

File No. 5671

SUPERIOR COURT OF JUSTICE

B E T W E E N :

OPTIMUM FRONTIER

Applicant

- against -

SOLICITOR GENERAL ET AL

Respondent

PROCEEDINGS ON APPLICATION

**BEFORE THE HONOURABLE MR. JUSTICE D. SALMERS
on Thursday, September 26, 2002,
at COBOURG, Ontario**

APPEARANCES

N. GROOT, ESQ.

Counsel for the Applicant

D. THOMPSON, ESQ.

Counsel for the Respondents

J. KUBURSI, Ms.

Counsel for the Fire Marshall's Office

R. BECKER, Esq.

Counsel for Mr. and Mrs. Rollo

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Optimum Frontier v. Solicitor General**Thursday, September 26, 2002****U P O N R E S U M I N G :****(11:45 a.m.)**

5 THE COURT: I see one matter that I haven't yet addressed, number four, Optimum Frontier vs. Solicitor General. I have no idea what it's about or how long it's going to take.

10 MR. GROOT: Good morning Your Honour, my name's Norman Groot, I am here for Optimum Frontier, the Applicant. This Application will probably take a better part of two hours.

THE COURT: Okay.

15 MR. GROOT: And it's on a rather novel issue, and that's probably the reason for the length of time it's going to take. So....

THE COURT: What is the issue?

20 MR. GROOT: The issue is if an insurer should-may have access to evidence seized by the police during-as pursuant to a Search Warrant, pursuant to s.490(15) of the Criminal Code which allows for interested parties to have access at discretion of the Court evidence seized by the police. This is a case of fire which I believe there is no issue that this is an arson, but there is an issue as to who committed the arson, and the insureds are a suspect

25 and the insureds have asked for a payment under their insurance policy and the insurer is in a difficult position as to determine payment or not.

30 THE COURT: What I will do, we'll hold this down till-I've got a couple of brief criminal pretrials that I'll have to do. So I'll conduct those pretrials and then I have the foreclosure matter

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that I'll also deal with, so we probably won't get to this before lunch, just so you know, and then we'll just....

MR. GROOT: 2:00 p.m.?

THE COURT: Probably not until then. I can't see us getting to it before then, but-and I want to read some of it at least.

MR. GROOT: Yes.

THE COURT: You don't have factums do you?

MR. GROOT: Yes.

THE COURT: There are factums?

MR. GROOT: Yes.

THE COURT: Has there been a filed one?

MR. GROOT: Yes.

THE COURT: Okay. Well if we can we'll get to it before lunch but I doubt it. I'll try to but I can't promise you before lunch. Alright?

MR. THOMPSON: Thank you Sir.

THE COURT: So what I'll do now, I am going to go into chambers and we'll do the criminal pretrials in chambers, alright? Thank you.

COURT REPORTER'S NOTE: (At this time other matters were spoken to in chambers.)

R E C E S S

11:25 a.m.

U P O N R E S U M I N G :

12:15 p.m.

THE COURT: So Mr. Becker and I'm sorry I didn't get your name Madam. Your initials?

MS. KUBURSI: I'm sorry it's Kubursi, K-U-B-U-R-S-I, initial J. for the Fire Marshall.

THE COURT: I'm sorry K-U-....

MS. KUBURSI: K-U-B-....

THE COURT: B...

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MS. KUBURSI: U-R-S-I.

THE COURT: Initial?

MS. KUBURSI: J. Initial J.

THE COURT: And essentially Ms. Kubursi you are just adopting the position of Mr. Thompson, the Crown?

MS. KUBURSI: Yeah, essentially yes.

THE COURT: Yes.

MS. KUBURSI: And I may have some oral submissions.

THE COURT: And Mr. Becker you are not opposing this?

MR. BECKER: I'm not opposing this.

THE COURT: Anytime you're ready Mr. Groot.

MR. GROOT: Your Honour I have appeared here for your assistance and for my friend's assistance, a summary of the or an outline of the submissions I'm going to make if it is at all helpful to you for your own purposes.

THE COURT: No objections?

MS. KUBURSI: No.

MR. THOMPSON: No I'm fine.

MS. KUBURSI: Thank you.

MR. GROOT: Your Honour the underlying issue which we intend to raise today on behalf of the Applicant is what the Court feels should be the balance to be drawn between the police right to investigate and insurer's right to investigate concurrently and there's actually one issue I just wanted to canvass with the Crown before we go ahead and that's on the issue of the search warrants. I did talk to Mr. Thompson about this before. The search warrants were requested by the Rollos and not provided to

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them by the Court, is my understanding. The informations that are the basis of the search warrants were provided to our adjuster. I'm going to be making some reference to these search warrants. I have not included the informations for the search warrants in the materials that I've provided to the Rollos. If there was an objection to this being released by the Crown or by the Court, and I just wanted to make sure that while my reference to these things, are to these informations, the Crown doesn't have any issue with that.

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MR. THOMPSON: I don't know what my friend intends to allude to. Certainly there's been no sealing order for the informations to obtain, so as I understand it, they are public documents at this moment.

MR. GROOT: Alright.

THE COURT: Okay, go ahead.

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MR. GROOT: Alright and Your Honour on behalf of the Applicant, we're not here on behalf of the Rollos as is apparent. I also want to make it quite clear from the outset that our intention is not to request for control or actual physical possession of the exhibits. We are simply asking for access. Our intention is not to upscale or in anyway interfere with the police investigation, but rather our intention is to find a way where the insurer's investigation can run complimentary and parallel to the police investigation without causing any interference, and Your Honour I'm sure that you're aware of cases such as the one against Pilot Insurance, of bad faith claims. The insurer

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feels that it has a duty to do what it can to
obtain the most information it can before it makes
a decision on coverage. Again, by way of overview,
we seek an order pursuant to s.490(15) of the
Criminal Code to grant the insurer's expert, Rochon
Engineering access and this is what I want to be
clear on, access to photocopy, physical-photocopy
documents, to photograph physical property, that
was seized pursuant to a number of search warrants
conducted by the O.P.P. We also are looking for
notice of when examinations and scientific testing
of the physical properties is to take place, and we
are requesting access to witness and videotape any
scientific testing, and this all falls under, what
I'm going to be arguing is the word examine,
pursuant to s.490(15) of the Criminal Code, and
although I haven't requested it in the order, and
in my factum itself, it presupposes that we're also
going to be looking for the results of those
testings. Whether that can be made at the time of
the testing, or whether that can be made at a later
time, has to be determined. This is an unusual and
unprecedented case. It's evidence from the
informations that support the search warrants that
the police have a great deal of evidence on which
to base a charge against the insured David Rollo.
The police have not charged David Rollo and our
issue is not with how the police conduct their
investigations, but only that the insurer needs
access to the exhibits for the purpose of making
it's own decisions. Exhibit "Q" of the Affidavit
of Documents-Affidavit of Shannon Thorne, it states
on page 3, when the adjuster is writing to the

