *R. v. Hoyes*, 2018 NSPC 26 (CanLII), https://canlii.ca/t/htk42

an ongoing investigation or to obtain a premature admissibility ruling, and will decline to hear the application for either or both reasons, as happened in Pèse Pêche Inc., supra.

Third, applicants who seek certiorari review of a search warrant with the goal of establishing their innocence and vindicating their reputational interests are pursuing a high-risk litigation strategy that can easily backfire on them. The standard of review in search warrant cases is onerous and difficult for applicants to meet. As the Supreme Court of Canada explained in R. v. Araujo, 2000 SCC 65 at para. 54:

> [T]he test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge. [Underlining in original].

Accordingly, applicants who seek a declaration that their rights have been infringed by the issuance of a warrant not only run the risk that they will not obtain the remedy they seek, but that the reviewing court will instead publicly uphold the validity of the warrant, and in so doing compound the harm to the applicant's reputational interests.

For these three reasons, I am not persuaded that there are likely to be vast numbers of future applicants who will have both the financial resources and the courage of their convictions necessary for them to follow the Applicant's litigation approach. However, even if I am underestimating the number of similar claims that could be brought in the future, it does not necessarily follow that it would be in the public interest to bar these claims from proceeding. The courts serve the public by providing a forum for resolving disputes and remedying legitimate grievances, and it is not apparent to me that properly-founded claims by the targets of allegedly unlawful searches who assert that they have suffered reputational harm are matters that ought never be heard.

iii) Factors weighing against certiorari review

As I see it, the main countervailing factors that weigh in favour of declining to conduct the proposed search warrant review are: (i) the need to preserve scarce court resources and avoid duplicative proceedings, in the event that charges are eventually laid against the Applicant; and (ii) the danger that I will reach an incorrect conclusion about the issuance of the warrant because I will be forced to rely on an incomplete factual record, as compared to the record that will be available to any future trial judge.

In my view, these are both substantial concerns. However, the first factor is offset to some extent by: (i) the possibility that no charges will ultimately be laid; and

> (ii) the fact that even if charges are eventually laid, at least some of the steps taken in the litigation before me will not necessarily have to be entirely re-done at trial. Even if my rulings and conclusions do not bind a subsequent trial judge, they may have persuasive force and may help the parties narrow the issues that must be relitigated at trial. Likewise, when assessing the second danger I take considerable comfort from the very high quality of the materials I have received from both parties so far.[98]

[204] Though expressed in a different context, this excerpt outlines some considerations to be weighed in contemplation of creating a statutory mechanism to challenge the underpinning of the seizure of things subject to a detention order. Crafting this process would amount to a significant change in the law. There are valid reasons to consider such a process, not the least of which is the recommendation in *obiter dicta* by the Supreme Court of Canada in *Raponi*. Nonetheless, there are substantial consequences that would flow therefrom that dictate that such an avenue should only be created with considerable caution. Amongst the issues that such a procedure would raise include:

- the appeal provisions that may have to be created by this form of application;

- the volume and breadth of such applications;

- the questions of the venue for such hearings;

- the application of the *Charter* and its remedial authority;

- the implications such hearings may have vis-à-vis any criminal trial on the merits, especially issues of *res judicata;*

- the potential for critical or determinative findings to be made outside of the trial process with consequences that may include the premature conclusion of the criminal investigation;

- that recourse to the civil court already exists to challenge the lawful basis of some seizures (e.g. applications to quash search warrants).

Given the comments of the Supreme Court of Canada on the issue, the possibility of the *Code* being amended to permit a challenge to the lawfulness of a seizure for thing that is subject to a detention order is highlighted. Several objections to this proposal were made within the group with reference to several significant issues that could arise. Similar concerns are outlined in the caselaw.

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[98] *R. v. 1758691 Ontario Inc.* ("ATV Farms"), 2019 ONSC 2933 (CanLII), https://canlii.ca/t/j08cj, paragraph 25 – 31, See also: *Further Detention of Things Seized (Re)*, 2024 BCSC 297 (CanLII), https://canlii.ca/t/k314k, paragraph 102; *Leduc c. Canada (Procureur général du)*, 2003 CanLII 6017 (QC CQ), https://canlii.ca/t/1bzhk,

Recommendation 8.3: The prospect of changing to the law to make section 490 a venue to challenge the basis of a seizure requires further analysis and policy development.

2.9 Section (9) and (9.1)

[205] Section 490(9) is currently the end point of all property detention applications not otherwise dealt through proceedings, with (9.1) allowing for the revival of an expired order:

> Disposal of things seized
>
> (9) 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 those 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.
>
> Exception
>
> (9.1) 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.

[206] There are numerous aspects of the final order authority of section 490 that should be revised:

> (a) Once again, the involvement of both levels of trial courts would in most cases be unnecessary.
>
> (b) "Proceedings" and "required" are key words in the provision that lack definitions and temporal references.
>
> (c) Once again, the issue of requiring a return order in all situations.
>
> (d) The mechanics of the final disposition hearing insofar as procedure, burden, and the parameters of admissible evidence.
>
> (e) The scope of the "unlawful" prerequisite to forfeiture.
>
> (f) The parameters of non-forfeiture disposition orders.
>
> (g) Expanding the remedial authority to ensure that it covers situations where a foundational order has not been made.
>
> (h) Clarifying the notice requirements for section 490(9.1) orders.

(a) "a judge… a justice";

[207] The utility of minimizing the Superior Court as the venue for applications under this provision of the *Code* has been explained above, as have reasons to maintain it as a discretionary option in certain specific circumstances.

Recommendation 9.1: The Working Group recommends amending section 490(9) to provide that the provincial and superior courts have concurrent jurisdiction, and that each court has discretionary authority to transfer the application to the other court if it is related to proceedings instituted or ongoing in the other court.

(b) "and proceedings have not been instituted in which the thing detained may be required"

[208] The term "proceedings" is not defined in relation to section 490 of the *Criminal Code*. A criminal charge that commences proceedings would fit this definition. A forfeiture application may as well, but clarity in that respect is desirable. Some judges agreed that detention for the purpose of eventual forfeiture proceedings may support further detention[99] others have not[100]. Forfeiture can be brought via several different conduits including applications that may be brought under the umbrella of civil forfeiture The interplay between section 490(9) order and those brought about through civil action can raise issues, as has been examined at the provincial appellate level[101].

[209] Caselaw has found that forfeiture applications can meet the definition of proceedings and have also considered the scope of term "required":

> Mr. Flynn concedes that a forfeiture proceeding following trial is an "other proceeding" and it commenced with the laying of the counterfeit charge although it remains dormant until the party is convicted: *R. v. Alekseev* (1990), 1990 CanLII 10992 (BC PC), 58 C.C.C. (3d) 544 (B.C.P.C.). He submits however that the Vehicle is not required for the forfeiture hearing.
>
> …
>
> Given the Crown's concession that the Vehicle is not required as evidence, I find it is not required pursuant to s. 490 for any potential offence-related property forfeiture proceedings. As noted by Meiklem J. in Felix, the property can be ordered forfeited as offence-related property whether it is held by the Crown or the accused.
>
> I find that I have the authority to return possession of the Vehicle to Mr. Flynn. There is no question that Mr. Flynn is the lawful owner of the Vehicle. Subject to Mr. Flynn entering into an appropriate recognizance, I order that the Vehicle be returned to him.[102]

And:

> The adjective "required" has different possible meanings. One meaning is that something is necessary, essential or indispensable. Another meaning is that something is demanded or desired.

