PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Barker*, 2021 NSPC 59

Date: 20210810
Docket: 8353060
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8353063
8353066
et al
Registry: Halifax

Between:

Her Majesty the Queen

Respondent

v.

Nicholas Barker

Applicant

Decision on Application to Examine Detained Property - s. 490(15)

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	June 25, 2021, in Halifax, Nova Scotia
Decision	August 10, 2021
Charges:	333.1 x 13, 355(a) x 8, 355(b) x 6 & 353.1 x 6 of the **Criminal Code**
Counsel:	Don Murray, for the Applicant Shauna MacDonald, Mark Heerema, for the Respondent

By the Court:

Introduction

[1] Mr. Barker is charged with a number of offences relating to theft and possession of stolen motor vehicles. The prosecution will allege that he was involved in a scheme that included stealing, dismantling, and re-vinning vehicles for sale as whole or parts.

[2] During the investigation, vehicles were seized by police and detained under s. 490 of the Criminal Code.

[3] Mr. Barker now applies under s. 490(15) to examine five of those vehicles to locate and record identification numbers. His proposed examination would require some disassembly and reassembly. He proposes that be done by a licenced mechanic, retained by him, observed by a licenced private investigator to document the process. He is not opposed to having the process observed by a representative of the police.

[4] On the day of the hearing, he expanded his application to also request permission to connect a device to the vehicles' computers to determine what software had been installed. That request is very different from the physical examination addressed in the Application, Affidavit and Briefs. A such, given the absence of proper notice, I will not deal with that request in this decision.

[5] The Crown does not oppose Mr. Barker being able to visually inspect the vehicles, with proper safeguards to protect the property. They do oppose the manner and scope of the requested examination, including any disassembly of the vehicles or any order which imposes obligations on the Crown or police.

[6] Section 490(15) has been interpreted as requiring notice to interested parties. In this case, insurance companies who claim an interest in the vehicles were advised of the application and agreed that their interest could be adequately represented by the Crown.

Evidence

[7] The material before me on the Application includes: Mr. Barker's Application; the Affidavit of Mr. Barker and his testimony; an Application for Return of Property under s. 490(10) filed by entities claiming a lawful interest in the property; and, the briefs filed by the crown and defence. The Crown did not call evidence.

[8] In his Affidavit, Mr. Barker identifies the five vehicles that are the subject of the application: a ford Mustang alleged property of Bruce Automotive (count 27); a Ford Mustang, alleged property of Carson Exports (counts 11 and 15); a Jeep Wrangler (counts 17 and 19); a Dodge Caravan (counts 16 and 18); and, a Forest River RV (counts 21 and 26). Mr. Barker is charged with stealing all but one of those vehicles and is alleged to have possessed all, knowing they were stolen.

[9] He says that in his trial, the crown will call "an insurance industry spokesperson", John MacKinnon, who has examined these vehicles and will testify that "hidden" vehicle identification numbers on these vehicles establish they have been stolen. I understand from submissions, that Mr. MacKinnon is a representative of the Insurance Bureau of Canada whom the Crown will seek to have qualified as an expert. Also from submissions, I understand that Mr. MacKinnon will testify that he located what he reports are the "secondary" VINs on these vehicles and compared them to a database to determine what he believes to be each vehicle's true identity.

[10] Mr. Barker states that he believes the "true" VINs for these vehicles are accessible and "findable". In cross-examination he clarified that there are specific areas he wishes to examine on these vehicles where he believes identification numbers are located. In his Affidavit he says that these numbers will show one of the following: that there is no basis upon which to infer that the vehicles are in fact stolen; that there is no basis to find that the VINs have been altered; or, that there will be reason to doubt the reliability of Mr. MacKinnon's evidence.

[11] Mr. Barker proposes retaining a licensed mechanic with 37 years experience to conduct the examination with a licensed private investigator to observe and document the examination. Resumes are attached for these two individuals. In his Affidavit he also states that if the Crown shows a legitimate concern about risk of damage, he is prepared to have any disassembly and re-assembly conducted by a mechanic retained by the Halifax Regional Police. In the alternative, during the hearing, through counsel, he agreed that if the examination were conducted by a mechanic retained by him, the process could be observed by a member or designate of the HRP.

