Citation: Winnipeg (City) v Caspian Projects Inc et al, 2021 MBCA 33

Date: 20210407
Docket: AI20-30-09509

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron

BETWEEN:

THE CITY OF WINNIPEG	)	
	)	
(Plaintiff) Respondent	)	
	)	
- and -	)	***R. S. Literovich***,
	)	***M. T. Duffy*** *and*
CASPIAN PROJECTS INC., CASPIAN CONSTRUCTION INC., ARMIK BABAKHANIANS, SHAUN ANDRE BABAKHANIANS, JENIK BABAKHANIANS, TRIPLE D CONSULTING SERVICES INC., PAMELA ANDERSON, 4816774 MANITOBA LTD. operating as MOUNTAIN CONSTRUCTION, JAGS DEVELOPMENT LTD., BROOKE HOLDINGS LTD., LOGISTIC HOLDINGS INC., JAW ENTERPRISES INC.	)	***K. R. Poetker*** *for the Appellants (via videoconference)*
	)	
	)	***M. G. Finlayson*** *and* ***G. C. Lisi*** *for the Respondent (via videoconference)*
	)	
(Defendants) Appellants	)	
	)	
- and -	)	*Appeal heard and Decision pronounced:* ***February 10, 2021***
	)	
PETER GIANNUZZI, DUNMORE CORPORATION, OSSAMA ABOUZEID, ADJELEIAN ALLEN RUBELI LIMITED (also known as A.A.R.), PETER CHANG, GRC ARCHITECTS INC., PATRICK DUBUC, 8165521 CANADA LTD. operating as PHGD CONSULTING, 2316287 ONTARIO LTD. operating as PJC CONSULTING, FSS FINANCIAL SUPPORT SERVICES INC., PHIL SHEEGL, 2686814 MANITOBA LTD., ABC LTD., DEF LTD., GHI LTD., JKL LTD.,	)	*Written reasons:* ***April 7, 2021***

JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, and JOHN DOE VIII

(Defendants)

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2020 MBQB 120

CAMERON JA (for the Court):

The Issues

[1] This appeal involves the defendants Caspian Projects Inc., Caspian Construction Inc., Triple D Consulting Services Inc., 4816774 Manitoba Ltd. operating as Mountain Construction, JAGS Development Ltd., Brooke Holdings Ltd., Logistic Holdings Inc., JAW Enterprises Inc., Armik Babakhanians, Shaun Andre Babakhanians, Jenik Babakhanians and Pamela Anderson (the defendants).

[2] The defendants appeal an order made pursuant to r 30.10(1) of the MB, *Court of Queen's Bench Rules*, MR 553/88 (the *QB Rules*), by Joyal CJQB in his capacity as case management judge (the case management judge). Rule 30.10 deals with the production of documents in the possession of a non-party. That order granted the plaintiff production of documents and data seized by the RCMP in the course of a criminal investigation into the defendants Caspian Projects Inc. and Caspian Construction Inc. (collectively, Caspian) regarding their involvement in the construction of the Winnipeg Police Service Headquarters Construction Project (the WPSHCP) (the investigation).

[3] At the hearing of the appeal, the defendants clarified that they were appealing the order that the RCMP produce 46 boxes of documents, as well as the data the RCMP obtained when they mirrored Caspian's hard drives and servers (collectively, the documents), all of which were seized pursuant to a search warrant. The defendants also sought the return of the documents.

[4] In addition, the defendants sought the return of information seized pursuant to a production order served on the company that maintained their backup servers. That information was not significantly different from the information that was seized from Caspian's hard drives and servers.

[5] Finally, we were advised that the case management judge dismissed a motion by the defendants to stay his order pending this appeal. By the time of the appeal hearing, the documents contained in the 46 boxes, save for those that were subject to claims of privilege, had been produced to the plaintiff. The information on the hard drives and servers had not been produced. Counsel for the plaintiff stated that, had it not been for this appeal, it would have placed the issues underlying the non-production of that information before the case management judge.

[6] At the conclusion of the hearing, we indicated that we recognised the complexity of the litigation and the fact that it had been ongoing for a significant period of time. In order to facilitate its continuation, we gave a brief oral decision dismissing the appeal and reserved our decision regarding costs. We indicated that written reasons would follow. These are those reasons.

Background

[7] The documents were seized pursuant to a search warrant, which was executed over the course of three days, commencing on December 17, 2014. After the seizure, the appropriate report to a justice was made pursuant to section 489.1 of the *Criminal Code* (the *Code*) and orders extending the time for the detention of the seized documents were sought and obtained pursuant to section 490(2)(a) of the *Code*. The expiry date of the final detention order was December 17, 2019.