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Rollos, under the heading of "Critical Path of Handling...", and the adjuster in this case is explaining to the Rollos, how they're going to make a decision on coverage. He says, "We await the outcome", in a second paragraph, the last line, "We await the outcome of their" being the police, "investigation". This is back on March 14th of 2000. Since that time, and reference should be made to Exhibit "QQ" a Proof of Loss has been filed by the Rollos, with the insurer and it was received by Crawford on July 25th, which effectively gives them pursuant to s.148 of the Insurance Act to yesterday, September 25th to make payment. Now my friend Mr. Becker has consented to a seven day adjournment on that-for the purposes of this Application. Now the facts essentially Your Honour, are agreed upon. Between February 9th and February 22nd, 2000, the Rollos were at various locations in the United States. They weren't home. On February 11th, 2000 there was a fire at the Rollos' residence and business, this is a business residence combination complex, their address at 1571 13th line, Campbellford. Again refer to Exhibit "F". The Rollos are-there's no issue that the Rollos are insured by Optimum Frontier and have coverage for accidental fire loss. The O.P.P. and the Ontario Fire Marshall found evidence upon the time when they fought the fire, of an arson and pursuant to search warrants conducted on February 12th, 13th, 15th, and 18th, seized a large number of exhibits. On February 25th Optimum Frontier, the Applicant, retained Rochon to determine origin and cause, which is standard in a fire investigation,

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and between February 25th to present, Rochon has attempted to gain access to the exhibits that were seized by the police and the Fire Marshall and has been denied such access. Now it's my understanding that the police have not done any testing. It's also my understanding that they have not done testing due to the inquiries of Rochon. There was some mention that some testing had been done, but I have no knowledge of what that is, and again this is not a case of how the police handle their investigations, just about access. There is one fact that is in dispute and I don't know if it will be crucial to your determinations but I point you to it in, I think it's the first paragraph of the Crown's factum. They say that David Rollo is not considered at this time to be responsible for the arson, but is merely a suspect. Now where did I take this statement from? And for that purpose I point you to Shannon Thorne's affidavit at Exhibit "I" which deals with-which is a copy of the search warrants and at the third page (sic) in on Exhibit "I", now at the top of the page says, "Appendix B", "David Rollo, date of birth, January 7th, 1949, did on or about the 11th day of February, 2000, intentionally or recklessly cause damage by fire, contrary to s.434 of the Criminal Code...", and that's where, that was essentially why that line was put in-it affects in the factum. This same line is also made at a subsequent information, I believe at Your Honour Tab "J", but for the purposes of today, right now, that is why that line was put in. I don't know if the police have changed their opinion at this time, but it seems to

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read like a standard information. On this page I list, and I won't go through it, but I list what appears to be the evidence that the police currently have to suspect that David Rollo was responsible for this fire. Of course David Rollo is one of the insured, and it's quite a lengthy list and again I won't go through each particular point. There is also on the following page, a few issues which I raise as evidence which may vindicate the Rollos, which may prove that they are-point to the fact that they weren't involved and so what this case comes down to, it's not a case of, is this an arson? This clearly is an arson, but rather a case of who is the arsonist? Now again with respect to the issues to be addressed, under s.490(15), there's authority that grants, the section says: "The court has authority to order that an interested party", and I don't think there's any issue that the Applicant is an interested party, "Be permitted to examine anything detained pursuant to a Criminal Code search warrant". So the issue really is, when should the Court permit such access? When should a Court deny such access? And if such access is permitted, what limits should be put on it, pursuant to s.490(16) of the Criminal Code, and by way of outset, the first case that I have in my book of authority, which really is the only case on point, the case of Haynes v. Ontario [1998] O.J. No. 4386 (Ont. Gen. Div.). In paragraph 11 of that case it say, an Applicant should be-an interested party should be permitted access, if they have "sufficient interest", and my argument is, is that Optimum

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Frontier does have sufficient interest. Now again by way of brief overview I've listed the history of the denial for access, and the reason I've done this is because it doesn't appear that it's clear from the various parties involved, that would be the Crown, the O.P.P., the Ontario Fire Marshall, who should be making the decision as to granting access and what policies to follow. There appears to have been a meeting schedule for March 7th, 2002 to allow Rochon to have access to the exhibits, but that meeting was cancelled. I don't know who that meeting was cancelled by, on whose advice it was cancelled, but if we look at Exhibit "T", and I've highlighted on page two the paragraph starting underneath the quote, and also a portion of the final paragraph, but essentially it says: the Crown was advised the Ontario Fire Marshall did not want access to be granted. There is also a point on this at Exhibit "W", where there is a Mr. Silvestri, who I believe is a Supervisor with the Ontario Fire Marshall and he's saying that the Crown does not want Rochon to have access. So there seems to be a bit of contradiction there and again at Exhibit "T" in that letter, it appears to say the Ontario Fire Marshall has no issue with access, but it must consult with the O.P.P. So when we're looking at around March 7th, it appears the three parties are assigning responsibility to each other. At Exhibit "R", which is now March 21st, the Ontario Fire Marshall refers the decision to the O.P.P. The first paragraph, the last three lines, I wish both parties-"I advised both parties that a Criminal investigation was being conducted

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and that their inquiries should be directed to the Northumberland O.P.P....", and she-he later names Detective Constable Lisa McInnis. On March 24, and I have this at Exhibit "S", and I'm looking at the second paragraph, it appears to say, the Crown says that the Ontario Fire Marshall says, "There is no policy requiring attendance of interested parties..." Then at Exhibit "Z", a letter dated April the 3rd, a letter from the Crown, it says it's his opinion the police should be allowed to continue their investigation as they see fit. Of particular importance is the exhibit at Exhibit "AA", which is from Crown Attorney John Sotirakos, Director of Crown Operations and I've highlighted the quoted paragraph as well as the paragraph beneath it, the last paragraph on that page and the only paragraph on the second page and essentially what the Crown has said here, is that as Criminal charges have not been laid, it is for the Ontario Fire Marshall to decide if interested parties shall be provided access. But if Criminal charges had been laid, it would be consistent with the Crown's own policies to permit interested parties access, and so since Criminal charges have not been laid, it seems to point out that we should be referring to the policies of the Ontario Fire Marshall for some reference as to what should be done in this case. On July 11th, I was advised again that the police should be allowed to exhaust their own investigations. This discussion went back and forth between July 11th and July 16th. On July 26th at Exhibit "OO", the last....

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THE COURT: Well the whole thing is this, right now, neither the Crown, nor the Fire Marshall want to grant access to the exhibits, correct?

MR. GROOT: Correct.

THE COURT: Okay.

