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UNIFORM LAW CONFERENCE OF CANADA

**WORKING GROUP ON
S. 490 OF THE *CRIMINAL CODE***

STATUS REPORT

**Presented by
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**Via videoconference
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Presented to the Criminal Section

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[1] At the 2017 ULCC meeting in Regina, Saskatchewan, the Criminal Section adopted a resolution from British Columbia to examine s. 490 of the *Criminal Code*. The Resolution is as follows:

That the Criminal Section of the Uniform Law Conference of Canada establish a working group to undertake an examination of section 490 (Detention of things seized) of the *Criminal Code* with a view to reform the detention of seized property regime.

(Carried as amended 26-0-1)

[2] The work of the s. 490 working group continues to be relevant in the current context. It appears that the issues in relation to s. 490 of the *Cr. C.* have multiplied since the beginning of the pandemic.

[3] One recurring issue pertains to the retention period currently provided for by the s. 490 of the *Cr. C.* The vast majority of investigations, even minor ones, involve the seizure of electronic devices and the analysis of extracted data. Following the *Jordan* decision, charges are now typically laid only once the analysis of the data seized has been completed. The initial retention period is often not sufficient to allow the investigators to complete their investigation. This leads the investigators to seek extension orders which require investigative and prosecutorial resources, not to mention court time. The continued detention orders and the challenges created by the obligation to return to a Superior Court is especially onerous for very lengthy investigations or cold cases. There is a risk that the current continued detention regime will negatively impact on the trial, if the investigation does lead to charges. More generally, the issues pertaining to s. 490 raises questions about the efficiency of the procedure.

[4] Questions and concerns about the s. 490 regime have been raised and discussed in other working groups. The Federal-Provincial-Territorial Cybercrime Working Group, under the auspices of the Coordinating Committee of Senior Officials Criminal Justice (CCSO), held a meeting where members discussed challenges arising from timeframes under subs. 490(2) of the *Cr. C.* The questions and materials in support of the discussions were forwarded to the chair of this working group.

[5] The CCSO Civil Forfeiture report recommended that DMs responsible for Justice and Public Safety refer the s. 490 issues to this working group. The questions and materials in support of the discussions were forwarded to the chair of this working group.

[6] Given the complexity and breath of the s. 490 regime, additional time is required to study the issues and make recommendations. In addition, the formulation of recommendations pertaining to the three periods covered by s. 490 (from the investigation to the laying of charges, from the laying of charges to the trial and, after the trial), it is proposed that the working group focus on the following questions during the next year:

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- 1) Whether s. 490 should apply to extracted data from seized devices;
- 2) The inadequacy of s. 490's timelines, particularly in light of the time required for forensic analysis in many cases?
- 3) The question of the propriety of ex parte applications;
- 4) The nature of the evidence in support of these applications;
- 5) What is required to perfect "notice";
- 6) Who should represent the applicant on the contested application;
- 7) Are civil forfeiture actions considered "other proceedings" for the purposes of s. 490; and,
- 8) Do Civil Forfeiture Authority have standing to advise the court on a s. 490 return application that a seized item is required for civil forfeiture purposes?

[7] It is recommended that the working group continue its work, in consultation with other committees which are working on issues related to search warrants, and report back to the Criminal Section at the annual meeting in 2022.