[8] On December 13, 2019, the Manitoba government released a media bulletin advising of the decision of the Manitoba Prosecution Service that, after considering the results of the RCMP investigation, it would not authorise any criminal charges (see Manitoba, News Release, "Manitoba Provides Update on Investigation into Construction of Police Headquarters" (13 December 2019), online: *Province of Manitoba* <news.gov.mb.ca/news/index.html?item=46541&posted=2019-12-13> (date accessed 22 March 2021)).

[9] On January 6, 2020, the plaintiff filed a civil lawsuit against the defendants and others, alleging a large-scale fraud in the area of at least $24 million related to the construction of the WPSHCP. At the same time, it filed a notice of motion pursuant to r 30.10(1) of the *QB Rules*, requesting production by a non-party of, among other things, the documents.

Applicable Statutory Provisions

[10] Rule 30.10(1) of the *QB Rules* states:

> **Order for inspection**
> **30.10(1)** The court may, on motion by a party, order production for inspection of a relevant document that is in the possession, control or power of a person not a party and that is not privileged where it would be unfair to require the moving party to proceed to trial without having discovery of the document.

[11] Also relevant are sections 489.1 and 490 of the *Code,* which are attached as appendix A to these reasons.

The Case Management Judge's Decision

[12] In his reasons ordering production to the plaintiff, the case management judge considered and applied what he found to be the relevant factors regarding production under r 30.10(1), including: 1) the relevance of the documents; 2) whether a privilege attached to the documents; 3) the importance of the documents in the litigation; 4) whether the discovery of the defendants was adequate and, if not, whether the responsibility for that inadequacy rested with the defendants; 5) the positions of the non-parties regarding production; and 6) the availability of the documents or equivalent information from some other source which was accessible to the moving parties (see para 152; see also *Ontario (Attorney General) v Ballard Estate* (1995), 129 DLR (4th) 52 at 56-57 (Ont CA); and *Callinan Mines Limited v Hudson Bay Mining and Smelting Co, Limited*, 2011 MBQB 159 at para 142).

[13] The case management judge stated that his analysis pursuant to r 30.10(1) was also informed by section 490(15) of the *Code*. Briefly, that section provides that persons who have an interest in anything ordered to be detained pursuant to sections 490(1) to 490(3.1) may apply for permission to examine it. Sections 490(1) to 490(3) allow for the detention of anything seized for the purposes of an investigation or a preliminary inquiry, trial or

other proceeding absent the consent of the lawful owner or person who is lawfully in possession of the thing seized pursuant to section 490(3.1).

[14] He considered the test applicable to a section 490(15) application as set out by Bond J in *Canada Post Corporation v Canada (AG)*, 2018 MBQB 87. In that case, she stated (at para 17):

> . . . The court must apply a two-step test. First, the court must consider whether the applicant has a legal interest in the item seized. In my view, as illustrated by the cases referred to, the interest must be not only legal but also actual rather than potential, and it must be concrete, defined and identified. Second, if such a legal interest is established, then the court must engage in a balancing of interests. In my view, this balancing must consider, at a minimum, the nature of the applicant's legal interest, whether access to the item is necessary for the purposes of advancing that legal interest in some concrete fashion, the law enforcement related interests of the police agency that is in possession of the item, the privacy interests of third parties, the interests of any suspect or accused person in a fair trial, and interests related to the proper administration of justice.
>
> [emphasis added]

[15] The case management judge analysed the application of section 490(15) of the *Code* in great detail. Although the plaintiff relied on it only as a tool to inform the Court's analysis of r 30.10, the defendants argued that section 490(15) was fundamental to the analysis since it pre-empted the production of the documents in question. The defendants maintained that the RCMP were no longer lawfully in possession of the documents because they were no longer required pursuant to sections 490(1) to 490(3). They maintained that the plaintiff could not have a legal interest in a document that was not lawfully detained.

[16] The case management judge rejected the defendants' argument. He was of the view that section 490 of the *Code* allowed for continued possession of the documents by the RCMP even after the expiration of the detention periods under sections 490(1) to 490(3). His analysis, in part, relied on his reasoning that section 490(12) (which allows for seized documents to be held pending a dispute over their seizure or an appeal of an order under section 490) contemplated "that a party like the [plaintiff] could assert its legal interest by way of s. 490(15)" (at para 129).