MR. GROOT: That's right and I'm just-the reason for-I'm going through this is just to point out that it doesn't appear-or it appears that there seems to be some dispute over who is responsible for making the ultimate decision on this. Alright, in that case I'll refer you then to Exhibit "N" Your Honour, which are the guidelines for the Ontario Fire Marshall.

THE COURT: But don't we have to deal with the Crown here, because these were evidence seized pursuant to a search warrant, isn't that the case?

MR. GROOT: Right.

THE COURT: So why do I need to look at these guidelines from the Ontario Fire Marshall?

MR. GROOT: Because the Crown does not have a policy with, dealing with access to exhibits seized before a Criminal charge is laid.

THE COURT: But isn't that governed by the Code.

MR. GROOT: Well it's governed by this particular section that-we're making this Application pursuant to.

THE COURT: Right.

MR. GROOT: Right.

THE COURT: So we don't really need to know about the policy do we? The Code is what determines it.

MR. GROOT: Well the Code is very general. It doesn't say on what sort of consideration should be given to the discretionary decision to grant access

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and if you'd rather Your Honour we can skip right to the one decision that deals with this issue which is....

THE COURT: That's what we have to look at, the discretion. Should I exercise my discretion and grant the access, that's the case, right?

MR. GROOT: Right.

THE COURT: So let's get to that then. I'm satisfied, I don't mean to rush you or anything I'm just meaning that we know that they're not granting access. We know they don't want to. We know that it has-it's a discretionary decision of mine whether or not to grant access and on what terms, but I don't need to know all the background behind that. I appreciate that there is a background, but I think I have just got to know why in this case, should I exercise my discretion to grant what form of access to you.

MR. GROOT: Well essentially the reason that we need access is because the insurer has to make a decision on coverage and the decision to make-or the basis for making a decision on coverage of course is based on evidence. We have very little evidence at this time and the only evidence we essentially have is these informations to the search warrants and we only have the informations for two of them, not all four.

THE COURT: And I know we have the competing interests of the insurer and they're obligated to make a decision on coverage within sixty days, which has been extended, versus the competing-versus the interest of the Crown in conducting their investigation.

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MR. GROOT: Right and in my-my submission is that these two competing interests can run parallel.

THE COURT: Yes.

MR. GROOT: That there can be a mechanism set up so that the-an insurer conducting it's own legitimate investigations, which have, in my submission, as much social policy reason for having them conduct their investigations as do the police. Most people in this Province have insurance, they don't want to have their claims being denied because the insurer cannot properly investigate their claims.

THE COURT: So how could we give access to you without impinging on the Crown investigation?

MR. GROOT: Precisely by the type of order that I've requested. When it comes down to the word examine, and what my friend is going to say that the word examine concedes that it includes the word photocopy or includes the meaning of photocopy, which is what was dealt with in this Haynes case. It's my submission that it also includes the allowance for witnessing a police scientific investigation where the police retain C.F.S. or some other expert to do scientific testing. It allows witnessing, that sort of thing. My concern, Your Honour, and what we're not requesting is to actually take possession or even touch these exhibits. We do not want to interfere with the police investigation. We don't want continuity issues to arise if there is a Criminal prosecution, but at the same time, those concerns being legitimate, it's my submission that there is going to be no issues that arise in voir dire in a Criminal prosecution if the investigator for the

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insurance company is simply allowed to witness them, not to touch the exhibits not to tamper with them, but the scientific testing that's going to be done, in the opinion of the insurer's investigator, will cause-will be destructive in nature. It's just by nature of the type of scientific testing they're going to do. So in that case, and as we are required to have evidence in order to deny a claim or to pay a claim, either way, to decide one way or the other. What we would like is the opportunity not so much to physically examine, to touch, but in replacement, or in the alternative to that, to actually be there to watch the government's experts do that. So we want to photograph what are physical objects. We want to photocopy what are documents and we want to witness the testing because there won't be, in all likelihood, there won't be any testing conducted by the insurer, subsequent to a Criminal investigation, subsequent to the Criminal testing, the testing done by the police.

THE COURT: Would it not be sufficient for the insurer to obtain a report as to the result of testing from the Crown?

MR. GROOT: Well, that is another alternative.

THE COURT: Would that not satisfy the insurer's obligation in making their decision on coverage?

MR. GROOT: It would assist, but what I'm saying, my-and I would actually want in that report, a report that goes from the police's expert to the police or the Crown. However, I think that it would even be stronger evidence for the insurer to have a videotape of this testing, so that it can

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actually say to the insured, one way or the other, that not only do we have a report, but we actually witnessed this testing. We have no concerns with its integrity and witnessed, stand on that report.

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THE COURT: But if I were to say that you're entitled to a copy of the report, is the insurer not protected from a bad faith argument by-you know from the insured, who might say well you should have had a copy of it and you say, well the Judge said no, I can't because that would have jeopardized the Crown investigation.

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MR. GROOT: That's precisely why we're here today to get a judicial order as to what an insurer should do in these cases. *VQ.*

THE COURT: Alright.

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MR. GROOT: What we want to do is, we don't want to leave a stone unturned. We don't want to leave the opportunity for the insured to come back to the insurer and say, you didn't do enough. So in this case could we make a decision based solely on the information of the search warrant? Hypothetically, yes, but if we then take this step, which we're here for today, to find out exactly where a Court is going to draw the line on parallel investigations between the police and the insurer, then we don't know.

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THE COURT: Alright, I follow you. Okay, do you need to say anything else or should I hear from Mr. Thompson at this time?

MR. GROOT: Well....

THE COURT: Go ahead, I'm not going to stop you.

MR. GROOT: I appreciate what Your Honour has said about reference to the Ontario Fire Marshall's

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5 policies, but I think it actually is kind of important because the Ontario Fire Marshall has, you know a long history of doing investigations with the police and with insurance companies and the-because based on this experience, they've actually drafted their own policies and what they've come to recognize is that it's very important for both insurers and the police to actually be there. The more people around the table who can add input or opinion or at the less, opportunity to say something at this testing did or did not happen, the better it is and in their own policies they say, where practical, interested parties shall be provided the opportunity to attend testing solely as observers.

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15 **THE COURT:** That's right, but weren't these-wasn't this evidence seized pursuant to a Crown warrant?

MR. GROOT: Yes.

THE COURT: So it's in the possession of the Crown.

20 **MR. GROOT:** Well....

THE COURT: So it's the Crown's decision whether....

MR. GROOT: Executed by the O.P.P.

THE COURT: Right, well....

25 **MR. GROOT:** Yeah.

THE COURT: But it's the Crown's decision whether or not to release the information. It's not the Fire Marshall's decision.

MR. GROOT: Well I'm not exactly....

30 **THE COURT:** Am I right on that?

