

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**  
2002NSPC021

*IN THE MATTER OF* an Application by Her Majesty the Queen and Constable David James Peters, a Peace Officer, pursuant to s. 490(5) of the Criminal Code for an Order for the disposition of certain items pursuant to s. 490(9) of the Criminal Code.

*AND IN THE MATTER* of an Application by Mr. Basil Chronis and by DIRECTV, Inc., for the return of certain items, pursuant to s. 490(5) and 490(9) of the Criminal Code of Canada.

Heard at: Sydney, Nova Scotia  
Dates Heard: May 16, 2002 and June 6, 2002  
Decision on: June 27, 2002

Counsel:  
Mr. John MacDonald, for Her Majesty the Queen  
Mr. Ralph Ripley, for Basil Chronis  
Mr. Guy LaFosse, for DIRECTV

[1] This decision follows a proceeding under s. 490(5) of the Criminal Code, an application initiated on April 4<sup>th</sup>, 2002, by Constable Donald James Peters, a Peace Officer, for an order for disposition of certain items seized from the premises of the respondent, Basil Chronis. The items of concern are so-called “Smart Cards”. These are key components of the equipment used to receive and decode direct-to-home satellite television broadcasting. The subject items are more particularly described in Appendix A to Constable Peter’s affidavit as revised May 10<sup>th</sup>, 2002, and spoken to by Constable Peters in testimony on May 16<sup>th</sup>, 2002. They were seized under the authority of a s. 487 search warrant issued October 24<sup>th</sup>, 2001. On November 1<sup>st</sup>, 2001, two charges were brought against Basil (Billy) Chronis alleging contravention as follows:

between the 25<sup>th</sup> of September 2002 and the 25<sup>th</sup> of October 2001 at or near Marconi Street, Glace Bay, in the County of Cape Breton did: without lawful excuse, manufacture, distributed offer for sale, sell, install, modify, operate or possess any equipment or devices or any components under circumstances that give rise to a reasonable inference that the equipment, devices or components are intended to be used for the purpose of contravening Section 9 of the Radiocommunication Act and thereby committing an offence under Section 10(1)(b) of the Radiocommunication Act.

And further: between the 25<sup>th</sup> day of September 2001 and the 25<sup>th</sup> day of October 2001 at or near Marconi Street, Glace Bay, in the County of Cape Breton, did: without lawful excuse manufacture, possess, offer for sale or sell any instruments, devices or components, the design of which renders them primarily useful for obtaining the use of telecommunications service under circumstances that give rise

to a reasonable inference that the device was intended to be used to obtain the use of any telecommunication facility or service without payment of a lawful charge therefore, contrary to Section 327(1) of the Criminal Code.

Subsequent detentions orders under s. 490 were issued while the RCMP did further investigation and considered whether the subject items were required for the prosecution of the foregoing offences.

- [2] From Constable Peter's affidavit of April the 4<sup>th</sup> and his testimony given on May 16<sup>th</sup>, 2002, it appears the investigation is completed and the items are no longer required by police or Crown. The items which are the subject matter of this proceeding are but a portion of the total items seized from Mr. Chronis's premises under the search warrant executed on October 24<sup>th</sup>, 2001. At the time of seizure, and at the time the charges were laid against Mr. Chronis, the police made a distinction between items used to capture American programming, and those used to capture Canadian programming. The items subject to this proceeding fall into the former category. Based on the law as it was then understood, they were considered not to "form part of the charge" according to Constable Peters. The decision of the Supreme Court of Canada in Bell Express Vu Limited v. Rex [2002] S.C.J. No. 43, released April 26<sup>th</sup>, 2002, in the midst of the current proceeding, has some bearing on the status of the

subject items and the question of lawful entitlement to them. Be that as it may, Constable Peters indicates that the Crown is abiding by its earlier decision and thus does not consider the subject items, dealing with American programming, as relevant to the charges brought against Mr. Chronis, and thus not needed for the prosecution of the offences, which are now pending trial.

[3] A determination under s. 490 does not depend simply on what charges are laid. In a given case there might not be any subsisting charge, for any number of reasons, including a finding of a Charter violation at some stage. Yet, possession of a given item, such as cocaine, could not be lawful. I do not mean to suggest a legal equivalency between cocaine and the subject items, the so called “Smart Cards”. I mean to say only that the question of lawful entitlement to the items in these proceedings is not wedded to particular charges that arise from the initial investigation.