The Parties' Positions

[17] On appeal, the defendants argue that the case management judge erred in making an order pursuant to r 30.10 of the *QB Rules*. They assert that implied in that rule is the requirement that the documents subject to such an order be in the lawful possession of the non-party. They maintain that the documents were not being lawfully detained pursuant to section 490 of the *Code* when the plaintiff made its application for production as none of the conditions in sections 490(1) to 490(3) existed at that time. Therefore, they assert that they were and are entitled to an order for the return of the documents pursuant to section 490(9). Section 490(7) provides that, subject to some exceptions, a person from whom anything is seized may apply for its return after the period of detention provided or ordered pursuant to sections 490(1) to 490(3) has expired. Section 490(1) provides that, save for some exceptions not applicable here, the judge shall order its return.

[18] The defendants also argue that the case management judge erred by ordering the disclosure of many documents that were irrelevant.

[19] Relying on rules of statutory interpretation, the plaintiff argues that there is no requirement in r 30.10(1) that the documents be lawfully possessed. In any event, it argues that the possession of the documents beyond the detention periods provided for in section 490 of the *Code* is not necessarily unlawful. In its view, where no order of return has been made by a judge pursuant to section 490, the documents continue to be lawfully possessed.

Standard of Review

[20] The decision by the case management judge to order production of the documents constituted a discretionary decision. Absent misdirection or a result that is so clearly wrong that it amounts to an injustice, that decision is subject to review on the standard of deference (see *Altemeyer v Winnipeg (City) et al*, 2018 MBCA 47 at para 5).

[21] Furthermore, Joyal CJQB was acting in his capacity as the case management judge. The Alberta Court of Appeal has recognised that courts must give some "elbow room" to case management judges to "resolve endless interlocutory matters and move these cases on to trial" (*Korte v Deloitte, Haskins & Sells*, 1995 ABCA 469 at para 3). Similarly, the Ontario Court of Appeal has held that it is only in "rare situations that an appellate court should overrule discretionary case management decisions" (*Louis v Poitras*, 2021 ONCA 49 at para 4).

[22] Of course, questions of law are reviewed on the standard of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

Analysis

[23] In our brief oral reasons, we recognised that this appeal might be moot in relation to those documents already produced. Nonetheless, we stated that we would exercise our discretion and determine the appeal. While some of the documents may have been produced, others have not. There is still a live issue regarding those undisclosed documents that were seized under the same warrant and subject to the same detention orders as those already produced. Determination of the appeal regarding all of the documents will produce a consistent result (see *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353-54).

Lawful Possession and Rule 30.10 of the QB Rules

[24] We would start our analysis by observing that the defendants have cited no authority for their argument that r 30.10 imports a requirement that the documents be lawfully possessed by the non-party. To the contrary, there exists case law authorising production in a civil proceeding of evidence found to have been illegally obtained by police in a criminal investigation.

[25] In *P (D) v Wagg*, 2001 CarswellOnt 546 (Sup Ct J), the defendant (the accused in the earlier criminal proceeding) was previously charged with sexual assault. During the course of the police investigation into those charges, the defendant provided statements to the police. The trial judge in the criminal trial held that the statements had been taken in violation of the defendant's right to counsel under section 10(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), and he excluded them from evidence pursuant to section 24(2). The plaintiff (the complainant in the criminal proceeding) successfully brought a motion for the defendant to produce the

statements which he had provided as part of the disclosure in the criminal proceedings. The defendant appealed and was partially successful in that, while he was ordered to disclose the existence of the statements, he did not have to produce them (see *Wagg* (2002), 222 DLR (4th) 97 (Ont Sup Ct J (Div Ct))). The plaintiff then successfully appealed that decision (see *Wagg* (2004), 184 CCC (3d) 321 (Ont CA)). While the case discusses a number of issues, such as disclosure and the rights of the Crown and police in such a situation, ultimately, the Court ordered that the defendant produce the statements on the basis that they were relevant, regardless of whether they might later be determined to be illegally obtained or inadmissible in the civil trial (see paras 70-72).

[26] While we acknowledge that the above case is factually different from this case, the principle is the same. That is, items illegally obtained, detained or possessed are not automatically immune from civil disclosure. Therefore, we would not import a requirement into r 30.10(1) that the documents must be lawfully held by the non-party before they are subject to production.

Continued Possession Under Section 490 of the Code

[27] Apart from the above, we are also of the view that the RCMP were required to continue their possession of the documents in light of the jurisprudence applying sections 489.1 and 490 of the *Code*.