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[99] *Further Detention of Things Seized (Re),* 2022 BCSC 2283 (CanLII), https://canlii.ca/t/jvf9b
[100] *R. v. Tingley, 2021 BCPC 24 (CanLII)*, https://canlii.ca/t/jd58w
[101] *British Columbia (Director of Civil Forfeiture) v. Qin,* 2020 BCCA 244 (CanLII), https://canlii.ca/t/j9dcw, paragraphs 108 – 113 & 122 – 133
[102] *R. v. Flynn*, 2011 BCSC 1688 (CanLII), https://canlii.ca/t/fpbql, paragraphs 20 & 42 - 43

> The decisions of the British Columbia Supreme Court in Felix and Flynn were both made on the basis that establishing that proceedings have been instituted in which a thing "may be required" within the meaning of section 490(9) meant that it was essential or indispensable that the thing be detained, because there was no other way that the thing could be ordered forfeited in the other proceedings.
>
> As I mentioned earlier, Part 3 of the Civil Forfeiture Act provides for interim preservation orders. Those orders include orders for the possession, delivery to the director or safekeeping of property. An application for an interim preservation order can be made without notice. No application for any interim preservation order has been made with respect to the money or the cell phones seized by Constable Crockford last May.
>
> More importantly, section 14 of the Act permits, at the time of the making of a forfeiture order, the making of orders requiring the disposition or transmission of property or the whole or the portion of the interest in property forfeited. It also permits orders providing that the government, on forfeiture, may take possession of or seize the property forfeited.
>
> CONCLUSION
>
> I conclude that with respect to the cell phones and the money seized by Constable Crockford, a forfeiture order could be made under the Civil Forfeiture Act whether these things are in the possession of Constable Crockford or in the possession of Mr. Keith. Detaining the cell phones and the money would simplify matters for the Director if he or she is able to obtain the forfeiture orders sought in the civil proceedings, but detention is not "required" for the purposes of those other proceedings.[103]

[210] Like many aspects of section 490, there is a tension between the interests of the state and those of the property owners. On one hand, the return of a thing seized can frustrate the eventual desire for forfeiture. On the other hand, the person affected can be deprived of the thing in question for some time until the hearing on the ultimate issue is heard, which may or may not be successful. An equitable balance may be achieved by incorporating legal authority akin to section 490.81 managements orders within the return provisions of s. 490.

[211] Another issue with section 490(9) is that it has been interpreted to limit its application only prior to proceedings being commenced. In other words, once proceedings are started, there is authority questioning the jurisdiction for the forfeiture or return when the thing is no longer required. This can create difficulties and legal voids for those things that cannot otherwise be dealt with via some other legal substratum such as being a weapon (s. 491), property obtained by crime (s. 491.1) or offence-related property (s. 490.1) For example, child pornography seized from a person but owing to

[103] *Crockford v. Keith,* 2015 BCPC 446 (CanLII), https://canlii.ca/t/gtpzj, paragraphs 28 - 32

an exclusionary *Charter* remedy a conviction is not entered such that 490.1 could apply. The child pornography which is unlawful to possess should be able to be the subject of a forfeiture order under s. 490(9)[104].

[212] There is considerable caselaw from Quebec concerning the applicability of s. 490(9) after charges have been instituted:

> [Unofficial Translation]
>
> The Court therefore finds, from the foregoing, that the scheme created by section 490 of the Criminal Code is no longer applicable once proceedings have begun.[105]

And:

> [Unofficial Translation]
>
> The Quebec Court of Appeal, in *Gagnon*, agreed with the reasoning of Judge Jackson in *Spindloe*, reproduced by Judge Vauclair in *EchoStar Corporation*, in holding that the entirety of section 490 of the *Criminal Code* is "no longer applicable once the proceedings have commenced, and even more so if those proceedings are completed".[106]

[213] And in contrast:

> [Unofficial Translation]
>
> For the reasons set out by the undersigned below in *Lacelle*, the undersigned declared that he has jurisdiction over motions for the disposition of and for the return of property after the end of the trial. It should be noted that in *Gagnon*[2] the decision does not include any finding that the court would have no jurisdiction to rule on the disposition of property after the trial; the Court of Appeal overturned a guilty verdict and forfeiture resulting from the guilty verdict. It concluded that it was imprudent to conclude that the judge's reasoning under section 462.37 of the Criminal Code would be the same under section 490(9) of the Criminal Code and leaves the question to the to be decided by court of first instance, if applicable.[107]

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[104] Section 164 forfeiture in relation to child pornography appears to flow only from judge-based seized in the section and is in the exclusive jurisdiction of the superior Court of all provinces save Quebec.
[105] *R. c. Garneau*, 2019 QCCS 2514 (CanLII), https://canlii.ca/t/j15vh, paragraph 35
[106] *9141-2023 Québec inc. c. R.*, 2021 QCCS 386 (CanLII), https://canlii.ca/t/jd5pc, paragraph 58. See also: *Nguyen c. Director of Criminal and Penal Prosecutions*, 2021 QCCQ 2722 (CanLII), https://canlii.ca/t/jfg1n
[107] *Directeur des poursuites criminelles et pénales c. Hébert*, 2019 QCCQ 8754 (CanLII),

[214] A possible solution lies in clarifying and amending what is currently outlined in s. 490(4) to give the court before whom an accused person appears with the jurisdiction to make a final disposition order. This authority would capture items not before it physically as a formal exhibit or otherwise in the physical possession of the court when the circumstances warrant such an outcome. The authority to make a final order concluding the supervision of a seized thing would thus apply pre and post proceedings being instituted.

Recommendation 9.2: The Working Group recommends that the legislation make clear that the property management powers to order return, forfeiture, or destruction apply after a proceeding has been instituted, and carrying through after the trial process is done. Consideration should be given to defining the term "proceedings" in section 490 of the *Criminal Code*.

> **(c) "if possession of it by the person from whom it was seized is lawful, order it to be returned to that person, or**
>
> **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,"**

[215] As mentioned several times in this report, it does not appear necessary for a discrete return order to be obtained to give back a thing that rightfully and unquestionably belongs to someone. While there are principled reasons for having the court supervise all seized things, a more balanced allocation of resources may be appropriate.

[216] The current provision does not provide any flexibility for circumstances where the equities would call for same. For example, if the police seize a vehicle that is stolen, file a report and obtain a detention order to facilitate a forensic identification examination of the car, which is quickly completed. Under the current law, the police cannot simply return the car to its registered owner but must get an order for same (and wait 30 days to return it). The ability of the police to simply return a seized thing to the person they are satisfied it belongs to would be the most expedient approach with the fact of this having been done then reported to the courts. Allowing for a return order to accompany the detention order in the first instance would provide a layer of accountability as an alternative option.

[217] Incorporating the authority to return within the legislation or at the time the initial order is made is logical and probably represents the reality of what is often done in any event. A provision within the legislation could permit return with a proviso requiring the

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https://canlii.ca/t/j5mjx, paragraph 7

police to get an order if they have a basis to believe that the person entitled to get the property back is either unknown or in dispute in which case an order would be required.