[4] Under s. 490(5), the court is to afford the person from whom the items were seized, and any person claiming to be the lawful owner or entitled to possession thereof, an opportunity to establish entitlement to possession of the items. The proceedings ultimately lead to an order under s. 490(9), under which the court is first to consider whether possession of the items by the person from whom

they were seized, in this case Mr. Chronis, is lawful, in which case it is to be returned to that person. Next, in the alternative, if such possession is unlawful, and some other person has established lawful entitlement, the court should order return to that other person. Failing this, where the lawful owner or person lawfully entitled to possession is not known, the court may order forfeiture of the items to Her Majesty.

- [5] In this proceeding, employing the terminology of s. 490(5), “the person from whom the thing was seized” is Mr. Basil Chronis. I have granted standing to and heard from DIRECTV, Inc. which is a “person who claims to be the lawful owner thereof or ... entitled to its possession.”
- [6] Certain rulings were issued in the midst of the proceedings. Portions of that decision are incorporated here for continuity and ease of reference.

#### STANDING - CORPORATION’S REGISTRATION ACT - DIRECTV, INC..

- [7] DIRECTV appeared by counsel before the hearing requesting status and an opportunity to establish lawful entitlement to the subject items. In support of its position an affidavit sworn April 18<sup>th</sup>, 2001, by Mr. Larry Rissler, Special

Counsel and Vice-President of DIRECTV, Inc., was filed with the court. Counsel for DIRECTV was given leave to cross examine Constable Peters at the outset of the hearing on May 16<sup>th</sup>, 2002. Nevertheless, counsel for Mr. Chronis later submitted that DIRECTV can have no standing in this proceeding by virtue of s. 17(1) of the Corporation's Registration Act, being Chapter 101 of the Revised Statutes of Nova Scotia, 1989. It states:

Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force...

- [8] I have considered the arguments made on this point, but have decided that DIRECTV is neither bringing nor maintaining an action in this proceeding. This proceeding was initiated by Constable Peters and may be regarded, in effect, as an *in rem* application. The standing of DIRECTV is afforded by the presiding Justice under the authority of s. 490(5) of the Criminal Code. Neither is this a proceeding in respect to any contract made in the Province nor in connection with any business done by DIRECTV within the Province. It is not necessary that DIRECTV prove compliance with the foregoing Act in order to maintain standing at this proceeding in its attempt to establish entitlement to the subject items.

ADMISSIBILITY/USE OF THE AFFIDAVIT OF MR RISSLER:

- [9] At the time that Mr. Rissler’s affidavit was filed, counsel for DIRECTV, Inc., indicated that the affiant would be attending the subsequent court proceeding for further examination and cross examination. Subsequently, counsel indicated that Mr. Rissler was unable to attend. The respondent, Mr. Chronis, objected to the admission of the affidavit for any purpose without such attendance by Mr. Rissler.
- [10] The court was referred to a decision of the Alberta Provincial Court in Certas Direct Insurance Company v. Attorney General of Alberta [2001] A.J. No. 1346. While this decision is not binding upon me, it sets out a suggested procedure to hear claims brought under s. 490 of the Code, a procedure which counsel urges I should follow here. In Certas, the court stated that any party who has filed an affidavit is subject to cross examination upon the affidavit. It suggests that if a party fails to submit to cross examination on request, that there could be cross examination on affidavit outside the court, or a date fixed at which the crown would hear cross examination *viva voce* .
- [11] The Certas decision makes no mention whatever of s. 657.1 of the Criminal Code. The section applies to “any proceedings” although it also speaks to

“property that was the subject-matter of the offence.” The section speaks to the admissibility in evidence of statements contained in an affidavit of a person claiming entitlement to property. For reasons given in paragraph [2], it may be argued that the subject items do not fall within 657.1 as being “the subject matter of the offence”.