[12] In his testimony, Mr. Barker described what he believes would have to be done to the vehicles as minor disassembly. He said that for one vehicle, the dash might have to be removed which would involve removing bolts and clips, removal and re-attachment of the dash. For others, the cowl cover and carpet would have to be removed or lifted. This would involve taking off nuts and clips, removal of the windshield wipers, removing some trim and possibly some insulation and lifting the carpet. He acknowledged in cross-examination that clips could break during the removal process but said this would be more of a concern for exterior clips.

[13] He testified that the mechanic would require a helper to assist with lifting things, but the helper would not have to be a mechanic.

[14] When testifying, Mr. Barker suggested that he would be present to supervise/direct the examination, but in submissions, his counsel withdrew this request.

[15] Mr. Barker was cross-examined extensively on whether the mechanic he proposed was truly independent. He acknowledged that he knows the mechanic. The mechanic's son resides next door to Mr. Barker and the mechanic does some work out of that address. He also acknowledged that the owner of that neighbouring property is the brother of a person who pleaded guilty to offences arising out of the same investigation which resulted in the charges against Mr. Barker. In his Affidavit, he did not disclose any previous relationship with the mechanic. In cross-examination, he said it was his first Affidavit and he did not know he had to include that information.

[16] According to Mr. Barker, the Resume for the mechanic was prepared by his counsel. It is brief but includes name, address and telephone number. It states that the proposed mechanic has been a licenced mechanic since 1984 and includes his places of employment for the periods 1983 – 1987, 1987 – 1998, and 1998 – 2018.

[17] The Crown did not submit evidence on the Application. However, it appears uncontested that motor vehicles have publicly displayed Vehicle Identification Numbers and secondary VINs that are not publicly displayed. The locations of these secondary VINS are confidential, known only to certain trained individuals.

Law

[18] Section 490(15) & (16) provide that:

> (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
>
> (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.

[19] There is no dispute that the technical requirements have been met - the vehicles are detained pursuant to s. 490(1) to (3.1) and the Crown has been given proper notice of the Application.

[20] An Order under s. 490(15) is discretionary. The test to be applied in exercising that discretion has been previously considered and there is no dispute here about the general principles (eg. *Her Majesty the Queen v. Mohammad Khattak*, 2013 ONSC 7098; *Canada Post Corporation v. Canada (A.G.)*, 2018 MBQB 87, at para. 17; *Fernie (City) v. Canada (Royal Canadian Mounted Police)*, [2018] B.C.J. No. 62; and, *Winnipeg (City) v. Caspian Projects*, 2020 MBQB 120).

[21] In *Canada Post Corporation* the court described it as a two-step test. The first step was to determine whether the applicant had an interest in the property. The Crown here does not dispute that, as a person charged in a criminal proceeding relating to the property, the Applicant has an interest in the vehicles sufficient to give him standing under this provision (See: (*Canada (Attorney General) v. Ontario (Attorney General)*, [1997] O.J. No. 5314 (Gen. Div.), para. 22; *R. v. Khattak*, 2013 ONSC 7098). So, the first part of the test outlined in *Canada Post* is met.

[22] In *Canada Post Corporation* (at para. 17), the second part of the test was described as a balancing of interests in which the court would have to:

> . . . 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.

[23] Other cases have described the test differently. For example, in *Fernie (City)*, the Court framed the test as a three part test: does the Applicant have an interest in the property; is the requested access necessary to advance that interest; and, is there another interest or public interest that overrides the Applicant's interest? (para. 18 – 20). However, there is general agreement on the applicable principles

[24] The Defence argues that the proposed examination is necessary for Mr. Barker to make full answer and defence and that any potential impact on other interests is minimal and can be protected through imposition of conditions.

[25] The Crown argues that the authority to "examine" found in s. 490(15) does not include authority to permit disassembly or to impose any obligation on the Crown.