Recommendation 9.3: The Working Group recommends that either the legislation or the initial detention order contain a provision permitting return where the rightful possession is not in question.

(d) "if possession of it by the person from whom it was seized is unlawful,… 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…"

[218] The forfeiture authority does not dictate either the burden of proof, nor the form of evidence required to discharge that onus. A legal burden is articulated elsewhere in the legislation and its absence in the context of an application for a final order is conspicuous. The caselaw has reasoned that the full criminal standard applies and while the evidence may be in affidavit form, it cannot contain hearsay[108].

[219] The onus to secure forfeiture and the evidence that is admissible to discharge it should be codified. This would provide consistency throughout the section. The suggestion has been made that proof beyond a reasonable doubt is an unwarranted burden. There may be a principled basis for the burden of proof to be lowered to a balance of probabilities given that forfeiture in the absence of conviction that is based on that standard has been articulated elsewhere in the *Criminal Code*[109]. Conversely, Parliament has articulated the standard of beyond a reasonable doubt in other parts of the *Criminal Code*[110] and other legislation[111].

[220] Permitting the admissibility of facts on affidavit with the discretionary ability to permit cross examination would provide a balance between fairness and efficiency. Evidence that is obtained second-hand is reasonable but given the nature of the hearing as generating a final order, it would be prudent for the ordinary rules of evidence to continue to apply.

Recommendation 9.4: The Working Group recommends that the burden of proof, form of evidence and the bounds of admissible evidence for forfeiture applications be clearly stated in the legislation.

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[108] *R. v. West,* 2005 CanLII 30052 (ON CA), https://canlii.ca/t/1lhd8, *AG of Canada v. Acero,* 2006 BCSC 1015 (CanLII), https://canlii.ca/t/1nqgl
[109] See section 83.14(5), section 164(4),
[110] See section 490.1(2)
[111] See section 16(2) of the *Controlled Drugs and Substances Act*

(e) "unlawful"

[221] The current law permits forfeiture from a known person if the thing is "unlawful". This is clearly the case when the thing seized is illegal for that person to possess. However, the law is not clear whether offence-related property, or property tainted by crime may be forfeited under section 490. For example, an otherwise legal object used as a murder weapon is not unlawful[112] per se, nor is a phone containing voyeuristic images in the absence of an intent to distribute. In Quebec, a court reasoned a section 490(9) forfeiture order could be based on when things seized are [unofficial translation] "tainted or contaminated by crime and therefore should not be returned to that possessor"[113]. A critical aspect that must be underscored on this point is ensuring that such forfeiture is a valid exercise of Federal constitutional authority and is consistent with *Charter* considerations.

[222] A conviction can provide a legal foundation for the forfeiture of such things, but in the absence of a finding of guilt, these are examples where the public interest may favour some manner of precluding the return to the person from whom they were seized notwithstanding the fact that the possession by the person would be lawful.

[223] There should also be a provision that permits for consent forfeiture or destruction regardless of the lawfulness of the item. This would be the case for things that might have had suspected evidentiary worth, but no value for the person either from a property or privacy point of view.

Recommendation 9.5: The Working Group recommends that consideration be given to specifically permitting the forfeiture of offence-related property or property tainted by criminality in certain circumstances provided that such forfeiture remains a valid exercise of the criminal law power as well as allowing for a consent forfeiture and destruction.

(f) "to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law."

[224] The current terms limit the authority of the court to two options: return the item to a specific person or order it to be forfeited. The phrasing of "otherwise dealt with in accordance with the law" is nebulous and non-specific but does not appear to vest the court granting a 490 order with the power to do anything with the object other than have it forfeit or returned. Though the language at the conclusion of the phrase captures other laws and provides a path that can be adapted to a variety of things that may happen with

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[112] See however: *Further Detention of Things Seized (Re),* 2021 BCSC 1323 (CanLII), https://canlii.ca/t/jh580, paragraph 130

[113] *Bouchard c. Directeur des poursuites criminelles et pénales*, 2020 QCCS 2806 (CanLII), https://canlii.ca/t/j9jdk, paragraph 11

respect to the object from those sources of authority, it does not expand the binary option presented with the court judging a 490(9)-disposition hearing.

[225] Greater authority should be specifically conferred in the power of the disposition court under s. 490. For example:

- an order for destruction for illicit things;

- an order for the disposition of things when the owner cannot be reasonably ascertained

- an order authorizing the modification of things to permit them to be put into a state of lawfulness to facilitate their return. For example, a leased car modified with an illegal after-market compartment[114];

- an order for the sale of items in exceptional circumstances where there a multiple lawful claimants and return to a specific person is determined to be impossible.

Recommendation 9.6: The Working Group recommends that the authority of the disposing Court be clarified and expanded as necessary.

(g) "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"

[226] Case authority has interpreted this provision as limiting the applicability of the remedial provision of s. 490(9.1) to where an initial order has been made[115]. However, another decision granted an order under 490(2) where no report / 490(1) order had been made. The same ruling found in *obiter* that such an order could be made under s. 490(9.1)[116]. Yet other authorities have found that no section 490(2) order could be made in the absence of one made under section 490(1)[117].

[227] Situations where the police have failed, for whatever reason, to initially report the seizure and seek to apply for authority to keep it is not captured in the current wording of the legislation. While the failure to adhere to the property detention provisions can amount to a *Charter* breach, there is a legal conduit to allow for the revival of an order despite police neglect. Such would not preclude the lawfulness of the police conduct from being subsequently litigated at trial or have an exclusionary remedy

[114] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_10008_01#section7
[115] *Re: Further Detention of Things Seized*, 2018 BCSC 2107
[116] *R. v. Newport Financial Pacific Group S.A.*, 2003 ABPC 80 (CanLII), https://canlii.ca/t/5bml
[117] *Gauthier c. Lalancette,* 2016 QCCQ 1666 (CanLII), https://canlii.ca/t/gnzhk

granted[118]. However, if there is no ability seek an order in the first instance, it could preclude bringing seized things under the umbrella of judicial supervision at all.

[228] In addition, the failure to seek an order and the explanation for it can be weighed in the "interests of justice" in granting or refusing the order sought. So too could the value of the thing in question and whether it is critical evidence on a serious offence. Indeed, it may not be negligence that was the basis for the failure to report, but rather a judicial interpretation on whether such was required for the class of things in question. Copied data for example.

[229] A solution to inability to use s. 490(9.1) to generate an order for detention in the first instance has been for the police to re-seize the thing in question from themselves via search warrant. This is a somewhat irregular use of the prior judicial authorization provisions of search and seizure. The effect of what has been called "a remedial warrant" is to restart the detention extension timelines such that the renewal from the re-seizure would be brought under s. 490(2) with its lower burden notwithstanding that initial non-reported seizure may have occurred over a year prior.[119]

[230] A related issue arises when there is a failure to seek an application for an extension in circumstances before proceedings are instituted. Facially the section contains a limitation insofar as "proceedings have not been instituted". This would preclude the application of s. 490(9.1) in circumstance where a charge has been laid or other proceedings have commenced, after a detention order has lapsed.

Recommendation 9.7: The Working Group recommends that remedial provision under s. 490(9.1) be modified to permit the Court to make an order when there has been a failure to seek an order under s. 490(1) as well as after proceedings have been instituted.