[12] Nevertheless, if only by analogy, I considered and decided that the suggested procedure set out in s. 657.1 is better suited to these proceedings than the procedure suggested in Certas, supra. The court is given *discretion* to require an affiant to appear for examination or cross examination in respect to the issue of proof of statements contained in the affidavit. Put another way, I did not consider that it should be mandatory in all cases that the affiant be required to appear for examination and cross examination. I did not consider such a step to be a pre-requisite to the admissibility of the affidavit. Rather, it seemed more appropriate to receive the affidavit into evidence. What weight the statements in the affidavit would receive, and their significance to the question of the lawful entitlement of the subject items by either Mr. Chronis or DIRECTV awaited completion of the proceeding. The discretion to order Mr. Rissler to appear was reserved. Upon completion of the evidence, which then



included the testimony of Mr. Chronis, no further motion was made to require Mr. Rissler's attendance, although counsel for Mr. Chronis again urged the court to give little weight to the deponent's statements. In the reasons which follow, I have referred to those portions of the affidavit which I consider relevant and reliable, even in the absence of cross examination.

#### ENTITLEMENT TO POSSESSION - COMPETING PRIVATE INTERESTS - THE PUBLIC LAW ASPECT OF LAWFULNESS

[13] As noted above, s. 490(9) states that I "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 further I "may"

if possession of it by the person from whom it was seized is unlawful, or 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.

[14] There are both private law and public law aspects to the competing claims in this proceeding. It is not enough that I evaluate the competing proprietary

claims of the parties, one against the other. I must also consider whether possession is lawful in the context of the Radiocommunication Act as that has been interpreted in the Supreme Court Decision in Bell Express Vu, supra. The relevant sections of that Act are

9. (1) No person shall

.....

(c) Decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

.....

10. (1) Every person who

.....

(b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening Section 9,

.....

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

[15] Entitlement and dis-entitlement are opposite sides of the same coin. If a party, in a proper attempt to establish its own lawful entitlement, shows that another party is not capable of lawfully possessing the items, then conceivably it may

defeat the other party's application for return of the items, whether or not it succeeds in showing that the items ought to be returned to it. Under s. 490(9) the court is first to determine whether Mr. Chronis is lawfully entitled to possession of those items. If so, the court is to return them to him. If it is shown that possession by Mr. Chronis is unlawful, and DIRECTV establish lawful ownership or entitlement to possession, the court may order the return to DIRECTV. Failing both of the foregoing possibilities, the items may be forfeited to the Crown. I see no legal reason why all the items must share the same fate.

[16] "Smart Cards" are rather ingenious devices and together with the software used to program them are central to the provision of direct-to-home or "DTH" television programming. In Bell Express Vu, supra, the Supreme Court indicated that there are currently, in Canada, two licensed providers of DTH programming. It also states (at paragraph 3) "There are two similar DTH satellite distributors in the United States...The intervener DIRECTV is the larger of these two U.S. companies." The testimony of Constable Peters and Mr. Chronis in this proceeding serves to indicate that the other U.S. company is known as "Dishnet". Apparently the other Canadian licensed distributor, besides Bell Express Vu, is Star Choice.

[17] The items before me bear either the writings or logo of the Dishnet company or that of DIRECTV or its licensee, "NDS". The Smart Cards are the size of a standard credit card. Some have obviously been used and handled. Some have names of individuals written upon them. Others appear to be clean and new.

[18] As background I reproduce here portions of the affidavit filed by Larry Rissler on behalf of DIRECTV.

1. I am Special Counsel and Vice-President of the Office of Signal integrity of DIRECTV, Inc. (together with its affiliated companies, "DIRECTV"), and as such have knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.

2. I have been employed by DIRECTV since 1994. Prior to joining DIRECTV, I spent 25 years as a Special Agent of the Federal Bureau of Investigation. In 1990, I became Special Counsel to the Anti-Piracy Task Force of the Satellite Broadcasting and Communications Association, a non-profit trade association representing satellite broadcasters. From 1992 to 1994, I served as Deputy Director for the worldwide anti-piracy operations of the Motion Picture Export Association of America, non-profit trade association representing the major motion picture companies.

