Citation:	Bromley et al v. Her Majesty the Queen in Right of Canada 2002 BCSC 149	Date: Docket: Registry:	20020131 BL0194 Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF AN APPLICATION FOR DETENTION OF THINGS SEIZED PURSUANT TO A SEARCH WARRANT

AND

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

APPLICANT/RESPONDENT

AND:

BLAKE BROMLEY, MARION BROMLEY, JOHN BROMLEY, KATHRYN BROMLEY, SERENA BROMLEY, BLAKE BROMLEY CONSULTING INC. (FORMERLY BLAKE BROMLEY CONSULTANCY COMPANY INC.), QDDQ SERVICES INC., ELEEMOSYNARY ENTERPRISES INC., PACIFIC TRADING CORPORATION, ABRAM ENNS, MARJORIE ENNS, THE VOICE OF PEACE FOUNDATION, DOUGLAS STELLING, HOWE SOUND SAMARITANS' FOUNDATION, LOEWEN KRUSE, IAN J. BYE & ASSOCIATES, ALLAN E. DOBSON, STAN UNGER, CAROLINA HOMES INC., ANDERSON PIERCEY AND DOUGLAS B. STELLING

RESPONDENTS/APPLICANTS

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WARREN

Counsel for the Respondents/Applicants:	S.M. Cook and T.S.Gill
Counsel for the Attorney General of Canada:	W.P. Riley
Date and Place of Hearing:	Vancouver, B.C. November 1, 2001 and December 17, 2001

Introduction

[1] The Crown is applying pursuant to ss. 490 (2) and (3) of the ***Criminal Code*** for an order permitting further detention of things seized under a warrant executed on October 4, 2000. The respondent

Bromley is applying under ss. 490 (7) and 8) for the return of the seized items, including any copies made.

[2] Section 490(2) provides that nothing seized under a warrant shall be detained for more than three months from the date of seizure, unless a justice is "satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted...." Section 490(3)(a) provides for more than one order for further detention,

> ... but the cumulative period of detention shall not exceed one year from the day of the seizure ..., unless ... a judge of a superior court ... 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 conditions as a judge considers just....

Background

[3] On October 4, 2000 Canada Customs and Revenue ("CCRA") investigators executed a warrant and seized a number of documents and other things from a number of locations, including the law offices of the respondent/applicant Blake Bromley ("Bromley"). At the time, Bromley expressed the view that there would be no claim of solicitor/client privilege advanced in connection with the materials seized. Of course such a view would not be binding upon his clients, to whom the privilege belongs.

[4] Included in the materials seized were the hard drives from the computers in Bromley's offices. It is this material that is at the centre of these applications.

[5] The material in support of the application for a warrant named eleven individuals and nine corporations or foundations averring a complicated and intricate charitable donation process, which the CCRA alleges was fraudulent.

[6] Some of the transactions were said to have taken place in Alberta and a similar search warrant was obtained in that province. As a result of the warrants, a large volume of documents, records and computer data was seized. Because many of the things seized came from a law office, a custodian, Kenneth Ball, was appointed pursuant to s. 49 of the ***Legal Profession Act*** to review the seized documents and ensure that those things over which solicitor/client privilege was claimed were sealed and delivered to the Court Registry. The computer hard drives were copied on site as an "image using 4.2 gigabytes optical media disks as the copying medium". The computers themselves remained in the offices.

[7] Mr. Ball swore an affidavit on October 29, 2001 in which he deposed that in order to review the contents of the optical discs and maintain continuity, copies of the copies were made onto conventional computer hard drives. He was assisted by CCRA staff and staff at the Law Society

of British Columbia, particularly Davis Bilinsky, who had assisted Mr. Ball with other similar tasks in the past.

[8] Mr. Ball also consulted with a computer consultant at his own law firm "on the complex aspects of this file since its inception." Mr. Ball was able to reproduce all complete files located on the hard drives as paper copies. He deposited the approximately 1,900 pages of documents with the Court Registry. This process "took months to accomplish because of the volume of the material and [his] somewhat limited time" available to work on the files, due to the demands of his own practice.

[9] After the documents were prepared and deposited with the Registry, Mr. Ball began the process of reviewing "deleted text", "slack text" or "text otherwise located in unused disk space". This process was time consuming and required advanced technical assistance and equipment. The process required that Mr. Ball be present at all times in order to ensure that only he had access to the contents of the hard drives.

[10] The search of the hard drives resulted in a vast number of matches, or "hits", and each "hit" provided a reference to a numbered "cluster". Each cluster in turn contained anywhere from a single word to whole phrases or numbers, which may or may not be intelligible. Further, Mr. Ball deposed, each cluster contained approximately fifty lines of text or other notations. Mr. Ball's task was to review each cluster to determine if the contents were apparently subject to the search warrant. This task was both complex and difficult to complete, and was made more difficult by some of the idiosyncrasies of computers.