[26] The Crown further argues that even if I were to find that s. 490(15) is broad enough to permit the type of examination requested by the Applicant, after balancing the respective interests, the application should be denied. More specifically, the Crown argues that: the Applicant has not shown how the proposed examination would provide relevant information so has not established how it would advance his interests; and, even if the Applicant could satisfy the court that his interest was advanced by the examination, that interest is overridden by the public interest and the interests of third parties who claim ownership of the vehicles. The Crown submits that the public interest is negatively impacted because the requested Order would infringe on the qualified privilege attached to the location of secondary VINs, the interests of third parties who claim ownership in the vehicles is negatively impacted because there is a risk of damage to the vehicles and these interests cannot be adequately protected through the imposition of conditions under s. 490(16).

[27] Finally, the Crown argues that if I am persuaded that the Application should be granted, Mr. Barker should not be present to direct the examination, the mechanic put forward by the Defence is not suitable because he is not independent, and conditions should be put in place to protect, to the extent possible, the interests of the third parties.

[28] The parties agree that s. 490(16) does not permit conditions that would require financial compensation for any damage to the vehicles.

[29] The issues, therefore, are:

1. In this context, does the authority to examine in s. 490(15) include disassembly?;

2. After balancing the respective interests should the application be granted and under what conditions? That requires consideration of:

    a. The extent to which the examination advances the Applicant's interest;

    b. Whether the proposed examination impacts the qualified privilege attached to the location of certain VINs; and,

    c. The level of risk to third parties and whether conditions can be put in place that would protect those interests?

Issue 1: Scope of Access Contemplated by s. 490(15)

[30] Section 490(15) gives the Court authority to order that the Applicant be permitted "to examine" the detained property. The Applicant in this case seeks an Order permitting visual inspection of identifying numbers on the vehicles and recording of those numbers and their location using photographs/video and notes. However, accessing the areas the Applicant wishes to inspect requires some manipulation and disassembly of the vehicles. The vehicles would have to be lifted, either by using a jack or a hoist. The proposed disassembly would involve lifting the interior carpet, removing the cowl cover and wipers and, for one vehicle, removing the dash. The examination would require that the Applicant be told where the vehicles are located, that his mechanic and private investigator be given access to the location and that the location have a hoist or a suitable space to safely lift the vehicles using a jack.

[31] The Crown does not oppose visual examination of the property by an independent mechanic retained by the defence and recording that examination by photographing, video-taping and/or taking notes. They agree that this could include examining inside and under the vehicle, under the hood and in the trunk. However, they argue that s. 490(15) does not provide authority to make an order that would permit disassembly of the vehicles.

[32] Determining the scope of access authorized by s. 490(15) depends on the interpretation of the word "examine", which is not defined in the legislation.

[33] The Supreme Court of Canada instructs that to determine the meaning of an undefined term in a statute, the words making up the term must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the

scheme of the Act, the object of the Act, and the intention of Parliament"... (*R v. C.D.*, 2005 SCC 78, para. 27).

[34] A similar analysis was undertaken by Borins, J. in *R. v. Sutherland* (1977) 38 CCC (2d) 252 (ONSC) in the context of an application under s. 446(5), the predecessor to s. 490, to inspect and copy documents. The Crown opposed the request to copy, arguing that the provision authorized visual inspection only. The wording of s. 446(5) was identical to s. 490(15). Justice Borins considered the ordinary meaning of "examine", the intent of Parliament in introducing the provision and reviewed the provision in the context of other provisions. He found that all supported an interpretation that did not limit an examination under the provision to mere visual inspection.

[35] To determine the ordinary meaning of "examine" he referred to dictionaries, one of which defined it as (para. 10):

> 1.to inspect or observe carefully, to look into the state of; to view in all aspects in order to find out the facts, physical condition, etc. of; to scrutinize; to investigate; to inquire into; as, to *examine* a ship to know whether she [sic] is seaworthy; to *examine* a document.

[36] In considering the intent of Parliament in introducing the provision, Justice Borins recognized that seizure of property under search warrant could have negative impacts. He focussed on the plight of an innocent person whose property was seized. However, he specifically noted that others, including accused persons, might also have status to bring an application. He concluded that the purpose of the provision was to mitigate the negative impact of warranted seizure by providing a mechanism for interested parties to access the property (para. 8).

