

CANADA / JUDGMENT

Further Detention of Things Seized (Re)

2020 BCSC 1100

COURT

Supreme Court of British Columbia

DECIDED

19 August 2020

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2020 BCSC 1100 Further Detention of Things Seized (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Further Detention of Things Seized (Re),

2020 BCSC 1100

Date: 20200819

Docket: X082114

Registry: New Westminster

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

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Crown:

N. Reithmeier

Counsel for Respondent:

J.D. Tarnow

Place and Date of Hearing:

New Westminster, B.C.

June 22, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 19, 2020

Introduction

- [1] This is an application under s. 490 of the Criminal Code, R.S.C. 1985, c. C-46 for further detention of items seized by way of a search warrant. Because detention is sought beyond one year from the date of the original seizure, the application is brought in the Supreme Court of British Columbia, which has jurisdiction over such matters under Criminal Code s. 490(3). Further, because the previous detention order expired before the application for further detention was filed, the court will also have to consider the requirements of Criminal Code s. 490(9.1).
- [2] The police seized the items for which further detention is sought on or about 15 December 2018, pursuant to a search warrant issued earlier that same day by a Judge of the Provincial Court of British Columbia, sitting as a justice under Criminal Code s. 487. The Provincial Court Judge also granted a sealing order prohibiting access to or disclosure of the materials relating to the warrant under Criminal Code s. 487.3.
- [3] I am not being asked to determine the merits of the application for further detention, as the application is opposed and the parties propose to adjourn the matter to a date when full argument can be made. In the meantime, I have been asked to deal with a preliminary issue, which has to do with the scope of the sealing order. In particular, Crown counsel seeks clarification as to whether the material filed in support of the present application for further detention is covered by the sealing order granted in conjunction with the original warrant on 15 December 2018.
- [4] Crown counsel says there is some uncertainty about the scope of the original sealing order and whether it applies to the material filed in support of the present application for further detention. There are two possibilities.
- [5] If, on the one hand, the court determines that the original sealing order prohibits access to and disclosure of the material filed in support of the present application for further detention, Crown counsel requires a variation of that sealing order to permit disclosure of the supporting materials to respondent's counsel. Crown counsel says the text of Criminal Code s. 487.3(4) gives a judge dealing with a s. 490 application jurisdiction to grant a variation of the initial sealing order. The operative language in s. 487.3(4) states that an application to terminate or vary a sealing order may be made "to the justice or judge who made the order" or alternatively to "a judge of the court before which any proceedings arising out of the investigation" may be held.
- [6] If, on the other hand, the court determines that the original sealing order does not apply to the material filed in support of the present application for further detention, then Crown counsel says he will require a fresh sealing order under s. 487.3. Specifically, Crown counsel

seeks a sealing order prohibiting public access to the material filed in support of this application, but allowing for disclosure of the materials to respondent's counsel, so that counsel can take an informed position on the merits of the Crown's application for further detention.

Statutory Framework

- [7] Criminal Code s. 487.3 provides when a search warrant, order, or other authorization to search is sought, or at any later time, a justice or a judge may make an order prohibiting access to and disclosure of "any information relating to the order, warrant, or authorization". To grant such a sealing order, the presiding justice or judge must be satisfied that (a) "the ends of justice would be subverted" by disclosure for any of the reasons in s. 487.3(2) and that (b) those reasons outweigh the importance of access to the information. The reasons for non-disclosure listed in s. 487.3(2) are where disclosure would compromise the identity of a confidential informer, compromise an ongoing investigation, endanger a person engaged in particular intelligence-gathering techniques, prejudice the interests of an innocent person, or "any other sufficient reason".
- [8] The procedure for handling material covered by a sealing order is set out in s. 487.3(3), which provides that such material is to be placed in a sealed packet and held by the court, subject to any terms and conditions that the issuing justice or judge considers desirable. Such terms may include provisions for non-disclosure for a specified time, or providing for partial disclosure, or redaction of certain information before disclosure is made.
- [9] The circumstances in which a sealing order can be varied or terminated are set out in s. 487.3(4). As noted above, an application to vary or terminate a sealing order may be made to the justice or judge who issued it, or a judge of any court before which any proceeding arising out of the investigation to which the warrant relates may be held.

Issues

- [10] The first question to be determined is whether the initial sealing order issued in conjunction with the search warrant applies to material subsequently prepared and filed in connection with the present application for further detention under Criminal Code s. 490(3).
- [11] If the first question is answered in the negative, then a second question arises, namely whether the court should grant a sealing order in respect of the material filed in support of the present application for further detention, on terms allowing for disclosure to the respondent, but prohibiting public access.