[11] For example, Mr. Ball deposed that due to overlapping letters some of the hits produced a reference to an unrelated text that was not the subject of the search warrant. Thus, the name "Enns", which is mentioned in the warrant, is part of the word "Pennsylvania". These unrelated texts made it necessary for Mr. Ball to spend some time manually removing irrelevant references.

[12] Mr. Ball is working with a computer consultant to devise a "macro", which will permit him to speed up the sorting process. If he is not able to devise an appropriate macro, Mr. Ball said that the time required to review each of the identified matches would be several months. A great deal of effort and manpower has been and is being expended in this process. In brief, the Crown argues that further detention is required because of the complex nature of the investigation, which involves a large number of persons and entities; the procedural complexity arising from the many solicitor/client privilege issues; the complexity brought about because of the need for, and appointment of, a custodian by the Law Society of British Columbia; and, the technical complexity involved in examining the hard drives, which require the involvement of technicians other than the custodian, who does not have the complete technical ability required, while still protecting the confidentiality of the enquiry.

Section 490 and the Further Detention Issue

[13] The Crown says that further detention beyond the one year maximum set out in s. 490 is required because of the complexity of the investigation. The overriding issue is the complexity of the case and the Crown says that it has established that, on a balance of probabilities, further detention is required. "Complexity" is to be given its ordinary meaning; while there are no authorities that exhaustively set out what constitutes complexity, the decisions in ***Canada (M.N.R.) v. Hunter***, [2000] O.J. No. 5424 (Q.L.) (Ont. S.C.J.) and ***R. v. Eurocopter Canada Ltd.,*** [2001] O.J. No. 1592 (Q.L.) (Ont. S.C.J.) provide useful examples of factors which have been considered in determining whether a particular investigation is complex. In the case at Bar, the Crown argues that the investigation is factually complex, involving three separate series of transactions. The complexity is compounded by the incapacity due to a stroke of Abram Enns, a central figure in two of the transactions. The investigation is also procedurally complex, involving the cumbersome determination of solicitor-client privilege claims. The investigation is legally complex, requiring the lead investigator to consult with counsel and requiring the appointment of a custodian of considerable experience. The custodian himself describes the search exercise as complex. In addition, the investigation requires an assessment of the legal doctrine of gift, which the respondent/applicant submits is pertinent to the transactions under investigation. Finally, there is the technical complexity of the investigation. The custodian does not have the requisite technical expertise, and has had to call in the assistance of software experts/technicians from his own firm, the CCRA and the Law Society [see ***Re Moyer*** (1994), 95 C.C.C. (3d) 174 (Ont. Ct. Gen. Div.) and ***Canada M.N.R. v. Hunter***, *supra*. Complexity can also include special procedural methods which, in this case, are mandated by the decision in ***Festing v. Canada (Attorney General)*** (2000), 31 C.R. (5th) 203 (B.C.S.C.). In ***Festing*** there were also solicitor-client privilege issues following the search of a lawyer's offices during the course of an investigation into his client's dealings [see also ***R. v. Eurocopter Canada Ltd.***, *supra*.

[14] In the alternative, the Crown argues that should the Court find that the matter is not sufficiently complex as to justify further detention, then any order for the return of the materials seized should extend only to those items actually seized from Bromley's office. The Crown submits that any order should not include imaged copies from Bromley's hard drive, as these are not things seized from his office but rather, are copies of things seized. Mr. Riley pointed out that the hard drives and their contents remain with Bromley, and argued that the Crown is clearly entitled to retain copies of things seized and any materials printed from the **imaged copies** of the hard drives, even if the originals are ordered returned: ***Criminal Code***, s. 490(13); ***Bleet v. Attorney General (Canada)*** (13 February 1997), Vancouver CC951333 (B.C.S.C.). In any event, the Attorney General has seized things from ten different locations and should Bromley be entitled to the return of things seized from either his home or his office, he has not presented any evidence to show that he was in possession of things seized elsewhere. The interested parties in eight of these ten locations have either consented to the items' further detention or have taken no position and, accordingly, no order should be made concerning things seized from those locations.

