

 **R. v. Jackson**

British Columbia Judgments

British Columbia Provincial Court

Prince George, British Columbia

M.J. Brecknell Prov. Ct. J.

Heard: December 6, 2023.

Judgment: January 29, 2024.

File No.: 9624-1

Registry: Mackenzie

[2024] B.C.J. No. 176 | 2024 BCPC 17

Between Rex, and Benjamin James Jackson

(39 paras.)

Counsel

Counsel for the Crown: G. Furmaniuk.

Counsel for the Defendant on December 6, 2023: M. Hajivandi.

Counsel for the Defendant on January 29, 2024: H. Osso, Articling Student.

RULING ON APPLICATION PURSUANT TO SECTION 490 OF THE *CRIMINAL CODE OF CANADA*

M.J. BRECKNELL PROV. CT. J.

1 The Applicant (Mr. Jackson) applies for an order under s. 490(7) of the *Criminal Code* that items seized by the Royal Canadian Mounted Police (RCMP) be returned to him. He submits that the RCMP failed to submit an application to extend the detention order and that no proceedings were instituted for which the seized items may be required so the items must be returned to him.

PROCEDURAL HISTORY

2 On March 19, 2023, the RCMP arrested and then released Mr. Jackson on an Undertaking relating to an allegation that he uttered or conveyed a threat to injure an animal contrary to s. 264.1(1)(c) of the *Criminal Code*.

3 On that same date, the RCMP seized 12 firearms and one possession and acquisition licence (PAL) (the seized items) from Mr. Jackson's residence.

4 On April 24, 2023, the RCMP filed a Form 5.2 Report to a Justice applying for the detention of the seized items.

5 On April 26, 2023, a Justice of the Peace ordered the seized items be detained "for a period of three months from the date of seizure, unless ... proceedings are instituted in which the thing(s) detained may be required."

6 On May 2, 2023, an Information was sworn alleging that Mr. Jackson did knowingly utter or convey a threat to injure an animal contrary to s. 264.1(1)(c).

7 On May 4, 2023, a first appearance on the Information was held. The trial of the Information is now scheduled for May 17, 2024.

8 On November 1, 2023, Mr. Jackson filed an Application to a Judge for the return of the seized items and for an order to replace the Undertaking with a Release Order permitting him to possess firearms and his PAL to facilitate sustenance hunting.

9 On November 10, 2023 Mr. Jackson filed a Notice of Application setting out:

- a) Grounds;
- b) Facts;
- c) Law;
- d) Supporting Documents; and
- e) Relief Sought,

in support of his request to have the seized items returned to him.

10 Mr. Jackson filed an affidavit in support of the Application. Relevant portions of that affidavit include:

- a) He uses firearms for sustenance hunting of game and fowl for himself, his family and community members of the McLeod Lake Indian Band;
- b) Sharing hunted traditional foods is culturally meaningful and important to many elders; and
- c) He volunteers time to mentor youth on a number of cultural activities including the hunting of and preparing of game.

11 Mr. Jackson's affidavit attached letters of support from his mother, Doris Jackson, his father Bruce Jackson and Chief of the Band, Harley Chingee. Those letters emphasised the community's reliance on Mr. Jackson's hunting skills in providing food and in ensuring the continuation of culturally important activities.

12 Veerkamal Singh, legal assistant to defence counsel, filed an affidavit that attached a number of documents relevant to Mr. Jackson's application.

THE LAW

Criminal Code

13 The following Sections of the *Criminal Code* relate to this Application:

a) **Detention of things seized**

490 (1) Subject to this or any other Act of Parliament, where, pursuant to paragraph 489.1(1)(b) or subsection 489.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,

- (a) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or

(b) where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.

b) **Further detention**

(2) Nothing shall be detained under the authority of paragraph (1)(b) for a period of more than three months after the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless

(a) a justice, on the making of a summary application to him after three clear days notice thereof to the person from whom the thing detained was seized, is satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted and the justice so orders; or

(b) proceedings are instituted in which the thing detained may be required.

c) **Detention without application where consent**

(3.1) A thing may be detained under paragraph (1)(b) for any period, whether or not an application for an order under subsection (2) or (3) is made, if the lawful owner or person who is lawfully entitled to possession of the thing seized consents in writing to its detention for that period.

