

CANADA / JUDGMENT

Further Detention of Things Seized (Re)

2020 BCSC 1067

COURT

Supreme Court of British Columbia

DECIDED

17 July 2020

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2020 BCSC 1067 Further Detention of Things Seized (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Further Detention of Things Seized (Re),

2020 BCSC 1067

Date: 20200717

Docket: X082120

Registry: New Westminster

In the Matter of an Application pursuant to Section 490(3) and 490(9.1) of the Criminal Code for
an Order for the Further Detention of Things Seized

And

William Price, Jason Van Den Born, Kendall Ballantine,

Mark Manastyrski and Keith Wallis

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Crown:

H. Russell

Counsel for the Respondent, William Price:

M.N. Dillon

Counsel for the Respondent,

Mark Manastyrski

M. Sanders

Counsel for the Respondents,

Jason Van Den Born, Kendall Ballantyne

and Keith Wallace:

C.R. Terepocki

Place and Date of Hearing:

New Westminster, B.C.

July 9, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 17, 2020

- [1] The Director of Public Prosecutions applies, pursuant to ss. 490(3) and 490(9.1) of the Criminal Code, R.S.C. 1985, c. C-46, for an order for further detention of things seized in the course of an investigation. Five individuals are named as respondents. Two of those, William Price and Mark Manastyrski elected not to oppose the application.
- [2] The remaining three persons, Jason Van Den Born, Kendall Ballantyne and Keith Wallace are together represented by counsel who appeared on this application to oppose the granting of the order sought.
- [3] In support of the application, the Crown has filed two affidavits, one affirmed by Cpl. Bolt, a member of the RCMP and another sworn by Ms. Schwartz, a paralegal at the office of the PPSC.
- [4] By way of broad-brush background, police officers attached to the Federal Serious and Organized Crime Section of the RCMP are engaged in an investigation into circumstances alleged to constitute following offences:
 - 1. Distribution of cannabis knowing that it is illicit, contrary to s. 9(1) of the Cannabis Act, S.C. 2018, c. 16;
 - 2. Exportation of cannabis s. 2, contrary to s. 11(1) of the Cannabis Act; and
 - 3. Possession of cannabis for the purpose of exporting it, contrary to s. 11(2) of the Cannabis Act.
- [5] The following summary of the investigation is taken from the affidavit of Cpl. Bolt:

1. Project E-Prominent is an investigation into the activities of the importation and trafficking of controlled substances into and within Canada, as well as the exportation of controlled substances to foreign countries.
2. On June 18, 2019 FSOC investigators executed search warrants at four separate locations:
 - a) A warehouse unit at 108 - 20167 96 Avenue in Langley.
 - b) A farm property at 527 224 Street in Langley that is the residence of Jason VAN DEN BORN, Kendall BALLANTINE, and Keith WALLIS.
 - c) William PRICE's residence at 5873 133 Street in Surrey.
 - d) Mark MANASTYRSKI's residence at 24625 86 Avenue in Langley.
3. A large scale cannabis grow operation was located at the farm property at 527 224 Street in Langley. Approximately 5,300 cannabis plants were seized, and over a 2,400 pounds of dried cannabis. As well, FSOC investigators seized 20 firearms, none of which were stored lawfully.
4. On August 27, 2019, a warrant was executed at Jason VAN DEN BORN's house at 527 224 Street in Langley and three additional firearms were seized.
5. All the items seized in this investigation were reported on Report to Justice Form 5.2s and three month Detention Orders were issued in relation to those items. On November 7, 2019, a Detention Extension Order was granted by the Honourable Judge Ferriss, and it expired on June 18, 2020.
6. On November 5, 2019, Corporal Kopperud of the RCMP FSOC group swore an affidavit in this matter in support of the application for the Detention Extension Order.
- [6] The November affidavit of Cpl. Kopperud set out a list of steps that remained to be taken in the investigation.
- [7] The affidavit of Cpl. Bolt, filed in the present application, provides an update in respect of each of those outstanding tasks. As I understand, a number of the required steps have been completed or substantially completed although some remain to be done. Nevertheless, the Report to Crown Counsel has been completed and has been filed with the office of the PPSC.
- [8] In the affidavit filed by Ms. Schwartz, she attests that the file has been assigned to a specific lawyer in the office. She also states that the material that has been received by the PPSC contains a 303 page Report to Crown Counsel, a disclosure inventory containing over 12,000 items, a Dataset folder containing 8,150 documents, 2,665 multimedia files and 1,811 tasks and 19 ITOs ranging in size with some in excess of 100 pages.
- [9] In short, the material which has been provided to the Crown is voluminous. In her affidavit, Ms. Schwartz states that it is anticipated that the charge approval process to review all of this material and determine whether or not charges will be authorized will take approximately three months. In addition, it is noted that the assigned counsel has another work obligation

which he is presently dealing with. And of course there is the fact that many people, the prosecutor included, are working from home, at least in part, as a result of the so-called COVID circumstances, which has some hampering effect upon the ability to operate at full efficiency.