MR. GROOT: No-well I'm not exactly sure on that either because as I pointed out in Mr. Sotirakos's letter, he said the Crown has a policy when it

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comes to access to exhibits after a charge. They have no policy on access to exhibits before a charge is laid. X

5 THE COURT: Well it's the Code we've got to go by and the Code says its discretion I've got to determine whether there's sufficient interest. ← 12

10 MR. GROOT: Right, so my submission is that the Crown actually doesn't have a policy that they can go by and it's not really the Crown's decision, it's the Court's decision, that's....

15 THE COURT: Right.

MR. GROOT: Why we're bringing an Application today.

THE COURT: Right, okay. I follow you.

15 MR. GROOT: If that is-I have a bunch of comments here listed in reply to the Crown's Factum, but maybe I should save that until after....

THE COURT: No go ahead.

20 MR. GROOT: What the Crown have to say-in the Crown's Factum, at Point "B" number seven, because it's paragraph seven, number one. Maybe I should pull this out in a minute. Again, I'm kind of beating the same course to death here, but it seems to be the basis of the miscommunication between the insurer's expert and the police, which is that we are not actually seeking control of these exhibits, or to actually even physically touch them, which is what it says here in paragraph one, the "Knowledge of and the right to physically inspect...". We are not looking for the right physically inspect. So we're looking to photograph and copy and to witness the testing and eventually to the results of the testing. I mean I have my own concerns. I would

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not expect the Court to allow us to physically inspect and possibly tamper with an exhibit. I also think at point 3, where they said, "Knowledge as to investigative techniques utilized by the authorities in the course of their investigations.", I don't know and maybe if my friend could help me, but I don't think they really have investigative techniques that are unknown to the private sector as far as scientific testing and all of that kind of stuff goes. There's all kinds of private labs that could do similar sort of testing, if the police weren't involved in this case. At paragraph 14 of the Crown's Factum, dealing with the issue of "Overriding State Interest", that's precisely, I think, the issue with that issue here today.

THE COURT: That's right, the Crown versus the insurer.

MR. GROOT: Yeah. The Crown is seeking that the terms to be imposed to be deferring access or not granting access whatsoever, or deferring access until the police investigation is complete and it's my submission that's not appropriate due to the time lines which an insurer has to act under, pursuant to the Insurance Act. I was not able to, because this just came in three days ago, cross-

examine Constable McInnis on her Affidavit.

Generally I have no issue with it, but I have listed a number of points there. The one thing is the duty of the insurer to disclose information, which is a concern of Mr. Becker to the Rollos. I don't believe we are under a duty to disclose unless we actually get into the Civil litigation

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process and into the exchange of the Affidavit of Documents. We're not at that point right now and therefore information that is obtained through an insurer's investigation, of course, is subject to its' own litigation privilege. Again, the notion, which she points out at paragraph 18, this business of a duty to secrecy, it's my submission Your Honour, that is a red herring, because the Courts routinely decide between the right to privacy and the right to know. Her point at paragraph 19, where Mr. Lane has advised-has not advised-that Mr. Lane is of the opinion that we actually don't need this access. Mr. Lane hasn't provided that opinion to either myself or Rochon. With respect to the Crown's authorities, Your Honour, they've provided as authority R. V. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.) of course a well known case, and R. v. Brown [1997] O.J. No. 6163, these are cases, Crown disclosure cases, again our intent is not to assist the insured to obtain Crown disclosure through the back door, which seems to be a concern of the Crown, a legitimate concern. Specifically the case of Stinchcombe they discuss a Crown's right to refuse disclosure when it comes to protecting informers, there's no case provided by the Crown which deals with refusing access when it comes to scientific testing, and simply photographing and photocopying exhibits. (Of course the principle as stated in the Stinchcombe case, that property seized as the result of a search warrant is not property of the Crown, but property of the public to make sure justice is done and justice applies equally, I submit, to the Criminal

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and Civil sphere. I would also like to point out Your Honour that in that case, the Court says that the onus is on the Crown to prove why disclosure should not be given, and equally it's my submission that in this case, the onus is on the Crown to prove why access as requested to these exhibits, should not be provided. Of course from the insurer's perspective, as mentioned, the most important case is the Haynes v. Ontario [1998] O.J. No. 4386 (Ont. Gen. Div.), and that's at Tab 1 of our Book of Authorities and what I refer Your Honour to in this case, this is a case I think a victim of an assault, is what this was about, he wanted to launch a Civil action in the United States. The Criminal charge had been laid and this is how the Crown differentiates this case. The Court ruled that the victim of the crime had a-was an interested party. At paragraph 7, I think is one of the important points "'interest' enunciated in s.490(15) extends beyond a proprietary...."

THE COURT: I'm satisfied the insurer has an interest. X

MR. GROOT: Okay.

THE COURT: I am satisfied of that.

MR. GROOT: And at paragraph 8 then, dealing with motivation. It says that "...the order need not be directly related to the criminal prosecution that was the basis for the search warrant." At paragraph 12, the Justice states "The provisions of the Rules of Civil Procedure and...of the Criminal Code stand separate and apart, neither having precedence over" one "over the other." Which to me

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is an important point to bring across in this Application, that these are simply two separate but equal systems. The police right to investigate does not supersede the insurer's right to investigate and that where it's possible, the two should be allowed to go ahead side by side. And then of course at the end of this case, in paragraphs 15 through 17 are conditions that are put on the access, and this is all laid out in my Factum as well. Specifically I refer Your Honour to paragraph 18 of my Factum where the conditions are listed. Your Honour in my Factum at paragraph 8, 10, 11, I make reference to a section of the Criminal Code and I italicize the word "person". I think the Criminal Code understands that it's not only the police who conduct investigations, but it can also be individuals who are not police officers, and most of the cases in my Factum, other than this first one, I deal with those sort of issues and I won't go through this at any length, but the case of Hung-Huong Ltd. v. Sovereign General Insurance Co. [2001] O.J. No. 2678 (O.S.C.), at Tab 3, and Rizzo v. Hanover Insurance Company (1990), 68 D.L.R. (4th) 420 (Ont. H.C.J.) at Tab 4, and Sweeney v. Zurich Insurance Company [1999] N.J. No. 185. (Nfld. C.A.) which I didn't include, which was supposed to be at Tab 5. These cases are all just included for the point of explaining what the onus is on an insurer to deny coverage in an arson type case, and in these cases it discusses that the onus is actually higher than in a typical Civil action. If there's allegations of criminality that are being made, then the

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standard is higher in the spectrum of balance of probabilities and there has to be evidence that there actually was an arson, which is not a problem in this case, but there has to be evidence of motive, opportunity, and credibility of the insured, which is all listed I think on page five of the case at Tab 3, and right now we have little evidence that relates to the credibility of the insured. It certainly would be much more useful to have the type of evidence that we're seeking by way of this Application. Certainly in these type of arson cases, the insurers always supply an expert to the Court and right now the our insurer's expert effectively has nothing to provide to a Court. A lot of these cases are actually cases of battles of the expert. At the cases at Tab 7, or 6, 7, 8, and 9, I submit it's solely for the purpose of these are cases where the Courts have actually examined the issue of parallel investigations by insurers and the police in arson type cases, but it all has to deal with the section 8 search and seizure type of issues. Probably in the old days, certainly as referenced in the R. v. Ouaida [1996] O.J. No. 962 (O.S.C.) at Tab 7, and I would turn you to paragraph 89 in that case which is where the Court sets out it's major concern. This was a case where the insurer didn't appear to do any investigation, other than paying for the security to be there and also paying for the Fire Marshall to conduct the investigation. But the Court raises the issue of the Fire Marshall being in collaboration with a private insurer, at paragraph 90, the Court sets out it's concern again I might say in passing.