3. Upon joining DIRECTV in December 1994, I assumed my current position. As Special Counsel and Vice-President, I am in charge of the Office of Signal Integrity of DIRECTV, which is principally responsible for investigating reports of satellite piracy involving the DIRECTV satellite television system. Over the past seven years, I have led or overseen between 300 and 400 investigations of individuals and businesses engaged in the design, manufacture, distribution and sale of illegal access cards and other devices intended to facilitate the unlawful reception and decryption of DIRECTV's satellite transmissions of television programming. I have also personally attended at and provided support in the execution of numerous criminal search warrants, reviewed thousands of pages of documents and records seized from

suspected satellite pirates, advised law enforcement agencies on the contents of such documents and records, and testified in criminal and civil matters in the United States involving the DIRECTV satellite system.

4. DIRECTV is a Direct Broadcast Satellite (“DBS”) distributor, licensed by the U.S. Federal Communications Commission to distribute satellite television programming in the continental United States, Alaska and Hawaii. DIRECTV is incorporated under the laws of the State of California, with its principal place of business at 2230 East Imperial Highway, El Segundo, California.

7. In 1996, DIRECTV created its distinctive logo, which consists of a white-on-black cyclone design (the DIRECTV Logo”). The DIRECTV Logo features prominently in all marketing and promotional materials prepared by DIRECTV, in all communications emanating from DIRECTV, and on satellite dishes used to receive DIRECTV programming which are sold to consumers, as described below. DIRECTV registered its trademark in the United States on July 23, 1996, and in Canada on January 25, 2001. DIRECTV is the holder of Canadian registered trademark TMA540,274 for the DIRECTV Logo. Attached hereto and marked as Exhibit “A” is a copy of DIRECTV’s Canadian trademark registration.

10. The DIRECTV satellites relay the encrypted signals back to Earth, where they can be received by DIRECTV’s subscribers. In order to receive DIRECTV, a subscriber requires the following specialized digital satellite system receiving equipment: (1) a satellite mini-dish, (2) an integrated receiver/decoder (IRD) and (3) and access card which is necessary to operate the IRD (The DIRECTV Smart Card) (collectively “Receiving Equipment”). Satellite receiving dishes can be mounted on a rooftop, windowsill, or deck railing at the subscriber’s home or business. The signal is received by the dish and transmitted by wire to the IRD. The IRD, which is a box approximately the size of a VCR player, processes the incoming signal using the credit-card sized DIRECTV Smart Card. The DIRECTV Smart Card is loaded into the IRD through a slot in the unit.

12. Consumers who have purchased Receiving Equipment can subscribe to various packages of DIRECTV programming, for which they pay a periodic fee, usually monthly. Subscribers can also order pay-per-view events and movies either by using an on-screen menu and a hand-held remote control device, or by calling DIRECTV and ordering the program in question over the telephone.

13. Because DIRECTV generates its revenues through sales of subscription packages and pay-per-view programming, it must be able to make access to programming conditional on the purchase of legitimate subscriptions. Accordingly, DIRECTV devotes substantial resources to the continued development and improvement of its security system.

14. DIRECTV employs so-called “conditional access” technology to prevent unauthorized access to its television programming by non-subscribers. The DIRECTV Smart Card is the “key” to DIRECTV’s security system and as such constitutes the primary security measure that protects DIRECTV’s programming against unauthorized access.

15. Each DIRECTV Smart Card has an embedded microprocessor (known as an electronic erasable programmable read-only memory (“EEPROM”)) that contains programming code which controls the decryption process and other functions (the “DIRECTV Software”) The DIRECTV Smart Card, and the DIRECTV Software, were developed by NDS Limited (“NDS”), a developer and supplier of proprietary encryption technology. By the terms of a Conditional Access License and Services Agreement dated August 13, 1999 (the “NDS License Agreement”) between DIRECTV and NDS, DIRECTV holds an irrevocable, perpetual, and fully-paid license from NDS to use the DIRECTV Software. NDS is the owner of the copyright in the DIRECTV Software. Attached hereto and marked as Exhibit “B” is a copy of relevant excerpts from the NDS License Agreement.

17. Pursuant to the NDS License Agreement, DIRECTV purchases from NDS DIRECTV Smart Cards that have been programmed and serialized (i.e. assigned unique electronic identifying numbers). DIRECTV then provides DIRECTV Smart Cards to IRD manufacturers, who typically package one DIRECTV Smart Card with each IRD. In some cases, DIRECTV Smart Cards may not be included with the IRD but are instead sent by mail to customers who purchase a min-dish and IRD.