[28] Sections 489.1 and 490 are part of a system to protect property and privacy interests. Where anything is seized, it must be brought before a justice or a report must be made to a justice under section 489.1. That section is the gateway provision triggering an obligation on the justice to supervise its

detention. Section 490 sets out a comprehensive scheme of judicial supervision for anything seized and for its disposition (see *R v Backhouse* (2005), 194 CCC (3d) 1 at para 112 (Ont CA); *R v Garcia-Machado*, 2015 ONCA 569 at paras 12-15; and *R v Craig*, 2016 BCCA 154 at paras 159-84).

[29] This case does not involve the *Charter*. Despite that, the *Charter* jurisprudence that has evolved regarding the continued possession of anything seized where there has been non-compliance with sections 489.1 and 490 of the *Code* is informative of the interpretation of those provisions. It evidences that, where property is seized and detained in a manner that is non-compliant with those sections, the continued detention has been found to be unlawful in the context of a section 8 *Charter* analysis (see *Backhouse* at para 115; and *Garcia-Machado* at para 46). [1]

[30] Nonetheless, even if the seizure or detention has been found to be unlawful, the evidence may still be admissible and, in any event, anything seized remains in the possession of the police until there is a valid court order for its disposition (see *R v West* (2005), 199 CCC (3d) 449 at paras 42-47 (Ont CA); *Canada (Attorney General) v Theoret*, 2007 CarswellOnt 16 at paras 17, 20 (Sup Ct J); and *R v Eddy*, 2016 ABQB 42 at para 68, confirming that the return of unlawfully seized or detained items is not automatic and requires a lawfully made court order).

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[1] Whether a detention that fails to comply with sections 489.1 and 490 is always a breach of the *Charter* has not been finally determined (see *Craig* at paras 164-76 for a discussion of cases going both ways). In *Garcia-Machado*, the Court "[left] for another day" the question of whether a minor or technical breach that had no real impact on judicial oversight would be a breach of section 8 (at para 55). The Alberta Court of Appeal took that position in *R v Villaroman*, 2018 ABCA 220 at paras 11-12, as did the Supreme Court of Canada in *R v Paterson*, 2017 SCC 15 at paras 1, 58.

This Court addressed this tangentially in *R v Ross*, 1996 CarswellMan 14 at paras 38, 43, where the police had forgotten to get an extension after the expiration of the initial section 490 order. The Court upheld the trial judge's decision to admit the evidence.

[31] A court order disposing of anything seized can only be granted if there has been an application based on a legal cause of action that permits the judge to grant a remedy in that regard, which could be under section 490 of the *Code*, under the *Charter* or for replevin (see *R v Raponi*, 2004 SCC 50 at para 33).

[32] In this case, at the time the plaintiff made its application for the production of the documents, there was no court order in effect to require or authorise the RCMP to release the documents. Until such an order was made, the RCMP were required to retain possession of them.

[33] Further, section 490 itself contemplates that detained property will remain in the possession of the police beyond the expired detention period. For example, section 490(6) provides that, where detention orders have expired and proceedings have not been instituted in which the seized property may be required, the prosecutor or police "shall apply . . . for an order in respect of the property under subsection (9) or (9.1)." This contemplates the continued possession of the property by the prosecutor or police beyond the expired detention period and until it is dealt with pursuant to section 490(9) or 490(9.1).

[34] Even if property is ordered returned pursuant to section 490(9), the prosecutor or police still retain possession of it pursuant to section 490(12) for a further 30 days, again evidencing the legislative intent that there be no automatic return of the property. While we are not convinced that the case management judge was correct in his determination that section 490(12) applies to an application made pursuant to section 490(15), we need not make a finding regarding that issue for the purposes of our analysis.

[35] Further, we would note that the RCMP retained copies of the data mirrored from Caspian's hard drives and servers, as is permitted by section 490(13). That section gives the police the right to make and retain copies of a seized document "before bringing it before a justice or complying with an order that the document be returned, forfeited or otherwise dealt with" (see also *Pèse Pêche Inc v R*, 2013 NBCA 37 at para 12; and *Garcia-Machado* at para 66, concerning the wide scope of the police power to retain copies of items seized).

[36] Finally, we disagree with the defendants' position that the case management judge erred when he distinguished the case of *Obégi v Kilani*, 2011 ONSC 4636, a case which found the continued possession of copied items by the seizing authority to be unlawful. In that case, the non-party order for production involved items that had already been ordered to be returned to the former suspect, but the mirrored "Images" had not been ordered to be returned due to an "oversight" (at para 6). We also note that, in *Obégi*, the seizing authority that retained the mirrored "Images" took the position that it was no longer in lawful possession of them (at para 8).