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Respondent Submissions by Mr. Thompson

5 These types of investigations will ultimately interfere with the administration of justice and that is the Crown's concern here today and that is why I was trying to seek a way to deal with these type of concerns. Just like in these cases that I'm referring to, the Courts have said that the police should obtain search warrants to obtain access to information that's held by insurers, likewise, we're here to get an order for access to information that's held by the police. Those essentially are my-the issues I wanted to raise Your Honour, subject to issues raised by the Crown.

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15 **THE COURT:** We're going to take a lunch break now and we'll come back here at 2:30 and Mr. Thompson can commence his submissions at that time.

MR. THOMPSON: Thank you Sir.

R E C E S S**1:20 p.m.)****U P O N R E S U M I N G****(2:30 p.m.)**

20 **COURT REPORTER'S NOTE:** (At this time another matter was spoken to briefly.)

THE COURT: Mr. Thompson.

MR. THOMPSON: Thank you Your Honour.

25 **THE COURT:** Before we get started, is there any materials which the Crown, which are being requested by the insurer, which the Crown is willing to release to them at this time?

MR. THOMPSON: Not at this time Your Honour.

THE COURT: Alright.

30 **MR. THOMPSON:** In my respectful submissions Sir, in resolving this Application there are really three questions that ought to be considered in order to arrive at a result. Those three questions I suggest are as follows: first, what is their need?

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Respondent Submissions by Mr. Thompson

And I here refer to "their" in terms of the Applicant. Secondly, what are the risks? And thirdly, how do you balance the factors? If I could address each of those three questions individually, commencing with the first one, what is their real need? It is my respectful submission that based on what you have heard today, they have no real need for the access that they are seeking. Counsel has effectively conceded in the course of his submissions, that they can respond to the claim with what information they currently have. Counsel indicated that hypothetically speaking, what we know now, will permit us to respond to the claim, and indeed that is, our understanding as well and it's documented in the Affidavit of Lisa McInnis at paragraph 19.

THE COURT: Okay, let's go to that Affidavit. Where is Ms. McInnis's Affidavit? Is it in your Motion record?

MR. THOMPSON: It was separate and apart from that and I saw it, it was in the file this morning.

MR. GROOT: Your Honour if I could assist, in mine, it's behind the Factum.

MR. THOMPSON: It's not with the Court's though, it's separate for the Court.

THE COURT: Okay, just make sure I've got it here. Okay.

MR. THOMPSON: Thank you. As I indicated Your Honour, that's set out at paragraph 19 of her Affidavit, where she indicates that in her view, she's provided the insurance company with sufficient information to address their immediate concerns and she indeed speaks of a telephone

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Respondent Submissions by Mr. Thompson

conversation that she's had with the Adjuster, Mr. Lane, when he confirmed that that was the case. So my submission is, the insurance company has had access to a great portion of the investigation as detailed in the information to obtain the search warrant. They are in a position to make a decision on the claim that has been filed and they do not need this access to, in effect, make that decision. To put it, perhaps in the vernacular, they've been given or they are aware of the meat and potatoes of the police investigation, but they're now asking that it be served with gravy on top, and they don't need it to make their decision. There is no real need. Let me address the second question, what are the risks? Those risks are documented again in the Affidavit of Lisa McInnis. The sum and substance of the Crown position is this, is that by granting the type of access that is being sought by the insurance company, may tend to compromise an incomplete ongoing investigation and that would arise Sir in two ways. First, it would provide access to a complete inventory of all articles in the possession of the police, which may become known and the significance of that is this, as we are well aware, police in the course of an investigation, do not release all information in their possession to the public. They hold back certain information and that information that is held back is critical in the course of their investigation because they can use that held back information as a test of veracity in the course of their investigation. So that is one basis upon which this access should not be granted because

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Respondent Submissions by Mr. Thompson

there is a risk of compromising or it becoming known what they know and have. Secondly, and even more significantly in my respectful submission, the risk is this, that by providing access to the insurance company through their retained expert, that it may become known what further investigation is going to be undertaken by the police and her Affidavit speaks to the fact that there will be further investigation. Her Affidavit is somewhat vague in terms of the further investigation and it is deliberately so. If I could analogize as it were, take it away from a case of arson, consider instead if this was a bombing, if the fire investigators were to examine the device that went off, it may very well indicate what the components of that device are made of and it would behove a police officer investigating a bombing to then make efforts to determine whether the suspect had access to those kind of components, whether there is a documented record of access to those kind of components, whether the suspect had knowledge as to how to fabricate such a device. These are the kind of investigative techniques that may be pursued as a consequence of the results of a scientific investigation, and for that to become known, may very well compromise the ability of the officer to (a) take those steps, or (b) to obtain that which he is looking for, because there is the risk that those items may be concealed. There is then in my respectful submission, documented in the Affidavit of Lisa McInnis, a real and substantial risk that the investigation could be compromised by the access being sought by my friend. Where does that

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Respondent Submissions by Mr. Thompson

take us in terms of a legal precedent? Your Honour has been provided with two authorities, the Stinchcombe decision and the decision of Justice Trafford in the case of R. v. Brown [1997] O.J. No. 6163. Both of those cases indicate and clearly confirm that in the case of an accused charged with a criminal offence, there is a constitutional right that the accused enjoys to disclosure of the evidence in the possession of the State. But what is of even more significance in both of those decisions is this, that even that constitutional right of the accused to disclosure will be ~~suspended~~ where disclosure may compromise or interfere with an ongoing investigation. I could take you to those passages, but they are referred to in the Factum as in each of the two cases, as to that principle, that is, that disclosure may be delayed where the risk of disclosure would be to compromise an investigation. My submission then and the answer to the second question is this, that there is a clearly recognized principle that disclosure may be delayed so as not to compromise an investigation and there is that clear risk in this particular case. That brings me to the third and final question that in my submission, the Court has to address and that is, ~~what should be the~~ balance of these interests? And in balancing the interests, I invite you to consider Sir, six factors: those factors I would list as follows: first, and as Your Honour has already observed, this is a discretionary Application. Your Honour may grant the Application not must grant the Application. Secondly, and as detailed more fully