(h) "order that the thing"

[231] Subsection 490(9.1) does not contain an explicit notice provision. The present notice provision may be derived from reference to section 490(5) - in turn referred to in section 490(6) - which refers to "affording" a class of people with "an opportunity". As mentioned above, that notice provision ought to be clarified. Mirroring the three clear days in subsections 2 and 3 is consistent and logical. So too should the court have an ability to dispense with notice altogether where justifiable.

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[118] *R. v Gill*, 2021 BCSC 152 (CanLII), https://canlii.ca/t/jfk28; *R. v Gill*, 2021 BCSC 377 (CanLII), https://canlii.ca/t/jfk29

[119] *RE: Further Detention of Things Seized* (unreported) 9 March 2023, Surrey Provincial Court file 251146

Recommendation 9.8: The Working Group recommends that remedial provision under s. 490(9.1) specify three clear days notice should be given to the person from whom the thing was seized with the same ability to proceed *ex parte* and *in camera* as outlined elsewhere in the report.

2.10 Subsection 10

[232] The subsection currently outlines a stand-alone application that can be brought by the lawful owner or lawfully entitled possessor.

> Application by lawful owner
>
> (10) 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.

[233] The twin issues with this subsection are:

> (a) The utility of a discrete section which is geared only towards lawful owners or those lawfully entitled to possession.
>
> (b) The requirement for the owner or lawful possessor to notify the person from whom the thing was seized.

(a) "Application by lawful owner"

[234] As outlined above, section 490 should permit the return of a seized thing without the need for a separate application for same. Nonetheless, it is unclear why there is a discrete provision dictating applications by "the lawful owner". Rather there should be one application for return covering all potential applicants who may have some lawful authority to possess the item in question.

(b) "notice to… the person from whom the thing was seized"

[235] The considerations of section 490(10) are identical to an application brought under s. 490(7) by the "person from whom anything was seized" except for the additional requirement to give notice to "the person from whom the thing was seized."

[236] This requirement for notice can work in a manifestly unfair way. For example, a seizure by police of stolen property from a burglar. Under the current provision, the plain language of the section alleged criminal is required to get notice of a return application.

Recommendation 10.1: The Working Group recommends that applications for return should be encapsulated under a single subsection whereby the moving party can be the owner or the person from whom the thing was seized. There should be discretion to dispense with requirement for notice to the "person from whom the thing was seized" in certain circumstances.

2.11 Subsection 11

[237] The subsection currently provides for the return order to owners or those entitled to possess a seized thing:

> Order
>
> (11) 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 or justice 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.

[238] The benefits of a more synthesized request for return order have been considered elsewhere in this report, but one aspect of this subsection meriting specific

consideration is the quite vaguely expressed compensatory scheme for frustrated owners.

> **(a) "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."**

[239] This compensatory procedure contains very little guidance on how a property owner is to be paid compensation for something that cannot be returned. Who is liable for disbursement of the "value"? How is that "value" determined? Is there any form of due diligence defence available?

[240] One solution would be referring such disputes to the civil courts. An alternative would be to provide more guidance as to how this compensatory system should operate.

Recommendation 11.1: The Working Group recommends further clarification to s. 490(11)(d) or referring such property disputes to the civil courts.

2.12 Subsection 12

[241] The subsection currently prescribes a mandatory wait period before return orders can be perfected:

> Detention pending appeal, etc.
>
> (12) 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.

[242] The central failing of this section is the delay required in every instance when a thing seized is returned. This is particularly problematic given that in each and every case of a thing being returned, the authorities must first obtain an order to do so.

> **(a) "Nothing shall be returned, forfeit or disposed of… within thirty days after an order in respect of the thing is made"**

[243] The intent of this provision was to permit an appeal or other action to be taken prior to the return or forfeiture order being perfected. The effect can be to delay the return of a person's property unnecessarily, for instance in case where there is no doubt who the owner is and that they should get their seized thing returned to them.

[244] Much of this unfairness will be remedied if the police could return a seized thing without the court's approval or an order for return is obtainable at the outset, in which case there need not be any delay. Regardless, it could be within the discretion of the court to modify the duration before which an order for return, forfeiture or disposal can be perfected.

[245] Caution should be exercised in the creation of such dispensation to avoid frustrating the right of appeal that does exist. A potential solution would be the jurisdiction to waive the 30-day period with the consent of all interested parties and if the court is reasonably satisfied that all potentially interested parties are before it at the time the waiver is made.

Recommendation 12.1: The Working Group recommends that the court making an order for forfeiture or return have the discretion to modify the 30-day period before it is perfected provided certain criteria are satisfied.

2.13 Subsection 13

[246] The management of things seized has a specific provision that deals with the copying of documents and is linked with the following subsection, 490(14), that addresses the evidentiary status of such copies.

> Copies of documents returned
>
> (13) 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.

[247] Two parts of this law ought to be considered for amendment:

(a) The scope of those things that can be copied which is presently limited to "documents";

(b) When the seized things can be copied.

(a) "documents"

[248] As a matter of first impression, the word document refers to a tangible physical thing in paper form. In 2024, "documents" frequently exist as an electronic item, often exclusively. Data more generally occupies the field once populated by paper. Consideration should be undertaken to decide whether the section should be updated

such that documents are defined as they are elsewhere in the *Criminal Code*[120]. A significant aspect of this consideration must focus on a potential stand-alone procedure for data seizure specifically the risk of inadvertently providing circumvention around a proposed data examination and retention regime. On this point, if the authority to copy is used to copy electronic data as a "document" in which any person has a reasonable expectation of privacy, the state must obtain judicial authorization before conducting any examination, and the copied data is subject to the data supervision scheme, as recommended in the Section 487 Working Group's Final Report.

[249] In many cases, what is of interest to investigators and has evidentiary value is not the data storage device (mobile phone, computer etc…) but rather the content of same. If the law makes it clear that the copy of data is captured by "documents" and therefore admissible as per subsection 14, the hardware and original copy of data could in some instances be returned to the owner. Although in some circumstances the original hardware may be required to fully capture the evidence as accurately and comprehensively as possible. Issues with respect to the search and seizure of data have been thoroughly considered by the ULCC Working Group tasked with examining section 487 of the *Code* and should be implemented as soon as possible.

Recommendation 13.1: The Working Group recommends clarifying the meaning of that the provision pertaining to "documents" and that any definition that includes data make clear that copying does not confer authority to examine, which must be the subject of prior judicial authorization if a reasonable expectation of privacy is engaged. The recommendations of the ULCC Working Group on Section 487 of the *Criminal Code* should be implemented as soon as possible.

(b) "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)"

[250] A seized thing that has been copied should be promptly returned to the owner if possible. The legislation should make that obligation clear absent certain exemptions; for example, if the seized thing is illegal (e.g. a mobile phone containing child pornography), the original is needed for some other reason relating to continuing or further investigative steps or its return would jeopardize the investigation in some articulable way.

[251] The language of the section should be clarified to indicate when copying under its umbrella may occur. One reading of the legislation may not include copying made when a detention order is in place but rather only when an order that will dispose the police of the thing has been made. There should be no such limit. Copying a thing while

[120] Section 487.011

it is detained would serve the dual purpose of facilitating its expeditious return while allowing investigators to rely upon the copy in the investigation. Although being "dealt with under subsection (1)" could include the item being detained under a s. 490(1) order, such ought to be made clearer. The intent of this suggestion is not to create an independent foundational power to search or seize, but rather to make comprehensible what can be copied and when it can be copied.