d) **When accused ordered to stand trial**

(4) When an accused has been ordered to stand trial, the justice shall forward anything detained pursuant to subsections (1) to (3) to the clerk of the court to which the accused has been ordered to stand trial to be detained by the clerk of the court and disposed of as the court directs.

e) **Where continued detention no longer required**

(5) Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor, or the peace officer or other person having custody of the thing seized, determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), the prosecutor, peace officer or other person shall apply to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered its detention under subsection (3), or

(b) a justice, in any other case,

f) **Application for order of return**

(7) A person from whom anything has been seized may, after the expiration of the periods of detention provided for or ordered under subsections (1) to (3) and on three clear days notice to the Attorney General, apply summarily to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or

(b) a justice, in any other case,

for an order under paragraph (9)(c) that the thing seized be returned to the applicant.

g) **Exception**

(8) A judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or a justice, in any other case, may allow an application to be made under subsection (7) prior to the expiration of the periods referred to therein where he is satisfied that hardship will result unless the application is so allowed.

h) **Disposal of things seized**

(9) Subject to this or any other Act of Parliament, if

(a) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or

(b) a justice, in any other case,

is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall

(c) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person, or

(d) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession,

and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person, and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

i) **Exception**

(9.1) Notwithstanding subsection (9), a judge or justice referred to in paragraph (9)(a) or (b) may, if the periods of detention provided for or ordered under subsections (1) to (3) in respect of a thing seized have expired but proceedings have not been instituted in which the thing may be required, order that the thing continue to be detained for such period as the judge or justice considers necessary if the judge or justice is satisfied

(a) that the continued detention of the thing might reasonably be required for a purpose mentioned in subsection (1) or (4); and

(b) that it is in the interests of justice to do so.

Case Law

14 Defence counsel relied on the following cases in support of the Application:

- a) *R. v. Tingley*, [2021 BCPC 24](#);
- b) *R. v. Booth*, [2021 BCPC 169](#); and
- c) *R. v. RH*, [\[2021\] BCJ No. 397](#).

15 Crown counsel relied on the following cases and articles in opposition to the Application:

- a) *R. v. Alchin*, [2007 ONCJ 589](#);
- b) *R. v. Church of Scientology of Toronto*, [1991 CanLII 11721](#) (ON CA);
- c) *R. v. Clarke*, [2019 BCSC 2171](#);
- d) *R. v. Davidson*, [2007 BCPC 487](#);
- e) *R. v. H.(E.)*, 1995 CarswellOnt 3713;
- f) *R. v. Soares*, [2020 ONCJ 243](#);
- g) *R. v. TO-Bargains Inc.*, [2015 ONSC 4404](#);
- h) *Re Applications Under ss. 490(9.1) and 487.3 of the Criminal Code*, [2021 BCPC 31](#);

- i) E.G. Ewaschuk, K.C., *Criminal Pleadings and Practice in Canada* (Toronto: Thomson Reuters) (loose-leaf updated 2023, release 1); and
- j) N. Hasan *et al.*, *Search and Seizure* (Toronto: Edmon Publishing, 2021).

SUBMISSIONS

Defence

16 Defence counsel submits the application should be granted for the following reasons:

- a) The seized items are not property related to the alleged offence;
- b) The original detention order granted by the justice was purely administrative in nature;
- c) Harm to Mr. Jackson is established on the evidence of his sustenance hunting activities for family and his community;
- d) Mr. Jackson would be willing to enter into a recognizance if required; and
- e) The seized items could be returned to Mr. Jackson with the requirement he turn in the items just prior to trial.

Crown

17 The Crown submits the application should be dismissed for two reasons:

- a) Since proceedings were instituted, an application under s. 490(7) cannot proceed without Mr. Jackson first establishing under s. 490(8) that he would suffer hardship if his application was not allowed to proceed now. He has failed to do so; and
- b) Even if Mr. Jackson establishes hardship, he has failed to meet the onus under s. 490(7) to establish that the seized items are not required for the proceedings.