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Respondent Submissions by Mr. Thompson

in the Factum, it is my submission that when you examine the regime in s.490 of the Criminal Code, it is evident that the State's interests will trump private interests in property. Where the State can show a legitimate need and interest in the property that has been obtained, even though they don't own that property, their interests will outweigh those of the actual owner or possessor of the property. If that is the case, in my submission, where you have as we do here, competing interests between the state and a private entity, such as an insurance company, similarly, the State interests should trump the private interests. The third factor I invite you to consider is this; my friend has fairly characterized this Application as being novel. A synonym for novel might be unprecedented. It is indeed my submission that this Application is unprecedented, it is novel. It is effectively a test case that I suspect my friend has launched here. It is unprecedented in two respects. First of all, and my third point is this, the timing of this Application, although permissible under the governing legislation and the governing section of the Code is something that has not been seen in any other decision under this section of the Criminal Code. In every other case, where access has been granted, the police investigation has been complete and charges have been laid, and that's all I'm suggesting should occur in this case. There is no case that my friend can point to where this type of access has been granted prior to the completion of a police investigation. Fourthly in considering the factors, I invite you to consider Sir, the

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Respondent Submissions by Mr. Thompson

degree of access that is being sought, because once again, in my submission, it is unprecedented. This is not simply a situation where they are seeking to look at what the police have. This is a situation where they are seeking to be party to and witness to scientific examinations conducted at the behest of the police. There is no case where this type of access has been permitted that I could locate, nor has my friend cited any. So it is unprecedented both in terms of what kind of access they seek, and when it is that they seek it. And finally when you consider the last two factors, the ones that I have already addressed, what is their real need? In my submission they don't really need it. They conceded they don't really need this extent of access. What is the downside? What is the potential jeopardy? The potential jeopardy is an ongoing investigation could be significantly compromised. In balancing those factors then, in considering that this is discretionary, that the State interests in my submission, should trump, that the timing and nature of access sought is unprecedented, they don't really need this kind of information in order to make the decision they are called upon to make and the risks to the

investigation, I submit that the Application should be dismissed or adjourned pending the completion of the police investigation. Subject to any questions, those would be my submissions.

THE COURT: How long do you say an insurer and an insured should wait for an investigation to be complete?

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Respondent Submissions by Mr. Thompson

MR. THOMPSON: Well it would depend upon the nature of the investigation. If you're asking how long this will take in this case?

THE COURT: Well in this case, let's use....

MR. THOMPSON: It could take a number of months Your Honour. My understanding is that the offices of the Fire Marshall can only conduct certain of their investigations at a certain time of year because they take place outdoors, and in the absence of that occurring, unless they can get it done soon, it may take a number of months.

THE COURT: And that being the case, it's going to take a number of months, how long should an insured and an insurer be obligated to wait?

MR. THOMPSON: Well in my submission Sir, they can make a decision now, based on the information they have and that's been conceded and they can proceed on in their own course in obtained access through the other avenues open to them as matters unfold. This is not a case where the police have hidden things from the insurance company. There has been disclosure in good faith on the part of the investigating officer, and Counsel concedes that. He knows what evidence is available to the police, and in my submission in balancing that against the jeopardy of an ongoing investigation, that the balance is in favour of refusing this Application at this stage.

THE COURT: Alright, that's fine.

MR. THOMPSON: Thank you Sir.

THE COURT: Go ahead Mr. Groot.

MS. KUBURSI: Sorry Your Honour.

THE COURT: Oh, do you wish to...

Submissions by Ms. Kubursi.

MS. KUBURSI: I would like to....

THE COURT: I'm sorry I thought you were just echoing his position, go ahead please.

MS. KUBURSI: Yes Your Honour I am on behalf of the Fire Marshall, fully adopting the submissions made by my friend and the manner in which the issues were set out, I entirely agree with, but I would just like to make a few comments.

THE COURT: Go ahead.

MS. KUBURSI: Just to assist, this morning Your Honour expressed some question about where the decision was made with respect to the release or whether or not this material that had been seized could be released, and this was an issue that was raised by my friend in presenting his Application, so I'd just like to make it clear that the position of the Office of the Fire Marshall and you know, I submit to you that it's consistently reflected in the materials and in the communication from the Fire Marshall, is that this is a police matter. The Office of the Fire Marshall doesn't independently make a decision as to whether or not to release any material that's been seized by the police for the purpose of a criminal investigation.

THE COURT: That's what I understood from this morning.

MS. KUBURSI: Yes, yes. So just to make that clear, and you know while I do fully agree with my friend's submissions, I would just like to again point out that this is an unprecedented case and we don't have any examples of cases in which an insurance company has sought the kind of access

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Submissions by Ms. Kubursi

that's being sought under s.490(15) of the Code and there's a reason for that because there are other means by which the insurance company can seek the information that it requires for the purpose of dealing with the insured. It's not that s.490(15) is the only way an insurance company can obtain the information that it needs and this is why we don't see any case law in that regard and it would be my submission that in making a decision under this section of the Code, the Court has to consider what is the nature of the interest and is it the kind of interest that justifies the making of the kind of order that's being sought and I think my friend's submissions on the extent to which a state interest needs to be given considerable weight in terms of how it is weighed against any other interest that might be asserted here. The insurance company is asserting what is essentially, I would say, a pecuniary interest and the Applicant expresses it as such in the Factum and the case law that we have, the Haynes case, and the R. v. Sutherland and the Queen (1977), 38 C.C.C. (2d) 252 (Ont. Co. Ct.) as well, and those are the only examples that we have. Those are not cases in which that kind of interest is being allowed to have this kind of access, to documents and other material that are being seized pursuant to a police investigation. So I would just point that out for the Court and ask that that be considered and in all other regards, as I said the Fire Marshall agrees fully with the position of the Crown.

THE COURT: What other means are available to the insurer to allow the insurer to obtain the

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Submissions by Ms. Kubursi

necessary information to make the decision on coverage?

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MS. KUBURSI: Well I would agree with my friend's submissions that as I believe was conceded, the insurer already has a significant amount of information available to them, in order to make their decision. Is it necessary for them to have full access to a criminal investigation for the purpose of dealing with this insurance matter and I submit to you that no, they don't require that access. There-should the issues between the insured and insurer go to Civil litigation, then there are the Rules of Civil Procedure, which allow the insurance company to seek further information for the purpose of that Civil action.

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THE COURT: The insurer has to use its best efforts to obtain all available information, correct?

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MS. KUBURSI: You know, I don't dispute that, but what I suggest is that s.490(15) of the Criminal Code is not in this circumstance, at this time, when you have an ongoing police investigation, charges haven't been laid, etceteras, that this is not something that's required as part, you know, of that duty. They can explore other avenues. There are other means of obtaining information at an appropriate time, and so I would also stress that it's not as if this is the only way that the insurance company can get what it needs and in fact, perhaps they have the information they need already. So those are my submissions, thank you.