Recommendation 13.2: The Working Group recommends that the obligation to promptly return a thing that has been copied be clearly articulated subject to certain exceptions. The legislation should be clarified that copying may be done while the original is covered by a detention order and if all required judicial authorizations are in place.

2.14 Subsection 14

[252] The subsection currently provides an evidentiary guarantee of things copied during a detention:

> Probative force
>
> (14) 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.

[253] Two features of this evidentiary rule should be analyzed.

(a) How things copies need to be authenticated.

(b) What kinds of seized things can be copied and in what form.

(a) "certified as a true copy"

[254] This requirement should be clarified to outline exactly what is required of the person making the copy, especially if the exception is to be expanded to copies of vast amounts of digital data. Certification of documents as true copies typically requires a visual comparison to ensure that the reproduction is an accurate replication of the original. For copied data which can be incredibly large in volume, such an exercise may be a challenging or impossible one. Section 491.2(2) – (4) prescribe the formalities of certified photographs for certain offences. A parallel provision with respect to 490(14) may be of benefit, although such would need to take into account variations across investigative units, and technological developments.

Recommendation 14.1: The Working Group recommends examining the utility of codifying a method of certifying a "true copy" particularly in the case of data.

(b) "original document"

[255] Technology has vastly increased the quality and availability of copying. The same can be said of photography. A picture of a seized object is often as good, or even better than the real thing. Digital magnification can reveal details unavailable to the naked eye. Indeed, it is less common for a tangible physical object to be tendered at trial as an exhibit than was previously the case. Accordingly, there should be consideration of the question of whether the copy provisions should be expanded to include photographs or video of objects. The progression of 3-D printing may well allow for the replication of real objects in the foreseeable future, but that moment has not crystallized to the point of necessitating law reform.

[256] This would increase the ability of the rightful owners to get back their property, while at the same time protecting the public interest in investigation and prosecution of crime. On the other hand, a picture of an object is not a copy of it, and it may not be able to reveal certain things or show details in the same way as the original. Weight is an obvious example.

[257] The context or the purpose of the thing as evidence may be determinative of whether the original has any greater evidentiary reliability or utility than a picture or video. In the end, after internal discussions it was concluded that such expansion to photographic depiction of things seized is best left to be determined on an offence-by-offence basis, as is done for example with s. 491.2.

Recommendation 14.2: The Working Group makes no recommendation for section 490(14) other than underscoring its necessary interaction with section 490(13), especially if copies of document is to be expanded to include data in any way. Expanding the scope of section 490(14) to photographs or replication of tangible objects would pose challenges and is best be left to application to specific offences, or if technology evolves to permit such replications.

2.15 Subsection 15

[258] The ability for interested parties to access a seized thing is presently permitted:

> Access to anything seized
>
> (15) 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.

[259] Who can bring applications for access should be the focus of any reform of section 490.

(a) "… has an interest"

[260] The term is vague. Does it refer to a proprietary interest, a privacy interest or some other general interest? For example, does it permit access by the media? A person under investigation? The Canada Revenue Agency[121]? The term has been the subject of judicial consideration:

> I begin my analysis of the issue before me by saying that the "interest" that s. 490(15) refers to cannot be interpreted literally. It would cast the authority provided for in the section much too broadly if all that was required was for an applicant to show some "interest" in a particular item. Depending on the prevailing circumstances, a great many people could have an "interest" in items seized. In this case, for example, many members of the public would likely be able to establish that they have an "interest" in the video, as would most media organizations.
>
> It seems to me that to properly invoke the authority contained in s. 490(15), a person must establish two things: (i) that s/he has a "legal" interest (or legal concern as Dunnet J. put it) in the item and (ii) that being permitted to have access to the item is necessary in order to advance that legal interest or concern in some concrete and required fashion. The most common example is the one that is revealed by the cases I have referred to and that is the continued prosecution or defence of outstanding litigation. It would also include those instances to which Reilly J. referred in Haynes, namely, the need to carry on a business or prepare some government mandated document.[122]

[261] One investigative agency may wish to see or investigate the thing held by a different one. For example, a firearm used in a homicide in one jurisdiction may be of interest to police in a different location. Police forces have rules in place for when police can share with other police or enforcement agencies, but it is unclear whether these practices entirely conform with the intent of the section: to provide judicial supervision over things that are detained. The detention is supposed to be justified for a specific

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[121] *Canada Revenue Agency v. Canada Border Services Agency,* 2013 BCSC 594 (CanLII), https://canlii.ca/t/fwzh8; *QW v YC*, 2017 SKPC 85 (CanLII), https://canlii.ca/t/h6k0x

[122] *HMQ v. Mohammad Khattak,* 2013 ONSC 7098 (CanLII), https://canlii.ca/t/g1whj, paragraphs 15 - 16

reason. If a second investigative agency wishes to take temporary control of a seized thing, likely for another purpose than was used to justify detention previously, requiring court approval would be consistent with the purpose of the section.

[262] It may be prudent to restrict access to the person from whom the thing was seized or an accused person. However, attention must be paid to the open court principle. Also, while likely remote, there is the possibility that a person under investigation who is not charged may wish to access a thing seized from another person. This might be done to exonerate themselves or otherwise proactively prepare for a defence for a possibly forthcoming charge.

Recommendation 15.1: The Working Group recommends clarifying that to access a detained thing for examination a person must have a legal interest in the seized thing and access must be pursuant to advancing that legal interest.

2.16 Subsection 16

[263] The subsection currently provides some guidance as to how seized things are accessed:

> Conditions
>
> (16) 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.

[264] What are the parameters for any analysis that may be sought? For example, is any modification of the thing such as disassembly permitted? If so, under what conditions[123]? Can things seized be ordered copied under this section? Can costs be ordered as part of the conditions[124]? The authority of the court could be expanded beyond those necessary to "safeguard and preserve" the thing to include all conditions that may be necessary in the circumstances, or in the interests of justice.

[265] The extent of the permissible conditions could be clarified, though it would not likely be possible to create an exhaustive list. It would be important to ensure a degree of flexibility and discretion if answers are to be outlined for some of the several questions raised by the caselaw as to the scope of what the court may order.

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[123] *R. v. Barker*, 2021 NSPC 59 (CanLII), https://canlii.ca/t/jl2zv
[124] *R. v. Barsoum*, 1988 CanLII 8989 (NWT SC), https://canlii.ca/t/jfwmg

Recommendation 16.1: The Working Group recommends examining the authority of the Court to define the parameters of access to specify what may be done or not done by the person who gets access to a seized thing.

2.17 Subsection 17

[266] The subsection currently:

> Appeal
>
> (17) 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.

[267] There are three components of the appellate jurisdiction over property detention matters that should be reconsidered:

> (a) The definition of who can appeal.
>
> (b) The scope of section 490 orders that can be the subject of appellate review.
>
> (c) What court level such appeal should be heard.