[37] He also considered the provision in the context of other provisions. Specifically, s. 533(1) (now s. 605) which permits access to trial exhibits on conditions and s. 446(6) (now s. 490(16)) which permits conditions to be placed on pre-trial access to seized property. He concluded that both supported an interpretation that did not limit "examine" to a visual inspection.

[38] Finally, he concluded that the provision provided a statutory right of access which would be defeated if the authority to examine was limited to visual inspection since inspection of documents without the ability to copy and make notes was not meaningful access (para. 19).

[39] Since *Sutherland,* "examine", in the document context, has been routinely interpreted as being broader than mere visual inspection and as including the ability to copy and make notes (eg. *Q.W. (Re),* 2017 SKPC 85; *Haynes v. Ontario,* [1998] O.J. No. 4386; *R. v. Khattak* 2013 ONSC 7098 and the cases considered therein). In *Haynes,* Reilly, J. said "…it seems clear, and is a matter of common sense, that the right to "examine" includes the right to make copies of documents relevant to the "interest" claimed by the applicant (para. 6).

[40] Other types of examination have come before courts in other contexts but without clear rulings on the scope of "examine". For example, in *R. v. Rana,* 2020 ONCJ 552, there is reference to an application under s. 490(15) for access to a firearm to "examine the firearm and its case and all the accessories of the firearm in order to refresh its recollection in the matter and to create a photographic record of the firearm and its case and accessories to be tendered as exhibits in court". The reference is made in the context of a decision relating to s. 11(b) of the *Charter* so it is not clear whether that application had been successful.

[41] In *R. v. Gray,* 2020 ABQB 68, the Crown obtained an Order under s. 490(15) permitting a computer hard drive to be copied and provided to a defence expert.

[42] In *R. v. Giesbrecht*, 2019 MBCA 35, there is a reference to a Defence application under s. 490(15) to have a Defence pathologist observe an autopsy. The application was dismissed because a body is not "seized" by police so not detained under s. 490. There was no discussion of whether the authority to examine under s. 490 could otherwise include that type of observation.

[43] I agree with the Crown that there is no precedent for the scope of examination proposed in this case. There is also no precedent that I am aware of that says the proposed examination is beyond the authority of s. 490(15). The reported cases primarily involve examination of documents. That has limited the discussion of what an examination could include.

[44] In this application, the Applicant wishes to visually inspect, photograph and take notes of areas of the vehicles that can only be accessed through some disassembly and manipulation of the vehicles.

[45] Based on my review of current dictionary definitions and recent cases, the ordinary meaning of "examine" has not changed since it was considered in *Sutherland.* It contemplates a careful and detailed viewing that is not limited to superficial visual inspection. I am satisfied that it is broad enough to permit the

examination proposed by the Applicant. I am also satisfied that interpreting it in this way is consistent with the purpose of s. 490(15) and its role in the context of the remainder of s. 490 and the other provisions of the *Code*.

[46] I agree with Justice Borins that the purpose of s. 490(15) is to permit meaningful access to seized property to mitigate the negative impact of the seizure.

[47] The type of examination that might constitute meaningful access will be influenced by the type of property that is under detention, what interest the Applicant is asserting, and the type of information required to advance that interest. For example, if one considers seizure of a smart phone in the context of a charge of theft of the phone, visual inspection might be meaningful access if the only issue was identification of the phone by colour and model. However, it would not be meaningful access if identification of the phone required access to the data indicating who was the registered owner of the phone. It would also not be meaningful access to the owner of the phone who sought access to information stored on the device.

[48] In the context before me, visual inspection of the vehicle without permission to access the areas of interest would provide no useful information so would not be meaningful access and would defeat the purpose of the provision.

[49] I have also considered the role of s. 490(15) in the context of the entire scheme for judicial supervision of detained property in s. 490 and exhibited property in s. 605.

[50] Section 490 is generally viewed as a complete code governing detention, access, return and/or forfeiture of seized items not in the custody of the Court. It contains a comprehensive set of rules for judicial supervision of seized property and allows for conditions to ensure interests are protected and property is safeguarded (*R. v. Raponi*, 2004 SCC 50; ***R. v. Backhouse*** (2005), 194 C.C.C. (3d) 1 (Ont. C.A.), paras. 109 to 112; and, Search and Seizure (Emond Publishing, Toronto, Ontario, 2021, Nader Hasan, Mabel Lai, David Schermbrucker and Randy Schwartz, at pp. 536 & 545).