THE COURT: Mr. Becker is there anything you wish to say on behalf of the Respondents, Rollo?

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Submissions by Mr. Becker
Reply Submissions by Mr. Groot

MR. BECKER: No Your Honour being not opposed, unless you're considering terms that would somehow restrict the disclosure that would be available in a Civil claim. I have no submissions to make.

THE COURT: What was that last-if I was setting terms?

MR. BECKER: Yes, if you were going to permit access on some terms that neither Counsel had proposed, that would somehow restrict the disclosure we would get in a Civil action, then I would have some submissions to make. I think....

THE COURT: Well no terms I would make would restrict disclosure on a Civil action, or a criminal action, it's entirely different. Criminal action is a separate matter from here. Disclosure in criminal is separate from disclosure in this case.

MR. BECKER: That's fine.

THE COURT: Okay? Okay Mr. DeGroot, or Mr. Groot, sorry, go ahead.

MR. GROOT: Yes.

THE COURT: Reply.

MR. GROOT: Your Honour the first issue raised by my friend is that, is there a real need? In my submission again, is that there is a real need.

There is a real need because insurers are more frequently being faced with bad faith claims.

There is a real need because we do not know where the wall is on how much information we can get before we make a decision. The point was raised that there are other avenues to obtain information, in that the police officer already disclosed

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Reply Submissions by Mr. Groot

information to the insurer. My submission is that's not accurate. The search warrants were obtained from the Court. The police have disclosed nothing to my knowledge. The information of Mr. Eric Lane as cited in the Affidavit of Constable McInnis, I would query if that is actually accurate. That opinion was never given to the insurer by Mr. Lane and I was certainly not aware of it and I find it kind of curious that they would send me here today, if that is in fact their position and even if that- I mean, the Crown's position is that the information of the search warrant is sufficient, my submission to you is that it is not, in that there certainly is a mechanism available to the Court to ensure the interests of both the insurer and the insured and I submit the public at large is better served. I think that it's a bit of a stretch to say that the police need this dome of secrecy which they are seeking. I would also like to point out that the onus here is on the Crown and there's been no specifics provided as to how this is going to compromise their investigation. It was the example given of the bomb, and that you may find evidence as a result of a testing that would lead the police to go to somewhere else to find further evidence. In this case Your Honour, in the search warrant informations, which I submit would be worthy of close review, the Crown-or the police officer has stated that they performed the subsequent search warrants on a garage and outbuilding and found further evidence which they intend to rely upon. This was back in February, days after the original

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Reply Submissions by Mr. Groot

search warrant. We are now over six months later. The Rollos have torn down the house and have rebuilt it, or are rebuilding it, to my understanding on their own accord. They've been back in this premise. The idea that the Rollos-or that the police would now be able to return to the Rollos residence and somehow obtain further information, based on testing, I think is somewhat remote, and that's why I don't think there's any prejudice to the police that these scientific tests are simply witnessed or videotaped. We're not asking to touch or tamper with the evidence, and I would also point out to Your Honour that it is a plausible mechanism that this information can be deferred from release to the Rollos. For example, in a typical Civil litigation process, when an insurer retains an investigator, that investigation is covered by litigation privilege. The insurer is not required to disclose the information to the insured. They may, at the end of the day, choose to do so, if they intend to rely upon it in evidence, but originally, in this case, we don't even have a Civil action, but say for the sake of argument, the Rollos do bring action against the insurer, the insurer could simply list this information in their Schedule "B" documents, and refuse to disclose it. They could also refuse to disclose it on the basis that there is a court order that the information not be disclosed until a completion of the criminal investigation and these are I think, avenues that are worthy of undertaking, but I think it's unfair to say to the insurer, no you can't have access to any

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Reply Submissions by Mr. Groot

information, notwithstanding your legitimate and I submit, equal interests, and this is what is said in the Haynes case, that civil and the criminal process are equal, but parallel processes and so I don't-it's my submission Your Honour that the criminal process should not be allowed to supersede the civil process where it can be evaded. I think in this case, we're not asking, like I said, to obstruct the criminal investigation, just to witness it, or at a minimum, photograph and photocopy the exhibits. I also point out to Your Honour, it's been suggested that this case is unprecedented and that this is seemingly a new technique that insurers generally will try to rely upon. The reason I put the cases in my Book of Authorities and my Factum on search warrant issues is because this is a seemingly new era that's coming about. I would submit to Your Honour that in days of old, the insurance investigators and the police more or less informally helped each other out, spoke with each other, gave each other information. Due to the new Charter era, where the police are required to get search warrants for information in the insurer's possession, the former I'll rub my back (sic) You rub my back relationship, is no longer there and therefore insurers are now required to find out exactly what the boundaries are to facilitate their investigations and do everything they can to avoid a bad faith allegation. Again, the-it's been said that there's other avenues. Your Honour asked my friend if there's other avenues. My friend said, well wait until the Civil litigation process.

Reply Submissions by Mr. Groot

THE COURT: You don't need to get into that. Okay?
I was not-I'm satisfied with that issue, it's okay.

MR. GROOT: Well those essentially are the points I
wanted to raise in reply.

THE COURT: A couple of questions. Can an
Application be made to extend the period that the
insurer has to make a determination on coverage-a
decision on coverage?

MR. GROOT: Well I haven't brought one of those
myself. In most of the cases that I'm familiar
with, a decision is simply made on coverage. In
this case, we've been granted an extension.

THE COURT: I understand.

MR. GROOT: And can I bring-of course the Court has
the authority to make any sort of decision it wants
to make. We certainly could bring a Motion for
that. I would think that we would try to hammer,
or come to an agreement with the insureds'
representative before doing so and certainly
obtaining a judgment such as we're seeking today,
would assist in that regard.

THE COURT: Now when you spoke of conditions
earlier today, I believe you referred to paragraphs
15 to 18 of Haynes?

MR. GROOT: Yes.

THE COURT: And you're suggesting similar
conditions would be on any order that I might make
today for disclosure?

MR. GROOT: I think those are factors that are very
relevant to consider. They certainly do not
foreclose any other conditions that could be set.
Certainly in our case we're asking for more than
they asked for in the Haynes case. In the Haynes

Reply Submissions by Mr. Groot

case they were-it's restricted to-the only thing that was asked for in the Haynes case was access to documents and to photocopy them. In this case there is actual physical evidence under scientific testing. Therefore we're asking for actually, photographs of the exhibits and to witness the testing.

THE COURT: Okay.

MR. GROOT: But the similar sort of-like we're certainly agreeable to this being carried out under supervision of a police officer. We're certainly agreeable to time and places that are mutually convenient. We're certainly agreeable to paying for any photocopies and any costs that the police would incur because of the insurer's experts involvement. We're certainly agreeable to time frames, which this must be done by, and I think those are the issues that are addressed.