(a) "A person who feels aggrieved"

[268] The description of those who can appeal an order under section 490 is phrased in odd language. The standing of those who can appeal an order should be articulated differently, likely to capture the Crown / police on the one hand and the person with an interest in the thing on the other. Any rearticulation of the class of appellant should consider the original intent of the provision and be mindful of non-legal interests in seized things. On the question of the original intent, the language of this subsection likely comes from Recommendation 4 of the Law Reform Commission of Canada's (LRCC) Report on Disposition of Seized Property[125]. The authors of the report explain their view that "a person who has an interest in what is detained"… "has been judicially interpreted

[125] Law Reform Commission of Canada, *Post-Seizure Procedures, Report 27* (1986), at pages 18-21.

to as to extend the notion of 'interest'… beyond strictly proprietary confines." A footnote refers to a person claiming privilege in seized documents as someone who has an interest and can apply to examine them or make copies. The report then recommends creation of an appeal route (which did not then exist) but did not elaborate on what was mean by "a person who feels aggrieved." However, in a working paper from the previous year the LRCC the phrase was considered not to capture a person who "does not have a legal or proprietary interest"[126].

Recommendation 17.1: The Working Group recommends that description of those who can appeal an order be considered for clarification.

(b) "an order made under subsection (8), (9), (9.1) or (11) may appeal"

[269] There should be recourse to those unsatisfied with the outcomes of applications under 490(2) and (3) to have the decision reviewed by an appellate Court. It should not be limited to orders made, but those that are not made as well so that both the applicant and the respondent can seek appellate review of property detention decision under section 490. Further, it may be prudent to articulate specific timelines for appeals of 490 orders given the potential ramifications for both the interested party and the investigation. The possibility of permitting a stay of a section 490 order pending appeal was added as a further possibility for reform of this part.

Recommendation 17.2: The Working Group recommends that scope of rulings that can be appealed under s. 490 be expanded and timelines for such appeals be articulated as well as the possibility of adding discretionary applications to stay orders pending appeal.

(c) "to the court of appeal"

[270] The recommendation outlined above is to place most property detention matters in the first instance within the jurisdiction of the Provincial Court. If this recommendation finds favour, the jurisdiction to appeal those matters can be conferred principally with the Superior court.

Recommendation 17.3: The Working Group recommends that appeals in the first instance for most matters under s. 490 be heard in Superior court.

[126] Law Reform Commission of Canada, *Working Paper 39 (Post-Seizure Procedures)* (1985), page 71

2.18 Subsection 18

[271] The subsection currently provides for dispensation from the amount of notice required for certain applications that can only be given by the would-be respondent:

> Waiver of notice
>
> (18) 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.

(a) "three days notice"

[272] As mentioned above, it is recommended that a court has the authority, in the interests of justice, to dispense with notice, or to permit notice be done substitutionally, or electronically. Section 18 would be an appropriate place to provide for these exceptions.

Recommendation 18.1: The Working Group recommends that subsection 490(18) be amended to allow for the dispensation of notice as well as for notice to be perfected in ways other than personal notification.

2.19 Section 490.01

[273] The section currently provides some guidance for how certain unique things are managed during a detention order:

> Perishable things
>
> 490.01 Where any thing seized pursuant to this Act is perishable or likely to depreciate rapidly, the person who seized the thing or any other person having custody of the thing
>
> (a) may return it to its lawful owner or the person who is lawfully entitled to possession of it; or
>
> (b) where, on ex parte application to a justice, the justice so authorizes, may
>
> (i) dispose of it and give the proceeds of disposition to the lawful owner of the thing seized, if the lawful owner was not a party to an offence in relation to the thing or, if the identity of that lawful owner cannot be reasonably ascertained, the proceeds of disposition are forfeited to Her Majesty, or
>
> (ii) destroy it.

(a) "dispose of it and give the proceeds of disposition to the lawful owner"

[274] The provision above appears to contemplate the sale of perishable things or their return but does not provide for a mechanism for care while in detention. There would be circumstances where such would be appropriate, especially for animals which caselaw has found to be subject to section 490[127]. The seizure of living creatures presents particularly unique issues in terms of protection, care, well-being and the associated costs after they are seized. Specific articulation of how the post-seizure management of animals is done should be considered.

Recommendation 18.1: The Working Group recommends that subsection 490.01 be amended to allow for the singular circumstances of the seizure of animals to be addressed.

3. General

[275] Section 490 does not contain a provision allowing for materials filed in support of and / or resulting from the application to be sealed. The caselaw has determined that the authority relating to search warrants can be expanded to cover section 490 applications if the material in question was obtained via prior judicial authorization. If not, the Court may use its inherent jurisdiction to do so[128]. A codification of this authority would be practical given that the common law on this point may not be evident across all Canadian jurisdictions. Further, the section 487 Working Group recommended in its report: "The scope of section 487.3 of the Criminal Code should be adjusted so that it clearly is capable of being applied in the context of materials filed in all proceedings under section 490, whether relating to a warranted or warrantless seizure."[129].

[276] The automatic application of a s. 487.3 sealing order on an application for a search warrant could be practical, but this would have to be weighed against the strong interests in the open court principle. At present, such orders do not extend to applications under s. 490 as a matter of course[130] .

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[127] *SPCA Montérégie v. Langelier*, 2017 QCCA 606; *R. v. Monster*, 2000 CarswellOnt 972, 45 W.C.B. (2d) 549 (Ont. S.C.J.), paragraph 13

[128] *Application to extend seizure of exhibits and to seal affidavits,* 2007 BCPC 281 (CanLII), https://canlii.ca/t/1sv9f

[129] https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2023/Section-487-Report-Search-Warrants.pdf,, p. 55

[130] *Further Detention of Things Seized (Re)*, 2020 BCSC 1100 (CanLII), https://canlii.ca/t/j980f,

Recommendation 19: The Working Group recommends the creation of a provision permitting the sealing of materials generated in relation to subsection 490 applications when such is justifiable and mindful of related recommendation 9.2 in the report of the section 487 Working Group submitted in 2023.

4. Conclusion

[277] The property framework for the detention of things seized outlined in the *Criminal Code* is very important. The invasion of a person's privacy by the state, and the dispossession of a person's property are among the most intrusive acts a government agency can do:

> The obligations imposed by ss. 489.1 and 490 of the Criminal Code are mandatory and, in my view, they are significant. They constitute an important safeguard in the balance between the state's jurisdiction to invade the privacy rights of citizens and the high value that Parliament and the courts have seen fit to ascribe to those rights.[131]

[278] The concurrent obligation on the police to investigate crime is obvious, as is the tension that opposing interests of the individual and the state will manifest in this area of law. The law in this respect should be clear and function efficiently, but at present it is neither. The has been a vast expansion in the number of property detention applications taking place, which require the allotment of judicial, legal and police resources to an increasing complicated process:

> And a third was a general lack of experience or facility with the handling of applications of this nature, which resulted in several steps taking much longer than they should have. As the jurisprudence finds increasing Charter and other significance in s. 490, which may have begun its life with much more modest, administrative intentions, s. 490 applications have greatly increased in their length and complexity. Not only is it unsuitable for an applicant to appear without counsel – which, I recognize, Cst. To did not – but also, counsel require substantial experience with the particular regime and process in order to pursue these applications effectively.
>
> However, as I said earlier, there is no evidence of any deliberate or concerted intention to disregard the requirements of the regime. Rather, the intention, guided as it evidently was by Crown counsel and then by Mr. Song, was to respect the regime's requirements, though the execution of that intention was less than effectual.[132]

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[131] *R. v. Pickton*, 2006 BCSC 1098 (CanLII), https://canlii.ca/t/2c72m, paragraph 60
[132] *Further Detention of Things Seized (Re)*, 2023 BCSC 1553 (CanLII), https://canlii.ca/t/jzzlr, paragraphs 44 - 45

[279] The breadth of the exercise reviewing the post-seizure powers of property detention and return is vast. Review and reform is sorely needed, yet reaching total consensus amongst the numerous stakeholders of the numerous necessary remedies is a taxing exercise. The foregoing report has attempted to identify the multiple critical deficiencies of the current regime and theorized possible solutions that may be appropriate. Rather than a providing definite solution, this report provides insight into the various problems with the current law and unpacks those issues with suggestions, not all of which carry the unanimous support of every one of the members of the group.