[37] In summary, it is clear that the legislation, as it has been interpreted by the jurisprudence, contemplates that seized items will remain in the possession of the police and/or prosecutor after the period of detention in sections 490(1) to 490(3) expires and until a court orders that they be released. Because that possession is authorised by law, it is not unlawful.

[38] Therefore, the RCMP, in this case, were required to retain possession of the documents until there was a court order made pursuant to an application based on a legal cause of action directing their release.

No Application for the Return of the Documents

[39] Next, the defendants argue that they made an application for the return of the documents pursuant to section 490(9). No application in that regard was filed in the proceeding before the case management judge and the issue of whether such an application was made is very much in dispute by the parties.

[40] Counsel for at least one of the defendants earlier in the proceedings (not the same as counsel in this appeal) indicated that he intended to file an application under section 490(7) of the *Code* for the return of the documents pursuant to section 490(9). That application was never made.

[41] The defendants submit that their application was made orally to the case management judge under r 50.1(3) of the *QB Rules*, which allows a case management judge "on motion by any party or on his or her own motion, without materials being filed, [to] make any order or give any direction that he or she considers necessary".

[42] We would not characterise the statement of intent to make an application for return of the documents made at the case conference, or the brief argument made by the defendants at the hearing before the case management judge, as constituting an application for return of the documents pursuant to section 490(7) of the *Code*. In fact, we would question, without deciding, whether r 50.1(3), a rule in a civil proceeding, applies to an application to release documents being held in a criminal proceeding under the *Code*.

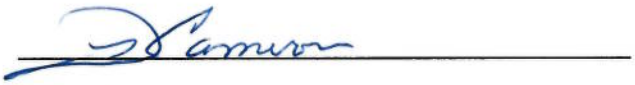
[43] We would also observe that the final order made by the case management judge did not reference such an application having been made, let alone order the dismissal of the purported application.

Decision

[44] Based on all of the above, we dismissed the defendants' ground of appeal that the case management judge erred in making the order of production, as well as the ground that he erred in failing to order the return of the documents to them.

[45] Finally, we dismissed the ground that the case management judge erred in granting access to irrelevant documents. The case management judge considered the undisputed fact that there were numerous irrelevant documents included within the documents. In reaching his conclusion, he considered issues of efficiency, proportionality and the need to ensure that the Court's practice directions regarding trial timelines were met in this complex litigation (see para 164). The decision in question was a matter wholly within the discretion of the case management judge who was in the best position to determine such issues. We were not persuaded that he misdirected himself or that his decision amounted to an injustice.

[46] In the result, we dismissed the appeal. We are ordering costs under the tariff to the plaintiff.



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APPENDIX A

Criminal Code (at sections 489.1-490):

Restitution of property or report by peace officer
489.1(1) Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,

(a) where the peace officer is satisfied,

(i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and

(ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,

return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or

(b) where the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii),

(i) bring the thing seized before the justice referred to in paragraph (a), or

(ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained

to be dealt with by the justice in accordance with subsection 490(1).

Restitution of property or report by peace officer
489.1(2) Subject to this or any other Act of Parliament, where a person, other than a peace officer, has seized anything under a warrant issued under this Act or under section 487.11 or 489 or

otherwise in the execution of duties under this or any other Act of Parliament, that person shall, as soon as is practicable,

> **(a)** bring the thing seized before the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, before a justice having jurisdiction in respect of the matter, or
>
> **(b)** report to the justice referred to in paragraph (a) that he has seized the thing and is detaining it or causing it to be detained,

to be dealt with by the justice in accordance with subsection 490(1).

Form
489.1(3) A report to a justice under this section shall be in the form set out as Form 5.2 in Part XXVIII, varied to suit the case and shall include, in the case of a report in respect of a warrant issued by telephone or other means of telecommunication, the statements referred to in subsection 487.1(9).

Detention of things seized
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,

> **(a)** where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
>
> **(b)** where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for

the purposes of a preliminary inquiry, trial or other proceeding.

Further detention
490(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.

Idem
490(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 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
490(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.

When accused ordered to stand trial
490(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.

Where continued detention no longer required
490(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

> **(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).

Idem
490(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).

Application for order of return
490(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.

Exception
490(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.

Disposal of things seized
490(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
490(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.

Application by lawful owner
490(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.

Order

490(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.

Detention pending appeal, etc.

490(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.

Copies of documents returned

490(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.

Probative force
490(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.

Access to anything seized
490(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.

Conditions
490(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.

Appeal
490(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.

Waiver of notice
490(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.