18 The Crown further submits:

- a) Once a thing is seized and detained by the RCMP, they must either bring that thing before a Justice or file a Form 5.2 Report to a Justice regarding it. The thing should be returned to the lawful owner unless the RCMP or Crown satisfy the Justice that detaining the thing is required for the purposes of any investigation, preliminary inquiry, trial, or other proceeding;
- b) If the justice is so satisfied, the justice shall detain or order detained the thing seized for up to three months following the initial seizure. If during that three-month period, proceedings are instituted in which the thing may be required, the detention is extended without any further orders;
- c) Whether the thing "may be required" has a broad meaning and is not limited to the evidence that is necessary to the Crown's case. It is not even limited to the trial itself. A thing may be required for a variety of other related proceedings. The case law shows that "other proceedings" casts a wide net capturing applications that include anticipated *Charter* applications and forfeiture applications;
- d) After proceedings are instituted in which the thing may be required, Mr. Jackson may seek the return of the seized items if he applies for leave through s. 490(8) to apply under s. 490(7). To do that he must establish that hardship will result unless the application is allowed to be made at that time;
- e) If he passes that hurdle, he must establish under s. 490(7) that "the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4)." The purpose under subsection (1) is that "the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding." Subsection (4) is not applicable in the instant case;

R. v. Jackson

- f) The onus on an application made under these subsections falls on Mr. Jackson, not the Crown (see *Criminal Pleadings and Practice in Canada* (3rd Edition), *Davidson and Soares*); and
- g) Mr. Jackson has failed to discharge this onus. He has failed to establish hardship for the following reasons:
 - I. The alleged hardship in Mr. Jackson's affidavit is irrelevant to s. 490(8). His chief complaint is that the detention of his firearms means he cannot use those specific firearms for hunting. In essence, he does not want to borrow a firearm from someone else to go hunting (in the event his conditions of release were amended to allow him to hunt while supervised by another). That alleged hardship will endure regardless of when the application is heard. And, even if hardship is found, s. 490(8) does not permit seized things to be returned to a person because the detention of those things in itself causes hardship. What s. 490(8) permits is that an application under s. 490(7) be made prior to the expiry of any detention order, rather than afterwards.
 - II. Mr. Jackson's true remedy is not an application under s. 490, but an application under s. 502(2) to replace his Undertaking with a Release Order that permits him to hunt while supervised by another properly licensed person.

19 The Crown also submits that Mr. Jackson has failed to establish that no proceedings were instituted in which the seized stems may be required. His application should be rejected for the following reasons:

- a) It is self-evident that proceedings were instituted by the Information before the Court;
- b) Mr. Jackson provides no support for his contention that the seized items are not required for the instituted proceedings. Nothing in his Notice of Application or filed affidavits addresses why he says the seized items are not required. All he asserts is that "No proceedings have been instituted in which the property is required." The Crown disagrees. He has failed to discharge the onus to show that is the case;
- c) Even if the onus falls on the Crown (which it does not), it is evident from the materials already before the Court that the seized items may be required for any number of proceedings including:
 - I. The Trial: The detained items could be evidence if the Crown argues that Mr. Jackson's firearms assist in proving the *mens rea* by showing that he meant his threat to be taken seriously or intimidate,
 - II. *Charter* Application(s): Mr. Jackson may raise *Charter* arguments for which the seized items may be required. For example, the defence may argue that the RCMP breached Section 8 by filing the Form 5.2 Report to a Justice on April 24, 2023. The defence might argue that this was not "as soon as is practicable" under s. 489.1, constituting an alleged breach of Section 8.
 - III. Forfeiture Application: Should Mr. Jackson be found guilty of uttering threats, the Crown may seek forfeiture of the seized items. The Crown may argue that the threat involved a firearm and therefore forfeiture is mandatory under s. 491. Or, if Mr. Jackson receives a firearms prohibition that does not specify otherwise, the seized items will be forfeited under ss. 115 and 116 of the *Criminal Code*.

DISCUSSION

20 The seized items were taken by the RCMP on March 19, 2023. Mr. Jackson did not consent to their seizure or detention at the time or since.

21 The Form 5.2 Report filed by the RCMP resulted in the Justice granting a detention order for the seized items. That order required the Justice to consider whether the seized items are required for the purposes of any investigation or any preliminary inquiry, trial or other proceeding. That determination is not merely an administrative step as alleged by defence counsel but the level of evidence is somewhat lower than the balance of probabilities.

22 The Information (the institution of proceedings) was sworn on May 2, 2023, which is within the three months described in s. 490 (2) (b) and as such no further application for an extension of the detention order is necessary.