[280] The central aspects of the report were authored as a synthesis from the commentary of the various members of this group in various ways as well as some of the product from its previous iterations.

5. APPENDIX "A"

The following appendix, "Comments from the civil forfeiture perspective on the Report of the Uniform Law Conference of Canada – Section 490 Working Group" represents a submission from the National Civil Forfeiture Committee. It does not represent an output of the Working Group. The Working Group did not examine the issues raised by civil forfeiture when making recommendations to amend section 490 and the Working Group has not discussed or commented on the below submission. Further, the Working Group notes that some courts in Canada disagree about the validity of using detention under s.490 as a "waiting room" for civil forfeiture. In addition, and as the submission rightly observes, there may be division of powers implications for some of the positions advocated. There are also criminal law policy considerations that would need to be taken into account. Finally, the Working Group notes that some of the views in the submission do not necessarily align with positions put forward by the Working Group.

The Working Group appreciates the participation of James Mallet, Director Civil Forfeiture, Alberta, and representative for the National Civil Forfeiture Committee in the Working Group's discussions and welcomes the insights provided by the Submission as to the impacts of possible reforms to section 490 for civil forfeiture mechanisms.

Comments from the civil forfeiture perspective on the Report of the Uniform Law Conference of Canada – Section 490 Working Group

Thank you for the opportunity to provide comments on the draft report of the ULCC Working Group on Section 490 of the Criminal Code.

All provinces and territories except Newfoundland & Labrador, Prince Edward Island, and the Yukon and Northwest Territories have civil forfeiture legislation and a civil forfeiture program (Civil Forfeiture Authority, or CFA). The programs are represented on the National Civil Forfeiture Committee (NCFC), an informal working group focussed on developing best practices, networking, and engagement with federal and other stakeholders.

The comments below are from the civil forfeiture perspective and reflect the general consensus of the NCFC, but not necessarily the views of any individual CFA.

It is acknowledged that s.490 is fundamentally legislation relating to criminal law and procedure, and that the needs of the criminal justice system and its participants will be of primary concern in any effort to reform the section. However, s.490 has a significant impact on the operations of CFAs across Canada, and it is important that decision makers are aware of the civil forfeiture perspective in assessing possible changes.

Civil forfeiture and criminal forfeiture both have an important role in disrupting crime through confiscation of criminal proceeds and other crime-tainted property. Civil forfeiture (also called "non-conviction-based forfeiture") has historically focussed on property associated with organized crime, especially drug trafficking, but is increasingly recognized as a critical tool in the fight against money laundering and other financial crimes. The Financial Action Task Force has formally recommended, and requires as a best practice, that member states (including Canada) have in place legislation and other measures necessary to enable their competent authorities (provincial and territorial CFAs) to confiscate criminal property through civil forfeiture.[133] It is important that any proposed reforms to s.490 are examined to ensure they do not hinder, but instead support, civil forfeiture in Canada.

In general, the aim of my comments is to

- describe civil forfeiture at a high level;

[133] The Financial Action Task Force is an inter-governmental body that develops global standards and recommendations to protect the global financial system against money laundering and other crimes. See ***The FATF Recommendations*** and ***Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery*** at <https://www.fatf-gafi.org/en/home.html>.

- point out areas of difficulty between s.490 and the provincial and territorial civil forfeiture regimes; and

- suggest solutions to address potential conflicts and clarify grey areas with a view to dovetailing the regimes and reducing unnecessary litigation.

Civil forfeiture in brief

Civil forfeiture is a statutory remedy by which the state takes ownership of property derived from or used to carry out unlawful activity through a civil court process. Although the facts supporting civil forfeiture proceedings almost always arise from a law enforcement investigation, the focus of the proceedings is not criminal liability or sanction, but the property itself. The constitutional authority for the provinces to enact civil forfeiture legislation has been recognized by the Supreme Court of Canada.[134] The purposes of civil forfeiture legislation include:

a) Taking the profit out of unlawful activity;

b) Preventing the use of property to unlawfully acquire wealth or cause bodily injury; and

c) Compensating victims of crime and funding crime prevention and remediation activities.

Civil forfeiture does not require a criminal prosecution or conviction, and the standard of proof is the standard applicable in all civil proceedings: a balance of probabilities.

Civil forfeiture may be pursued through a civil court action or alternatively (in some provinces) through an administrative process:

- The nature of the court action varies across Canada, but generally involves an initial without-notice application in Superior Court for a civil restraint (or preservation) order, which the court can grant if satisfied there is a serious question to be tried as to whether the property is a proceed or instrument of unlawful activity. The CFA then serves its filed court materials on those with a potential interest in the property. To oppose forfeiture and make a claim, a person is required to participate in the action and present evidence setting out the origin and extent of the person's interest in the property. Once any document discovery and pre-trial questioning is completed, a forfeiture hearing or trial is scheduled at which the court decides on a balance of probabilities whether the property is a proceed or an instrument of unlawful activity and whether the property should

[134] *Ontario (A.G.) v. Chatterjee,* 2009 SCC 19; *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.,* 2023 BCCA 70, application for leave dismissed, 2023 CanLII 92310 (SCC).

be forfeited to the provincial/territorial Crown or returned to one or more of the persons claiming the property. In general, the civil rules of court apply.

- In certain cases, an administrative forfeiture process (available in B.C., Alberta, Saskatchewan, Manitoba, Ontario, and Quebec) allows the CFA to provide statutory notice to persons with a potential interest in personal property where there is reason to believe the property is a proceed or an instrument of unlawful activity. If a notice of objection to forfeiture is not received by the CFA within the statutory dispute period (generally 30-90 days), the property is forfeited by force of statute without the need for a court action. If a valid notice of objection is received within the dispute period, the CFA must either withdraw (resulting in no forfeiture) or commence a court action for forfeiture, where interested parties can make their claims. The administrative process is generally not available where there is a prior court order giving anyone other than a public body a right to possess the property (such as a s.490 return order).

Intersection of criminal proceedings civil forfeiture

Most of the elements of s.490 were adopted by Parliament before the advent of civil forfeiture in Canada (2001). Section 490 and civil forfeiture regimes operate independently, but with significant overlap in operation. There are many gaps and uncertainties in how the two regimes relate. From the CFA perspective, any reforms to s.490 should facilitate and clarify rather than complicate the interplay between s.490 and provincial and territorial civil forfeiture regimes.