[15] Mr. Cook argues for the respondents/applicants that the purpose of s. 490 is to prevent laches and the lack of good faith on the part of the seizing authorities. The burden is on the Crown under s. 490(3) to satisfy the court that a further detention is required having regard to the complex nature of the investigation: ***Re Moyer***, *supra*; ***R. v. United Grain Growers Ltd.*** (1996), 39 Alta. L.R. (3d) 285. In ***Canada (Revenue) v. Welford*** (1996), 18 O.T.C. 388 (Ont. Ct. Gen. Div.) Zelinski J. held that some of the indicators of complexity may include: the assistance of experts to help decipher documents seized; a need to interview witnesses in and beyond Canada; a combination of complexity with unique time consuming issues; the absence of "feet dragging", delay or procrastination; and, an absence of prejudice. He held that additional relevant factors may be the training and experience of those involved in the investigation; the time dedicated to the investigation by such persons; and, the need for further investigation or inquiry as a consequence of information derived or received as a result of earlier enquiries.

[16] The respondents/applicants' counsel argues that his clients have tried to simplify the solicitor-client issue from the beginning by expressly waiving their privilege. In any event, counsel submits that the legal principles applicable to solicitor-client privilege are well established, arise frequently and do not make the investigation complex.

[17] The Crown's evidence shows that they have called the Custodian only three times over the course of the year following the seizure, which is hardly a vigorous attempt to speed things along. In any event, difficulty in obtaining information from a third party (Mr. Ball) does not increase the complexity of the investigation if there were procedures which could have been used to have the third party co-operate more fully, more speedily and more readily with the investigation: see ***R. v. Jackson*** (1997), 31 O.T.C. 34 (Ont. Ct. Gen.Div.). The respondents/applicants argue that the Crown has not discharged the burden of showing that the complexity of the investigation warrants an extension beyond the one year (***R. v. United Grain Growers Ltd.***, *supra*). They argue that there is no evidence to establish that the Crown made reasonable efforts to ensure the material in Mr. Ball's custody was released within one year as contemplated by s. 490. The Crown could have applied under a number of provisions of the ***Criminal Code***, the ***Income Tax Act*** or the ***Legal Profession Act***, and could have applied for the appointment of an additional custodian to deal with the burden of the material, thereby helping to shorten the time needed to complete the inquiry. The Crown cannot rely upon the custodianship as a factor where the Crown has not established on the evidence that it has made all efforts to ensure the custodian did not obstruct the investigation.

[18] Further, a computer hard drive is a standard piece of office equipment. If examination of such a common tool in an office is held to be sufficient to render an investigation complex, then the protections afforded by s. 490 will be lost to a majority of individuals from whom things are seized.

[19] As for the Crown's argument that the nature of the transactions under investigation renders the investigation complex, Mr. Cook replied

that the design and effects of the transaction were well understood from the beginning. He says that nothing seized or reviewed to date has increased the complexity or changed the nature of the transactions as originally understood by the CCRA. Most, if not all, of the remaining investigation is directed at a determination of the "correct" amount of charitable donations, so that a civil reassessment of the respondents/applicants' tax liability can be made. The purpose of s. 490(3) is for a criminal investigation, and only the criminal component of the investigation should be considered when weighing the complexity of an investigation. Here the Crown is attempting to use the further detention of the things seized in furtherance of a civil reassessment, which is precisely the type of fishing expedition not permitted under the section (***R. v. United Grain Growers Ltd.***, *supra* at para. 16).

[20] In ***Re Moyer***, *supra*, and in ***Re Golden Enterprises***, [1999] S.J. No. 491 (Q.L.) (Sask. Q.B.) it was held that volume of items seized and the extensiveness and breadth of the investigation will, of themselves, not render an investigation complex. The lack of resources necessary to complete the review of materials seized within the one year time period is not necessarily indicative of a complex investigation: ***Re Moyer***, *supra*, at p. 177.

[21] In ***Moyer***, a search warrant was executed in November 1993 and a number of extensions were granted until a further detention was ordered in February 1994, ending in November 1994. The Crown applied in November 1994 for an additional 12 month extension. The issue facing Fedak, J. was the same as that facing this Court: had the applicant satisfied the burden, having regard to the complex nature of the investigation, of establishing that a further detention was required. In ***Moyer*** there was a large volume of documents - some twenty banker's boxes and 100,000 documents - and only one primary investigating officer. That officer admitted that if he were on the investigation full time it would significantly reduce its length. At p. 176 Fedak J. observed that the purpose of s. 490 of the ***Criminal Code*** is to prevent the potential for laches and the lack of good faith on the part of the seizing authorities as well as, presumably, preventing the things seized being forgotten. He concluded that there was no doubt the voluminous amount of items seized required much more time and resources to investigate than originally anticipated, but that was not necessarily an indication the investigation had become more complex; only more extensive.