The Legal Principles and the Positions of the Parties

[10] The Criminal Code provision which has application in this matter is s. 490, and specifically s. 490(3):

Idem

- (3) More than one order for further detention may be made under paragraph (2)(a) but the cumulative period of detention shall not exceed one year from the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless
 - (a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, 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, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period and subject to such other conditions as the judge considers just, and the judge so orders; or
 - (b) proceedings are instituted in which the thing detained may be required.
- [11] Essentially, in order for this application to succeed, I must be satisfied "having regard to the complex nature of the investigation, that the further detention of the things seized is warranted". Accordingly, applications of this nature often turn on an analysis of the details of the investigation and whether that investigation is properly characterized as complex.
- [12] In the matter at hand, the Crown says that hurdle has been met. Counsel submits the evidence establishes that the investigation has been adequately resourced and that there is no unexplained delay. She says as well that the investigation is fairly and properly characterized as complex. The applicant notes that some items have been returned and that the list now sought is shorter than for previous applications.
- [13] Counsel for the three opposing respondents does not dispute the test for complexity as posited by the applicant. However, he focuses on the issue of complexity in the circumstances of this case. In his submission, this is a fairly routine investigation. It involves firearms, DNA and computers which are password-protected. He says that the first affidavit suggested that the Report to Crown Counsel would be ready by the end of November, and so he says that any reliance placed upon the pandemic circumstances is something of a red herring, as that complication really did not arise until somewhere around mid-February. Accordingly, as I understand the position of the respondents, they contend this is not a complex investigation, and any reliance on the COVID conditions is not valid.

[14] The most helpful discussion of the concept of complexity in the context of an application of this type is found in the decision of Justice Durno in *Canada Revenue Agency v. Nathaniel Okoroafor*, 2010 ONSC 2477, where he conducted a thorough canvass of the relevant authorities. At paras. 17 - 23, he articulated a comprehensive statement of the principles to be applied to the analysis. Among the points he identifies which are applicable to the application at bar are these:

- The onus is on the applicant to establish the complexity of the investigation and the need for further detention.
- The court must focus on the issue of how the complexity impacts the need for continued detention.
- This Code provision does not place time limits on police investigations.
- In assessing the complexity of the investigation, the court may consider what work is yet to be done, the estimated time for completion and whether the work should reasonably have been done earlier.
- Essentially, the court must ask whether it is a complex investigation requiring further detention or a non-complex investigation that investigators have had insufficient time to complete. The former leads to further detention; the latter does not.
- A complex investigation is one that has many varied interrelated parts, patterns, or elements and consequently is hard to understand fully.
- Among the factors that have supported a conclusion that the investigation was complex are the number of police services and/or government departments involved; whether the investigation requires the assistance of lawyers, accountants, computer technicians and/or other professionals to decipher the documents or for other purposes; whether the investigation requires the cooperation of police services other than the applicant; and that the investigative agency has no control over the timely responses of third parties.
- In assessing whether the complexity of the investigation requires further detention, the absence of evidence of "foot dragging", other delay, procrastination, prejudice and bad faith are relevant considerations as is the training and experience of those involved in the investigation, the time dedicated to date by those persons, and the need for further investigation. Whether additional human resources would have sped up the process or likely delayed it is also a consideration.
- Factors that have not supported a conclusion that the investigation was complex include the fact that insufficient resources have been assigned to the investigation and that voluminous material must be reviewed and or that the investigators did not have enough time to fully review the documents seized.

Analysis

- [15] On consideration of the facts of this case, it is my view that, on balance, the investigation is fairly described as complex in the sense that is relevant to the application at bar. The basis for that conclusion is as follows.
- [16] I note that this is a large scale investigation, that multiple sites of search and seizure are involved and that a great amount of material is required to be examined.
- [17] That, standing alone, is not determinative. However, it can be a consideration in understanding the magnitude and complexity of the steps necessary to conduct a proper investigation.
- [18] In the facts at hand, the investigation has entailed engaging the specialized assistance of a number of other police services and departments. Specifically, those include firearms experts, DNA experts, a drug recognition expert, the Digital Forensic Services Branch (to forensically access and examine password protected electronic devices), and a special police section dealing with confidential informants and agents in order to review materials, that is, privilege vetting for material that will be disclosed or otherwise promulgated.
- [19] It is reasonable to infer that each of those agencies has its own workload and priorities which have impacted their ability to deal with the present investigation in a timely way. In the result, the investigation is at the mercy of the schedules and other commitments of those departments.
- [20] On the evidence, that is apparently what has occurred here.
- [21] Additionally, I accept that the workplace disruptions resulting from the COVID crisis have, to some extent, impacted standard operating practices in a negative way.
- [22] Finally, I find no evidence of laches, bad faith or a lack of resources, nor do I understand those conditions to have been alleged by the respondents.
- [23] In my view, the fact that the Report to Crown Counsel is now in the hands of prosecutors for charge approval, given the challenges that the investigation has faced, is a positive and weighs in favour of the application.

Conclusion

- [24] The Crown's application for an order for further detention is granted.

"Williams J."

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