Police normally refer cases to a CFA when property seized during a criminal investigation is believed to be proceeds of crime or offence related property and is no longer required for the investigation or criminal proceedings. The most common property referred is cash, vehicles, jewelry, and other valuables.[135]

The CFAs liaise closely with the federal and provincial crown prosecution services and have developed procedures to ensure civil forfeiture proceedings do not impact criminal proceedings. Upon receiving a police referral, where charges are laid or the CFA is aware the Crown has been engaged by police in relation to the investigation, the CFA contacts the relevant prosecution service to determine whether the Crown has any concerns with civil forfeiture. A request for the CFA to stand down may lead to further discussion but will be accommodated. CFAs do not proceed over the objections of the police or the prosecution services. Requests to stand down are rare but typically involve cases where the Crown is pursuing a proceeds of crime charge or the property is required for further investigation or as an exhibit at trial.

[135] Police can also refer property that is not physically seized, including bank accounts and real estate.

If the case meets the CFA's criteria and the Crown doesn't raise any concerns, the CFA will either

a) commence administrative forfeiture proceedings, which provides police with statutory authority - or in some jurisdictions a legal obligation - to continue to hold the property pending the outcome of the administrative proceedings; or

b) obtain a civil restraint order requiring the police to 1) maintain custody of the property, 2) pay the cash into court in the civil action, or 3) turn the property over to the CFA, pending the outcome of the forfeiture action.

In many cases, at the time civil court or administrative proceedings are commenced, a report to justice has been filed and the property is still formally under the purview of s.490.[136] However, in practice, once police have authority to hold the property for the purpose of civil or administrative forfeiture proceedings, there is generally no application made under s.490(5) or (6). Disposition of the property occurs pursuant to the civil forfeiture process.

In cases where police or the prosecutor have not initiated charges and the detention period will not be extended, a police referral to the CFA must normally be made in time for the CFA to commence proceedings within the initial three-month detention provided for in s.490(1). This timeline presents an increasing challenge to the CFAs. Usually, the police investigation will need to conclude before the CFA is in a position to initiate civil proceedings. As a result of pre-charge Crown review and Jordan deadlines, more investigations involving seizures are now resulting in either no charges laid or in delayed charges. Clarity and consistency in the length of the initial detention period greatly assists the CFAs in determining whether a police referral is viable.

In cases where police or the prosecutor have not initiated charges and the initial s.490 three-month detention period (or any subsequent extension) has expired without being extended, depending on the length of and reason for the lapse, the loss of authority to hold can in some jurisdictions render a referral to the CFA unviable.

In cases where police reasonably believe property to be proceeds or an instrument of unlawful activity[137] but the property is no longer required for the criminal investigation or proceedings, imposing a pro-active duty on police to immediately return the property without a s.490(9) order is likely to create a significant practical obstacle to civil forfeiture. Specifically, it will accelerate the timeline for return of property, reducing the time available for police to make a referral and for the CFA to initiate civil proceedings and tie up the property. This could be partly addressed through improved coordination between police and the CFAs (earlier referrals), but there is a limit to how quickly police

[136] In other cases, a s.490(9) return order has already been granted and the property is being held by police for 30 days pursuant to s.490(12) – discussed below.

[137] Generally, under civil forfeiture legislation, property derived directly or indirectly from unlawful activity (proceeds), or property used to engage in or carry out unlawful activity (instruments).

and CFAs can make and process a referral, and this change is likely to lead to a significant increase in the return of crime-tainted property to criminally affiliated persons. To mitigate this concern, the engagement of any pro-active duty to return property without a return order when no longer required for the criminal proceedings could be postponed for (e.g.) 30 days from the date police determine the property is no longer required, to allow time for police to make a referral to the CFA and for the CFA to commence proceedings and restrain the property.

It is also important to recognize that a police agency holding property pursuant to s.490 may have parallel, ongoing authority (or a legal obligation) to continue to hold the property in existing administrative or civil court proceedings. Any pro-active duty on police to return property to the owner without a court order once the property is no longer required or detention has lapsed should be subject to any ongoing police authority (or legal obligation) to continue to hold the property for the purposes of a civil or administrative forfeiture proceeding.

Likewise, from the CFA perspective, it would be preferable to clarify that, once police have authority or a legal obligation to continue to hold property for the purposes of a civil or administrative forfeiture proceeding, there is no requirement for police to apply for an order under s.490(9) to dispose of the property (see s.490(5) and (6)). This would reflect the current reality. If necessary, s.490 could require police to file a report with the criminal court in order to "close off" the s.490 process for such property.

Clarifying that "other proceeding" in s.490 includes civil forfeiture proceedings would resolve much of the uncertainty surrounding the interplay between s.490 and civil forfeiture regimes. Implications for the operation of s.490 as a whole would need to be considered. Questions have also been raised regarding the potential of this change to take the section outside the scope of federal legislative authority over criminal law and procedure, to the extent it would provide for continued detention under s.490 for the purposes of a civil proceeding.

A related issue is CFA standing at s.490 hearings to extend detention or return property. Under s.490, a return order shall not be made where "proceedings" have been instituted where the item may be required. However, the consensus of the CFAs is that standing is not desirable as it would routinely involve the CFAs in criminal court proceedings and complicate s.490 hearings.

The law is fairly settled that a return order cannot prevent civil attachment, and a civil restraint order obtained within the 30 days specified in s.490(12) will prevent property from being returned.[138] However, in complex cases, receiving the referral from police and commencing court proceedings within the 30 days can present a significant

[138] *British Columbia (Director of Civil Forfeiture) v. Qin,* 2020 BCCA 244; *British Columbia (Director of Civil Forfeiture) v. Hyland,* 2010 BCCA 148; *New Brunswick (A.G.) v. Gorman*, 2017 NBQB 18; but cf. *Ontario (A.G.) v. $787,940,* 2014 ONSC 3069.

challenge for CFAs, and s.490 return orders can and do result in crime-tainted property being returned before it can be restrained in civil forfeiture proceedings. Consistency and clarity in the holding period following a s.490 return order (490(12)) helps the CFAs determine the deadline for obtaining civil restraint and allows an important opportunity to restrain property before it is returned. It also provides certainty to other persons with an interest in the property who may be considering an appeal.

The cases indicate that the focus of s.490 is entitlement to possession, while determination of ownership is the focus of civil forfeiture proceedings.[139] From the CFA perspective, it would be appropriate for the language of s.490 to focus on lawful possession rather than ownership.

Harmonization of the s.490 and provincial civil forfeiture regimes in a way that respects federal and provincial/territorial spheres of authority and clarifies outcomes where property is subject to both processes would assist criminal defendants, defence counsel, property interest holders, Crown prosecutors, and CFAs to navigate this complex area. It would reduce unnecessary litigation and help ensure any operational conflicts can be resolved efficiently. Finally, it would help ensure the public interest in the appropriate forfeiture of crime-tainted property is not frustrated by gaps and operational tensions between s.490 and the civil forfeiture process.

Sincerely,

James Mallet

Director, Civil Forfeiture Office (Alberta)

June 11, 2024

[139] *British Columbia (Director of Civil Forfeiture) v. Hyland,* 2010 BCCA 148; *Lin v. Ontario (A.G.),* [2008] 240 C.C.C (3d) 541 (Ont. S.C.J.), 2008 CarswellOnt 8024.