18. After a customer installs the Receiving Equipment at his or her home or business, the DIRECTV Smart Card permits access to DIRECTV test signals but blocks access to full DIRECTV programming until the customer purchases one or more programming packages from DIRECTV. When the customer subscribes to a package, DIRECTV electronically activates the subscriber’s DIRECTV Smart Card in accordance with that subscription. The DIRECTV Smart Card then acts as a re-programmable microprocessor to (1) authorize the decryption of that DIRECTV

programming specifically purchased by the subscriber, and (2) capture and transmit to DIRECTV the subscriber's pay-per-view selection information (via a modem located within the subscriber's IRD). Upon activation by DIRECTV, the DIRECTV Smart Card permits subscribers to view DIRECTV's television programming in a decrypted or descrambled format. Without a subscription contract, DIRECTV does not authorize access to its programming. Any modification of or tampering with the DIRECTV Smart Card is prohibited by DIRECTV. Moreover, the terms on which DIRECTV Smart Cards are sold to consumers provide that they are strictly non-transferable by persons who purchase Receiving Equipment.

28. Pirates typically obtain DIRECTV Smart Cards either by acquiring genuine, inactivated (i.e. new) DIRECTV Smart Cards from retail outlets as part of the Receiving Equipment, or by purchasing used DIRECTV Smart Cards from persons who have or have cancelled subscriptions to DIRECTV. Retail outlets sell the complete set of Receiving Equipment for as little as US \$49.00 and it is not unusual for pirates to purchase sets of Receiving Equipment solely to obtain DIRECTV Smart Cards. Pirates then re-program the DIRECTV Software contained in the DIRECTV Smart Cards using any of a number of hardware devices designed for this purpose. Once the DIRECTV Smart Cards are re-programmed, they are sold to consumers by way of print advertising, over the Internet, and by other means. Pirates frequently use euphemisms such as "Test Card" (i.e. implying that the card is to be used for the purpose of "testing" Receiving Equipment) to refer to illegally modified DIRECTV Smart Cards.

[19] Without quoting Mr. Rissler in full, the affidavit goes on to describe various generations of Smart Cards manufactured for DIRECTV over the years. These include so-called "DSS" cards and "HU" cards. There is a clear correspondence between the Smart Cards described in the Rissler affidavit and the greater portion of the items seized in this case. The remainder bear logos or writing connecting the card to the other U.S. direct-to-home distributor, Dishnet.

[20] The cards all contain a statement in the following form: “This card is the property of \_\_\_\_\_ and must be returned upon request.” In some instances the owner is described as “News Datacom Ltd.” or “NDS Ltd.” The evidence establishes a clear connection between these two entities and DIRECTV. In some cases (those cards bearing the Dishnet logo or label) the owner is described as “Echostar Communications Corporation”. I note also that Mr. Rissler’s affidavit states that the standard DIRECTV customer agreement stipulates that Smart Cards are non-transferable and remain the exclusive property of DIRECTV.

[21] Mr. Rissler describes the License Agreement as “perpetual” and I am satisfied, even in the absence of cross examination of the deponent, that the arrangement subsists to the date of this application. The License Agreement between NDS and DIRECTV creates a virtual equivalency between these two companies for the purposes of the present proceeding which is concerned, in a private law sense, with any proprietary interests which compete with those of Basil Chronis.

[22] From the testimony of Mr. Chronis and that of Constable Peters, it is clear that Mr. Chronis was in the business of programming so-called “American Cards” for local customers such that they would be enabled to pick up satellite signals



emanating from one of the two U.S. distributors, DIRECTV and Dishnet. He apparently believed such activity to be lawful, although he states he “shut down” with the ruling of the Supreme Court of Canada in Bell Express Vu. As the Supreme Court stated, s. 9 of the Radiocommunication Act had received inconsistent application in the courts of this country. Decisions in Nova Scotia may have been interpreted to not prohibit the decoding of U.S. broadcast signals. Nevertheless, this was a gray area which the Supreme Court clarified with its ruling in Bell Express Vu. Thus we now know that

Parliament intended to create an absolute bar on Canadian residents decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization.