[51] Section 490(15) is the mechanism to access detained property at this stage (s. 605 is presumably not triggered until an exhibit has been tendered in the trial). It is relied on by innocent third parties from whom property is seized or who have some other interest in the property, accused who require information to make full answer and defence, and law enforcement who resort to s. 490(15) to access property detained in other investigations (eg. *Sutherland*; *Haynes;* and, *R. v. Angel*

Acres Recreation & Festival Property Ltd., 2004 CarswellBC 3100 (WL Can) (S.C.).

[52] Overly restricting the scope of "examine" in s. 490(15) could result in unfairness to all of these participants. In many post-*Charter* cases, the robust disclosure requirements in a criminal case are sufficient to address the interests of accused. Accused also have access to s. 605 for release of exhibits during the trial. However, these avenues are not available to victims, other innocent third parties or law enforcement.

[53] It is also sensible to interpret s. 490(15) so it is not significantly more restrictive than s. 605. Section 490(15) permits access to detained property, pre-trial. Section 605 permits access to exhibits tendered at trial. Section 605 specifically and explicitly permits release of an exhibit for testing and examination. However, that can only happen once the trial begins and the item in question is exhibited. To interpret s. 490(15) as significantly more restrictive than s. 605 could result in significant delays in trials by forcing the Defence to wait until the property in question had been tendered at trial and then apply for access. In the case before me, the Crown advises that the vehicles themselves will not be entered as exhibits at trial and, as such, s. 605 would not be available to request their release for testing. However, in *R. v. Oland*, 2015 NBQB 242, it was held that the term "exhibit" should be read broadly such that s. 605(1) applies to permit the release of items and objects that are not physically before the court where the evidence of the results of testing or examination of the item is or will be before the court (para. 16-17). In *Oland*, the court was dealing with DNA results from blood analysis, however, the reasoning could apply equally to a case such as the one before me where it is impractical or unnecessary to have the physical item entered as an exhibit and the real evidentiary value is in the information taken from the thing, rather than the thing itself. In the case before me, in my view, once the Crown enters the evidence resulting from Mr. MacKinnon's examination of the vehicles in question, s. 605 could be engaged. Releasing the vehicles for examination at that point would disrupt the trial and cause significant delay.

[54] I am satisfied that interpreting s. 490(15) to permit the examination requested in this case is not inconsistent with s. 490 as a whole and allows s. 490(15) to exist harmoniously with the entire scheme for property supervision in the *Criminal Code*.

[55] In conclusion, I am satisfied that s. 490(15) provides authority for the requested examination.

Issue 2: On Balance, Should the Application be granted?

[56] My conclusion that there is authority to grant the application does not mean that it should be granted. Resolving that issue requires me to consider the various interests in play: Mr. Barker's interest in making full answer and Defence; the public interest in ensuring any evidentiary value in the seized property is protected; the public interest in protecting the qualified privilege attached to the location of certain VINs; the interests of third parties who claim ownership of the property; and any other relevant interest.

a. Advancing the Applicant's Interest

[57] The cases that have considered s. 490(15) have not specifically articulated the burden on the Applicant.

[58] As discussed previously, in general, the cases have referred to the need for the Applicant to show that the examination would advance their interest and the need to balance that interests against other interests.

[59] In the context of Applications by law enforcement to access property detained in other investigations, courts have concluded that the burden on the Applicant is less than the reasonable grounds standard required to get a search warrant (*Nova Scotia Securities Commission v. Canada (Minister of National Revenue)*, 2007 NSSC 51 (*Canada (Attorney General) v. Ontario (Attorney General)*, [1998] 3 C.T.C. 41 (Ont. Cr. Jus.), 1997 CarswellOnt 5173; *R. v. Angel Acres Recreation and Festival Property Ltd.*, [2004] B.C.J. No. 1523, [2005] B.C.W.L.D. 1864, 2004 CarswellBC 3100; *R. v. Szalontai,* (1993) B.C.J. No. 2934; *R. v. Vukelich*, [1993] B.C.J. 903; and, *Nova Scotia (Liquor Licence Board) v. Nova Scotia (Attorney General),* [1993] N.S.J. No. 322).