23 The remaining issues to be decided include:

- a) Has Mr. Jackson demonstrated that he has suffered hardship; and
- b) Will the seized items may be required for the trial or other proceedings.

24 As the applicant, Mr. Jackson bears the onus of satisfying the Court both that hardship exists and that the seized items are not required for this or any other proceeding.

25 The "hardship test" described in s. 490 (8) has a low evidentiary threshold (see *TO-Bargains Inc.*) and creates an avenue for an application under s. 490 (7) but does not necessarily result in granting the relief sought (see *Alchin*).

26 I disagree with the Crown's submissions that hardship has not been established in the circumstances. Mr. Jackson's hardship is on many levels including:

- a) He is unable to provide sustenance to his family and himself which is the equivalent of negative financial repercussions as described in *TO-Bargains Inc.*;
- b) The sustenance hunting conducted by Mr. Jackson has community and cultural importance and ramifications regarding his standing within the community;
- c) The Courts have long established that Indigenous people have a constitutional right to participate in hunting and other food gathering for sustenance or cultural purposes within their traditional territories; and
- d) The importance of familiarity with the firearm and ammunition being used in a hunt to the success of the hunt seemed to be either unknown to or of no importance to the Crown.

27 This determination only gets Mr. Jackson part way to his goal of having the seized items returned to him. He must also establish that no proceedings have been instituted for which the seized items may be required.

28 I have carefully considered s. 490 (7), the case law provided and the submissions of counsel. Although all of the cases provide some guidance, none of them are on all fours with the circumstances of this case.

29 In *Tingley*, the seized item (an excavator) was returned but in large part because no proceedings had been instituted and were not likely to be for some time and the Court was satisfied that Mr. Tingley required the equipment to continue other work on his property and as a source of income.

30 The Crown pointed to three possible proceedings in which the seized items may be required; the trial, anticipated applications for *Charter* relief and forfeiture applications.

31 There are some differing perspectives in the case law with regard to whether or not a forfeiture application falls within the wording of "other proceeding" (see *Tingley, Clarke, Soares and Alchin*). For the purposes of determining Mr. Jackson's application, I do not need to address this issue.

32 I do not accept the Crown's contention that the seized items may be required for an application for *Charter* relief. Even if there were to be a *Charter* application, which is speculative at this time, there would be no need for the seized items detained or presented to the Court as part of that process. This case is much different from the circumstances in *Church of Scientology of Toronto* where the actual items seized may have been needed to be examined as part of the application.

33 Mr. Jackson has not persuaded me on a balance of probabilities that the seized items may not be needed for the trial itself. They may be relevant from a number of perspectives including:

- a) If he did utter a threat as alleged did he have the means to carry out the threat by utilizing one of the seized firearms;
- b) The seized items may not be firearms. In order to determine that they may need to be forensically examined by an expert qualified in that area; and
- c) Although the seized items were taken from his residence, there may need to be evidence establishing whether Mr. Jackson owned the firearms and whether he was legally permitted to possess them.

34 In those circumstances, I am compelled to dismiss his application to have the seized items returned to him, with one exception.

35 In order to facilitate Mr. Jackson potentially being able to hunt with other firearms under a Release Order he will need to have his PAL and any other required documentation seized from him. The immediate return of those documents is required so that in the event he is in possession of any firearm under a Release Order he will not have any issues with an RCMP member or a Conservation Officer who may stop him.

36 Although I am required by the *Criminal Code* and legal precedent to make this order, I am disappointed that Mr. Jackson's obvious hunting expertise will not be available to provide for himself, his family and his community. This decision will also interfere with an important part of Mr. Jackson's cultural activities; something the Crown made clear in its submissions it considered to be of little or no importance.

37 It is also disappointing that counsel could not have come to an arrangement where some or all of the seized items could be turned over to a duly licenced third party who could release them to Mr. Jackson as needed for specific sustenance or cultural hunting activities.

DECISION

38 The application by Benjamin James Jackson to have the 12 firearms seized by the RCMP on March 19, 2023, as described in the Report to a Justice (Form 5.2) returned to him pending trial is dismissed.

39 The application by Benjamin James Jackson to have the identification cards and other documents seized by the RCMP on March 19, 2023, as described as Tag Number 13 in the Report to a Justice (Form 5.2) returned to him pending trial is granted.

M.J. BRECKNELL PROV. CT. J.