Mr. Chronis has acknowledged that he is not a customer, employee, or authorized distributor for either Dishnet, DIRECTV, nor either of the two licensed Canadian providers, Bell Express Vu and Star Choice.

[23] Mr. Chronis states that he purchased fifty of the Smart Cards from an individual in Toronto for \$75.00 a piece. Smaller batches were purchased from individuals in the local area. Three cards came to him via his father. While Mr.

Chronis said he did not “sell systems, just do the cards”, he indicated that people would sometimes sell him the cards for what it cost them to buy an entire system. Some of the cards which were seized had been left with Mr. Chronis by customers for re-programming. Thus, the names written on some of them. Some of the cards were brand new and thus “unmodified”. While Mr. Chronis wishes to have return of all the items, so that he can return certain ones to former customers, he seems primarily interested in receiving back the new, unmodified cards because he has a ready sale for these. A Mr. Roy Moore, who also testified at the proceeding, is prepared to offer Mr. Chronis \$40 to \$50 (U.S.) for each of these unmodified cards. Mr. Moore in turn intends to resell the cards over the Internet where he believes he can obtain at least this much for them.

[24] Mr. Chronis states, and his counsel has contended in argument, that mere possession of these Smart Cards is not unlawful. Evidently the cards, even in an unmodified state, will pick up a test channel from the distributor. When questioned about the use and value of these cards, Mr. Chronis said, “If a customer wants to watch a test channel, that’s up to them. It is not illegal to possess them, it is illegal to modify them”. Constable Peters agreed that it was not illegal to bring a satellite system from the U.S. to Canada, including the

Smart Card, provided duty was paid, nor is it illegal, per se, for individuals to sell systems or Smart Cards to one another.

[25] Mr. Chronis, referring to the fact that the cards themselves were not illegal or prohibited, as for example are certain drugs or weapons, said that he was not concerned with the ultimate destination or use of the cards, “as long as I get paid”. Mr. Moore adopted a similar position. Can the court be so indifferent to the ultimate use of these cards if they are returned to Mr. Chronis and then sold in a batch to the high bidder on an Internet auction site?

[26] From paragraph 17 of the Rissler affidavit it appears that the only original source of a DIRECTV smart card is via the purchase of a complete system by a customer, or through a DIRECTV subscription. In paragraph 18 Mr. Rissler states that the cards are non-transferable. I have mentioned the stipulation written on the cards themselves that ownership remains vested in DIRECTV (or its equivalent). It states on the back of each card that it must be “returned upon request”. The representations of DIRECTV in this proceeding constitute such a request. Thus, in a private law sense, it appears the possessory interest of Mr. Chronis in the seized items, such as it was prior to seizure, ought to give way to the greater claim possessed by DIRECTV in whom ownership remains vested. There is no direct evidence from the Dishnet company or any related

entity before this proceeding. Earlier steps taken by the applicant and investigating officer, Cst. Peters, would suggest that this company was apprised of the seizure of some of its cards. It has not displayed the same diligence in asserting its interest as has DIRECTV. Nevertheless, given the similarities in the writings on the cards themselves, taken in the context of all the evidence in the case, it is not unreasonable to conclude that Dishnet has retained a similar interest in its cards as has DIRECTV.

[27] Counsel for Mr. Chronis has pointed out that DIRECTV has been paid for the cards which were seized from Mr. Chronis. Further, counsel points out that Mr. Chronis paid significant sums of money for many of these items, particularly the newer unmodified cards. He argues that if the cards are forfeited or returned to DIRECTV, it is only Mr. Chronis who stands to lose in such a scenario, whereas DIRECTV will be unjustly enriched.

[28] However, what DIRECTV was paid for a single card would not appear to match the price of \$70.00 - \$75.00 put out by Mr. Chronis. As Mr. Chronis stated, people would sometimes sell him the card for what it cost them to buy an entire system. It is clear that the value of these cards is not in the plastic, nor even their ability to capture test signals; rather, it lies in the intellectual property contained in the programable features of the card. The real value of these cards

lies in their decoding capability. The cards represent potential revenue to satellite distributors such as DIRECTV, revenue which will compensate for its costs and generate profit on the development of soft ware and the associated distribution and marketing of its product. Satellite distributors are thus concerned with the loss of potential revenue. On the other hand, customers who use modified cards, without the permission of a licensed distributor, acquire something of value for which they do not pay. This is the main reason and “unmodified card”, which may be programmed to have this capability, has market value. As counsel for DIRECTV stated “people don’t buy these to use as bookmarks”.