[60] In the context of a request for release of an exhibit under s. 605, the burden has been described as a burden of persuasion, requiring the applicant to show that the request is "… reasonable in the sense that it must be founded on something more than mere speculation. There must be an air of reality to it." (*R. v. Eagles*, (1989), 47 C.C.C. (3d) 129 (N.S.C.A.), at p. 136; *R. v. Shrubsall*, 186 N.S.R. (2d) 70 (N.S.S.C.) at paras. 7-9; and, *R. v. L.R.*, 2019 ONSC 5533, at paras 28 - 29).

[61] It makes sense that the burden under s. 490(15) should not be lower than the burden under s. 605.

[62] In the present context, an Application by the accused where the identified interest is full answer and defence, I am satisfied that it is sufficient that the Applicant show there is an "air of reality" to his claim that the requested Order will advance his interest. In the disclosure/production context, the "air of reality" standard has been interpreted as synonymous with the *Stinchcombe* test for disclosure - a reasonable possibility that the material in question could assist the defence or, the inverse, a reasonable possibility that the accused's right to make full answer and defence would be impaired if the material was not disclosed/produced. That is how I will assess the Applicant's claim in this case.

[63] Clearly, "wishful speculation" on the part of the Applicant that the proposed examination will result in useful information is not sufficient (*Eagles*, at p. 137). However, "simple skepticism on the part of the judge as to the benefits to be gained…" by the examination is not be enough to defeat the Application (*Shrubsall*, para. 7).

[64] The Crown argues that that the Applicant has not met even an "air of reality" standard, arguing that this Application is nothing more than a fishing expedition without any basis to find that access to the vehicles would advance the defence. In essence, the Crown argues that the Applicant is simply asking to look for identifying numbers on the vehicles in the hopes that some may be different from those found by Mr. MacKinnon and that he has put forward no basis to claim that the numbers will be different or that, if they are different, this will advance his defence in any way.

[65] In his Affidavit, the Applicant essentially asserts that he believes there are identifying numbers on the vehicles that are different than those found by Mr. MacKinnon. I agree with the Crown that the Applicant has provided little to no support for this belief. However, he has made the assertion which was not undermined in cross-examination and there is no evidence to contradict. In an "air of reality" or other similar threshold assessment, courts generally accept the factual basis that is put forward and decide the issue as if those facts were true (eg. *R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.) at para. 39; and, *R. v. Vukelich* (1996), 78 B.C.A.C. 113, leave to appeal refused [1996] S.C.C.A. No. 461). Assuming that applies to the context before me and in the absence of any evidence to contradict the Applicant's belief, I will decide whether the "air of reality" test has been met using the Applicant's assertion that he believes there are numbers on the vehicles that are different than those discovered by Mr. MacKinnon.

[66] The Crown argues that even if the Applicant finds identifiers that are different, unless they are the secondary or "true" VINs, they are irrelevant. The Crown submits that there may be many identifiers on a vehicle but the only one that matters, in establishing the true identity/owner of the vehicle, is the secondary VIN. Further, if the Applicant later asserts that an identifier is the real "true" VIN (as opposed to the one found by Mr. MacKinnon), that cannot be put to Mr. MacKinnon in cross-examination since the privilege would prevent him from confirming or denying that the location where the identifier was found was the location of the "true" VIN. Alternatively, the Crown argues, that even if the Applicant found "true" VINs, cases such as *R. v. Boomer* ([2000] N.S.J. No. 11) and *R. v. Smith* (2009 ABPC 88) confirm that these numbers are generally not relevant to any element that is in issue in a trial – they do not prove the vehicle is stolen, who stole it, that the accused knew it was stolen, that the accused was in possession etc.