THE COURT: Now you mentioned it was the Crown's onus to prove that these documents should not be disclosed. Where do you get that?

MR. GROOT: From the Stinchcombe case, in the Stinchcombe decision.

THE COURT: That's in a criminal matter. You say that applies in Civil matters as well?

MR. GROOT: Yes, yes and in this case because the Criminal Code says the Court may grant such an obligation, the Crown should-it's just like if someone, if an accused was to bring an Application to say why should the Crown continue to hold onto my property after three months? The Crown would have an obligation to say, these are the reasons

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why. I think similar reasoning applies to this section.

THE COURT: Alright, that's fine. I'm going to break for 20 odd minutes. I'll be back here at 3:30 and I'll give you my decision then.

R E C E S S

(3:10 p.m.)

U P O N R E S U M I N G

(3:45 p.m.)

REASONS FOR JUDGMENT ON APPLICATION

SALMERS, Superior Court Justice (Orally):

Thank you Counsel. It is a very interesting and with the bad faith cases against insurers, it is going to be an increasingly important issue. I have noted the appearances here. I am sorry, Ms. Kubursi, I spelled your name wrong.

This is an Application under s.490(15) of the Criminal Code by an insurer to allow it to obtain information for purposes of making a decision on coverage on an insured. The insurer is required by the Insurance Act to make a decision on coverage within a certain period of time. The insurer has a duty to act in utmost good faith towards its insureds. However, the extent of information requested by an insurer may compromise an ongoing police investigation, especially in this case regarding arson. These competing interests must be balanced. X The insurer has an interest and a need for at least some of the information requested. The Respondent Crown does not wish to grant any of the requested relief. The insurer should not be expected to wait indefinitely for the Crown to

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complete its investigation, that could cause damage to an innocent insured.

In this case, the fire occurred February 11th, 2002, the police investigation is still not complete seven months later and with winter coming, may not be complete for several more months. By obtaining some of the relief requested, the insurer can make the required decision re: coverage and has used its best efforts to act with utmost good faith towards its insured. Some requested relief must be adjourned to a later date to allow the police to complete their investigation uncompromised. However, as stated above, the insurer and the insured are not expected to wait indefinitely. Order to go:

1. Granting the relief requested in paragraph one of the Notice of Application.
2. If the parties cannot agree as to times and conditions, submissions may be made to me by conference call. That is, the relief I have granted is simply the photographing and photocopying of already seized materials.
3. The balance of the requested relief is adjourned sine die returnable on seven days notice. Although at this time it may be imprudent to allow or grant the relief at a date in the future it may be reasonable to grant that relief.
Anything else that I need to do other than cost Counsel?

MR. GROOT: Your Honour, I'm just a little bit-
just to clarify. The third term for the witnessing

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and videotaping of the scientific tests, this is
put off sine die? X

THE COURT: Yes.

MR. GROOT: Does that mean that if such testing was
going to be done at a certain date, is there any
obligation on them to notify us when the testing is
going to be done?

THE COURT: No.

MR. GROOT: And so I-am I correct to assume then
that there will not be access to the testing? X

THE COURT: At the present time, no. At the
present time, I'm giving you the relief you
requested in paragraph one only of your Notice of
Application.

MR. GROOT: Thank you.

MR. BECKER: Your Honour, this may not be my place
to speak up, but there's just one circumstance
where this may cause concern and that is if the
testing would be destructive of the entire exhibit,
or entire seized item, and I wonder if my friend
might at least get notice of that or of....

THE COURT: Well your friend, the insurer, they
have the opportunity to take these photographs and
have photocopies immediately.

MR. BECKER: Yeah, my only....

THE COURT: If they do that immediately, you'll
have a record of everything that was seized.

MR. GROOT: Your Honour one last point. Is there
going to be any obligation to disclose a report
with the results of the scientific testing?

THE COURT: Not at the present time. At the
present time, only the seized material.

**Reasons for Judgment on Application
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MR. GROOT: Okay.

THE COURT: But I am not foreclosing you from doing that or asking for that in the future.

MR. GROOT: Okay, the only problem is that we won't know when the testing happens, so we won't know when to ask for the report.

THE COURT: It would be prudent for you to wait a few months. The Crown is going to have to proceed with some reasonable amount of speed in its investigation. At that time, you could request whether it has been done and again, if necessary, make a further or bring back this Application, which has been adjourned sine die.

MR. GROOT: Okay.

THE COURT: So you are not prevented from doing that, but I am also saying to the Crown, they can do their investigation. We are not going to compromise it any more than this does already, but they must proceed reasonably. They can't wait forever.

MR. GROOT: Thank you.

THE COURT: Alright? Anything else that any Counsel wishes to hear from? Alright, costs. May I hear submissions on costs.

MR. GROOT: Yes Your Honour. It's my respectful submission that we've been successful at least in part on this Application. A request was made and understandably it was denied. A request was made to settle this informally. The Crown wished not to and again, with respect to my friend, I understand his concerns, but we do request our costs on-for today and....

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THE COURT: Do you have a bill of costs prepared?

MR. GROOT: I do not have a bill of costs prepared but I can have that sent to you within seven days.

THE COURT: I'd like to deal with it today. How much are you going to request?

MR. GROOT: Well the prep. time for this, as you can see, it's a-quite a large Application record, so there was one-conservatively I will say there was one day put into preparation and the day of being here.

THE COURT: So what amount are you asking?

MR. GROOT: I'm asking for \$4000.

THE COURT: Okay, Mr. Thompson?

MR. THOMPSON: It's not usual for Crowns to address matters of costs Your Honour. My position is that the success on this Application was divided. There were competing interests and this was a novel Application as Your Honour has already observed. In my respectful submission, there should be no order as to costs.

THE COURT: Ms. Kubursi.

MS. KUBURSI: Yes, I would just agree with my friend. I don't think this is an appropriate case, given the outcome.

THE COURT: And Mr. Becker, are you just here?

MR. BECKER: Again, I'm not opposing the Application. I neither seek costs and I trust I won't-will not have costs against me.

THE COURT: The Crown was unwilling to provide any of the relief requested. There was some relief granted today to the Applicant, so costs of the Applicant up to and including today's hearing, to

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**Reasons for Judgment on Application
Salmers, Superior Court Justice**

be paid by all Respondents, other than the Rollos,
in the amount of \$2500.

MR. THOMPSON: Thank Your Honour.

THE COURT: I wish to thank everybody. It was well
argued.

C O U R T A D J O U R N S (4:15 p.m.)

* * * * *

THIS IS TO CERTIFY THAT the
foregoing is a true and accurate
transcription from my recordings
to the best of my skill and ability.

Diane Archer

Diane Archer
Certified Court Reporter

Transcript ordered.....September 26, 2002
Transcript completed.....October 16, 2002
Transcript approved for release.....October 18, 2002

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