- [29] Section 10(1) of the Radio Communication Act is rather encompassing. It does not only speak to the modification of equipment. Rather, it broadly states that every person is guilty of an offence who distributes, offers for sale, sell, modifies, operates or possesses any component under circumstances that give rise to a reasonable inference that the component has been used, or is or was intended to be used for the purpose of decoding an encrypted subscription programming signal (otherwise than through a valid authorization from a lawful distributor of the signal). Section 327(1) of the Criminal Code is also drafted in rather broad terms, describing persons who possess, sell, offer for sale, or

distribute equipment under circumstances that give rise to a reasonable inference that the device has been or is or was intended to be used to obtain a telecommunication service without payment of a lawful charge. Section 21 of the Criminal Code defines a party to an offence as being everyone who actually commits it, does or omits to do anything for the purpose of aiding another to commit it, or abets any person in committing it.

[30] The monetary value attributed to these cards by Mr. Rissler, Mr. Chronis and Mr. Moore does not result from their ability to obtain a test signal. Their value arises from their ability to be programmed to decode satellite television programming. From the evidence of Mr. Chronis, and also the affidavit of Cst. Peters, certain of the items seized from the Chronis residence have already been modified for this purpose. This fact in itself tends to show the likely use to which the remainder, the unmodified cards, will be put. All are thus tainted by the clear ruling of the Supreme Court in Bell Express Vu, supra. It is a virtual certainty that the newer, unmodified cards, if given back to Mr. Chronis, and then sold to Mr. Moore and then auctioned on the Internet, as is contemplated, would all eventually be modified in an attempt to procure satellite television programming. The reason for the monetary value of the cards also emerges from the fact that Mr. Chronis made a business, over the years, of programming

cards, particularly DIRECTV cards, to enable reception of satellite television broadcasting.

[31] Selling the cards on the Internet, as Mr. Chronis and Mr. Moore propose, gives no assurance that the cards will not find their way back into Canada again. It is a distinct possibility they may be sold directly to a Canadian purchaser and be modified to pick up DIRECTV programming signals. At present, at least, a person cannot legally be a consumer of DIRECTV programming in Canada. The same may be said of Dishnet. The return of the seized smart cards to Mr. Chronis, and the subsequent sale of these items to persons unknown, as he proposes, would provide a clear opportunity for persons to unlawfully decode subscription programming in violation of the Radio Communication Act. Indeed, it would be tantamount to countenancing such activity. In all the circumstances pertaining here I cannot conclude that possession of the seized items by Mr. Chronis would be lawful under Section 490(9) of the Criminal Code.

[32] In summary, the public law considerations outlined above serve to dis-entitle Mr. Chronis to possession of the seized items. The private law aspects, which I have also briefly noted, reinforce this position.

[33] Concluding, as I do, that possession of the seized items would be unlawful by Mr. Chronis, I must consider whether other persons have established lawful entitlement to same. There have been no direct representations from Dishnet at this proceeding. While the items themselves contain some evidence connecting them to this entity, I do not think that the evidence is sufficiently cogent or complete to conclude that such items ought to be returned to them. As indicated, they had some knowledge of the seizure of the items and have not taken an opportunity to intervene in this proceeding. However, DIRECTV have established lawful entitlement to the smart cards which contain its logo. The DIRECTV trade mark appended to Mr. Rissler's affidavit corresponds with the trade mark as it appears on certain of the smart cards seized from Mr. Chronis.

The affidavit also establishes that the name "DSS" was used to identify DIRECTV receiving equipment prior to 1999. Consequently, I order that all the smart cards displaying a DIRECTV logo or the name "DSS" be returned to it. The remainder, the Dishnet cards, will be forfeited to the Crown. Any which cannot be identified in one of these ways will also be forfeited.



[34] I note that it will be necessary to give regard to s. 490(17) prior to implementation of this Order.

Dated at Sydney, Nova Scotia, this 27<sup>th</sup> day of June, 2002.

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JUDGE A.P. ROSS  
A PROVINCIAL COURT JUDGE