[67] The Defence argues that the information is necessary to challenge the evidence of Mr. MacKinnon who will testify that he examined the "true" VINs and determined what they were. That evidence will be used by the Crown to establish the true identity of the vehicles and, as was stated in *Boomer*, identify the true registered owner of the vehicles. The Defence concedes that he could not ask Mr. MacKinnon whether any of the discovered identifiers was a "secondary" VIN. However, armed with the identifiers and photographs of the areas where they were found, he could cross-examine Mr. MacKinnon on whether he looked in those areas, whether the numbers match the numbers he found and, if they don't, whether that causes any concern about the true identity or true ownership of the vehicles. The information could also be used to challenge the true ownership of the vehicles and any allegation that the VINs were altered. He argues that without the ability to examine the identifiers himself, he must simply accept that Mr. MacKinnon's evidence is complete and reliable and that the true identity of the vehicle and/or owner is as asserted by the Crown.

[68] The Defence submits that these issues are more of a concern and more relevant in a case where there are rebuilt vehicles or where there are allegations relating to vehicles being disassembled for parts and VINs being changed.

[69] I am satisfied that in the context of this case there is a basis upon which the requested Order could advance the Applicant's interest in making full answer and defence. The case includes allegations involving vehicles being dismantled, parts being sold and VINs being modified or removed and the identity/ownership of the vehicles may be in issue. The Crown's case will include the evidence of an expert

whose evidence will be an important component in establishing identity and ownership of the vehicles. In that context, the presence of other identifying numbers on the vehicles, whether they are "true" VINs or not, is potentially relevant to an issue in the trial and to allow the Defence to test the reliability of the evidence of the Crown expert.

[70] In most cases, the broad disclosure obligations on the police and Crown mean that resort to s. 490(15) is unnecessary. In this case, despite full compliance with those obligations, an informational gap exists that potentially negatively impacts full answer and defence.

[71] I agree that there may be very real problems with what use could be made of this information in cross-examination because of the qualified privilege. However, that is not a basis to deny the Application. The cases that have examined s. 490(15) in the law enforcement context have confirmed that concerns about the admissibility of the evidence ought to be dealt with at trial rather than in a s. 490(15) application (*Angel Acres*, para. 24). I agree that at this stage, the analysis is concerned with whether the information is potentially useful to the defence, not with whether it is admissible at trial. The information may confirm the Crown's evidence and not be used at trial at all. It may be used in a way that does not impact the privilege. It is also possible that the information could be used to support a request to set aside the qualified privilege attached to the location of the VIN. The public interest/police technique privilege is not absolute; it can be set aside where the public interest in enhancing the promotion and protection of efficient law enforcement is outweighed by the public interest in provided the accused full answer and defence.

b. Does the Application infringe on privilege?

[72] The Crown argues that the requested Order infringes on the qualified privilege attached to the location of secondary VINs. If it does, that would be an important consideration in determining whether the public interest in protecting that privilege overrides the Applicant's interest.

[73] I have concluded that the requested Order does not undermine the qualified privilege associated with the location of the secondary VINs. That privilege attaches to the location of the secondary VINs. The Applicant does not seek disclosure of any location. His evidence is that he knows the location of certain identifiers and seeks permission to access to those locations. Again, I accept that if the Application

is granted, cross-examination of Mr. MacKinnon may engage privilege. At that stage, the Crown may have a valid objection.

c. Interests of Third Parties

[74] The Crown has identified a number of concerns relating to the proposed disassembly of the property. These relate to the potential financial impact of disassembly on the vehicles and include: who will repair damage and how will it be repaired; if the Applicant is required to compensate the lawful owners for damages; how will that amount be established; how will the lawful owners be provided with information to properly assess future roadworthiness of the vehicles resulting from damage; and, whether the applicant would be required to assume financial responsibility for any depreciation that results from the physical interference with the vehicle.

[75] The Crown's concern that the lawful owner, who is yet to be determined, should be made whole is a legitimate concern. However, based on the uncontroverted evidence before me, the disassembly required to conduct the examination will be minor and only minor damage is a reasonable possibility. There is no evidence that the proposed disassembly would impact the road-worthiness of the vehicles or that the proposed physical interference would cause depreciation of the vehicles.

[76] I accept that there is a risk of some damage. However, there is no evidence that these vehicles are "irreplaceable" in the sense that they are antiques or "one of a kind" items. As such, the risk is financial.