Conclusion

[22] The arguments of the respondents/applicants on the issue of delay are compelling. Further, I agree with the analysis and conclusions of Fedak J. in ***Moyer,*** *supra*. While there is evidence from the Crown that the investigation is complex, much of the complexity is of a technical nature exacerbated by the custodian's lack of specific computer expertise. My review of the Information to Obtain Search Warrants filed on September 29, 2000, which is 97 pages long, shows that the Crown had and has extensive familiarity with the underlying activities which it says constitutes a fraud. The volume of materials and the technical difficulties are the impediments to concluding the investigation. In my view there were, and are, further resources available to the Crown to assist in dealing with the technical complexity and the volume of

materials. For example, it was open to the Crown to apply under s. 54 of the ***Legal Profession Act*** for the appointment of another custodian to ease the burden imposed on Mr. Ball. There is a clear burden on the Crown, where things have been seized, to employ all reasonable resources that are required and to diligently press on with the investigation. I am satisfied that the investigation is time consuming, involving a multitude of transactions and individuals, with the added technical intricacies of deciphering whatever remains on the hard drive. Nevertheless, in the case before me there were avenues open to the Crown that may have ended the investigation within a one year time period.

[23] The Crown has failed to discharge the burden on it and the Crown's application to extend the time fails.

[24] I turn now to the cross application of the respondents/applicants for an order that those things seized, **including any copies**, be returned forthwith. This issue also addresses the alternative submission of the Crown referred to above. Mr. Cook believed that there were no British Columbia authorities dealing specifically with this point and pointed out that the authorities from outside British Columbia are conflicting. He submitted that if this Court finds that the investigation is not complex and the Crown's application for further detention is not granted, then s. 490(13), correctly interpreted, does not authorize the retention of the materials, including copies, beyond one year. On a purposive interpretation, he argued, to permit the Crown to retain copies would undermine the very purpose of s. 490 and open the door to the potential for laches and a lack of good faith on the part of the seizing authorities. He submitted that the purpose of s. 490(13) is to permit copying of originals where the originals are required for other purposes such as the filing of a tax return, but it does not authorize any retention of copies on a Crown application to extend the time under s. 490(3). To do so would be to deprive a respondent of any protection and there would be no incentive on the Crown to proceed vigorously with the investigation: see ***R. v. United Grain Growers Ltd.***, *supra,* where, at para. 3, Veit J. of the Alberta Queen's Bench held that the State is not entitled to make and retain copies save under the limited circumstances of s. 490(13). Veit J. went on to say at para. 3:

> Moreover, a purposive interpretation of s. 490 ... establishes that any routine ability of the State to make and retain photocopies of seized documents would undermine Parliament's intention in setting deadlines for State action in dealing with seized documents.

[25] The Crown, in reply, relied on the unreported decision of Williamson J. in ***Bleet,*** *supra*, which deals directly with the propriety of permitting the retention of copies of things seized when the originals have been ordered returned pursuant to s. 490. In ***Bleet***, there had been an earlier order for the return of the seized originals when Thackray J. dismissed a Crown application to extend the time for their retention. In the meantime, the Crown had copied the originals and Bleet applied for their return, arguing that further retention would be unlawful. The Crown relied upon s. 490(13), arguing that it dealt directly with Bleet's submission that further retention would be

to permit a circumvention of the purpose of s. 490. Williamson J. considered ***Moyer***, *supra*, and the conflicting Alberta Queen's Bench decision in ***United Grain Growers Ltd.***, *supra,* and the later decision of the Alberta Queen's Bench in ***R. v. Cartier*** (1997), 197 A.R. 70 (Q.B.). The Court in ***Cartier*** did not follow the earlier Queen's Bench decision in ***United Grain Growers Ltd.*** and held that s. 490:

> ... wants such things to be returned expeditiously not to limit the time of investigation of a crime but because the rightful owner will want and may need the "seized things" in his normal business especially if they consist of books of account and record, contracts, wills and the like. By the use of s. 490(13) and (14) **the section may compel the seized things to be returned without adversely affecting the ability of the public authorities to continue police investigations and to use - through copies - the seized things in evidence should a prosecution be instituted. To read more into the section is not, in my view, warranted.** [my emphasis]

[26] As do I, Williamson J. preferred the view of the Ontario Court in ***Moyer*** and the second Alberta decision in ***Cartier***, *supra*. A plain reading of s. 490(13) permits the Attorney General, or other person having custody of a seized document, to make a copy and retain the copy before complying with an order under subsections (1), (9) or (11). The wording of this subsection is clear; there is no ambiguity. Copies of things seized may be made and retained although the originals are ordered returned pursuant to s. 490.

[27] Accordingly, those things seized from the home or office of the respondent/applicant Blake Bromley shall be returned to him. The Crown may make and retain copies of things seized including, without in any way restricting the generality of the forgoing, material printed from the imaged copies on the hard drive and copies of the hard drive.

"T.P. Warren, J."
The Honourable Mr. Justice T.P. Warren