Conclusion

[77] I am satisfied on balance that the Order should be made. The Applicant has an interest in the property. There is a reasonable possibility that his interest in making full answer and defence would be advanced if the Order were made. That is an important interest. To refuse the application would essentially leave the Defence with no ability to challenge the findings of the expert or the conclusions with respect to the true identity and ownership of the vehicles.

[78] In the balancing exercise, I have also considered fairness as an aspect of public interest and of the Applicant's interest in making full answer and defence. The property in question was seized by police under warrant. The vehicles have been examined by an expert retained by either the Crown or the police. The Crown will

use information gained from that examination to attempt to secure a conviction against the Applicant. Essentially, the police and Crown have had and continue to have access to the property, apparently without any need to seek permission from the Court. The Defence is not in the same position.

[79] In my view the comments of Sopinka, J. in *Stinchcombe* ([1991] 3 S.C.R. 326, at para. 12) have some application here: "… the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done".

[80] I recognize that this is not a disclosure case and the vehicles are not in the actual possession of the Crown. However, the core principles are similar. These principles don't relieve the Applicant of his burden but, in my view, have to be taken into account when balancing the interests of an accused-Applicant against other interests.

[81] I accept that there is a risk of damage to the vehicles, some smaller risk that such damage cannot be repaired and that there is no mechanism for me to Order compensation to third parties for any financial loss they suffer. However, there is almost always some risk when this type of order is granted. Even in *Sutherland*, the Crown argued that there was a risk of loss or destruction of documents through the copying process. The issue is whether, on balance the interests of the third parties, which are essentially financial interests, override the interest of the Applicant. I am not satisfied that the important interest of the Applicant is overridden by the interests of third parties who claim ownership.

Conditions

[82] I agree with the Crown that the Applicant should not be present during the examination. I also agree with the Crown that the mechanic proposed by the Applicant is not entirely independent. However, he appears to be a trained mechanic and any concerns with his independence are alleviated by the fact that the process will be observed and documented by a licenced private investigator and can be observed and documented by a member of the HRP and/or a mechanic or other person designated by the HRP. Finally, I agree with the Crown that I have no authority to impose any financial obligation on the crown or police.

[83] Section 490(16) requires that any order under s. 490(15) be made on such terms as appear to the judge to be necessary or desirable to ensure that the property

is safeguarded and preserved for any purpose for which it may subsequently be required. I agree with the Crown that this includes the interests of third parties who claim ownership.

[84] So, subject to comment by the Crown and/or the Applicant, I Order the following:

- A licenced mechanic retained by the Applicant may examine the 5 vehicles in question. The examination will include visual inspection, documenting the inspection through notes, photographs or video and some minor disassembly and reassembly. Visual inspection includes looking under the vehicle and in any other area of the vehicle that is designed to be accessed such as under the hood, in the trunk, etc. and permits any necessary manipulation of the vehicle to access those areas or see the item of interest (including lifting the vehicle on a hoist or using a jack and cleaning surfaces). Disassembly of the vehicles will be limited to those areas identified in the evidence: removing the cowl cover, lifting the carpet and insulation, removing windshield wipers, and removing the dash;
- The Examination will take place at the location where the vehicles are currently stored unless that location is not suitable in which case it will take place at some other mutually agreeable location;
- The Examination will take place on a date that is mutually convenient to all participants but not later than [to be determined];
- The vehicles will be made available for examination for two, 12 hour days;
- The Examination must be observed by a licenced private investigator retained by the defence;
- The licenced mechanic may be assisted by a helper provided that name is provided to the Crown in advance and the Crown agrees the person is suitable;
- The Examination may be supervised by a member of the HRP and/or a licenced mechanic or other person designated by them;
- The mechanic retained by the Applicant will advise of any damage to the vehicles that occurs during the examination and that damage will be noted and photographed by the private investigator;

- The Applicant will ensure the Crown is immediately advised of any damage; and,

- Any damage will be repaired as soon as practicable and any damaged part will be replaced using new parts.

[85] This will require the Crown to advise the Applicant of the location of the vehicles and ensure that his mechanic, helper and private investigator be given access to the location.

Elizabeth Buckle, JPC