Discussion

- (i) Whether the Initial Sealing Order Applies to Material Subsequently Prepared and Filed in Connection with an Application for Further Detention under Criminal Code s. 490(3)

- [12] Crown counsel says the answer to this question is determined by reference to the text of Criminal Code s. 487.3(1) itself. More specifically, counsel says that the phrase "any information relating to the warrant, order, or authorization" makes the sealing order applicable not just to material filed in support of the warrant itself, but all material "relating to the warrant", including material prepared and filed in a subsequent application for further detention beyond one year brought under Criminal Code s. 490(3).
- [13] With respect, I do not agree with counsel's approach. The text of s. 487.3 is permissive, in that the judge may issue a sealing order with respect to "any information relating to the warrant, order, or authorization". The scope of the order - that is, what it applies to and on what terms - depends not just on the text of s. 487.3, but also on the terms of the particular sealing order that is made by the presiding judicial officer. Thus the analysis must take into account both the text of s. 487.3 itself, and the terms of the particular sealing order in issue in this case, that is, the sealing order issued in conjunction with the original search warrant. In this regard, my analysis is broken down into two stages. The first stage will focus on the scope of s. 487.3 itself. The second stage will focus on the text of the sealing order.
- [14] As regards the interpretation of Criminal Code s. 487.3, we are concerned here with the breadth of the phrase "any information relating to the warrant, order, or authorization". Sealing orders are most commonly obtained for material filed in support of a warrant, that is, the information to obtain the warrant and any attachments. No one would question the proposition that such supporting materials qualify as "information relating to the warrant". The issue that Crown counsel raises is whether the phrase "information relating to the warrant" applies not just to material filed in support of the warrant, but also material in relation to its execution (such as a report to justice), and material in relation to further detention proceedings (more specifically, an affidavit filed in support of an application under s. 490(2) or (3)).
- [15] Under the modern approach to statutory interpretation, the court must give the words in the statute "their most obvious ordinary meaning which accords with the context and purpose of the enactment": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 at para. 14 [CanadianOxy]. The phrase "information relating to" is by its nature broad and open-ended. It is comparable to the phrases "with respect to", and "in respect of", both of which have been characterized as "words of the widest possible scope": *CanadianOxy* at para. 16, citing *R. v. Nowegijick*, [1983] 1 S.C.R. 29 at p. 39. It is also necessary to bear in mind the context in which s. 487.3 operates, that is, as a provision authorizing the issuance of sealing orders prohibiting access to and disclosure of materials relating to warrants and other judicial authorizations obtained in the investigation of criminal offences. There is also a constitutional dimension to s. 487.3, in that it is intended to allow for the protection of sensitive information in a manner that is consistent with the open courts principle, a principle which is discussed in further detail later in these reasons. All of foregoing considerations inform the court's interpretation of the phrase "any information relating to the warrant, order, or authorization" in s. 487.3.

- [16] Taking all of the foregoing into account, I have no difficulty concluding that the phrase "any information relating to the warrant, order, or authorization" can apply to material filed in support of the said warrant, order, or authorization. As for material created and filed in relation to the execution of a warrant (such as a report to justice), and material subsequently created and filed in further detention proceedings (such as an affidavit sworn in support of a s. 490(2) application), my conclusion is more nuanced. In my view, the proper interpretation of s. 487.3 requires a consideration of both the scope of the phrase "any information relating to the warrant, order, or authorization", and the timing of the sealing order application.
- [17] With regard to the scope of the phrase "any information relating to the warrant, order, or authorization", in my view the text is broad enough to apply to material subsequently created and filed upon execution of the warrant, and material subsequently created and filed in support of further detention proceedings. There is at least one prior decision holding that s. 487.3 does not apply to s. 490 materials, although the case in question does not appear to have expressly considered the scope of the phrase "any information relating to the warrant, order, or authorization": *Re: Tran*, 2004 BCSC 806 at para. 24.[1] There are other cases where sealing orders have been granted under s. 487.3 with respect to materials created and filed in connection with the execution of a warrant or further detention proceedings, and in my view these cases are more reflective of the broad language found in the text of s. 487.3. See *Winnipeg Free Press (Re)*, 2006 MBQB 43 at paras. 65-81; *Royal Canadian Mounted Police (Re)*, 2008 MBQB 137. However, that is not the end of the matter, because there is still the question of timing to consider.
- [18] Regarding timing, I would break the analysis down even further by distinguishing between material created and filed with the court after the warrant is executed, and material created and filed with the court in support of further detention proceedings.
- [19] With regard to material relating to the execution of the warrant, in my view it would be conceivable but very unusual for a justice issuing a warrant to also issue, at the same time, a sealing order covering such material. It is conceivable that, in the course of a particularly sensitive investigation, an affiant could present case-specific evidence showing that access to or disclosure of the report to justice and its attachments would subvert the ends of justice by impairing an ongoing investigation, or by prejudicing the privacy interests of an innocent party. Such a circumstance would in my view be quite extraordinary. It would require, in the affidavit filed in support of the sealing order, some compelling case-specific reason for believing, even before the warrant is executed, that disclosure of the materials relating to its execution would subvert the ends of justice in some specific way. Just as importantly, the resulting sealing order would have to expressly state that it applies to particular documents created and filed subsequent to the execution of the warrant, for example the report to justice, or perhaps the attachments to the resulting initial detention order issued under s. 490(1).

- [20] With regard to material subsequently created and filed with the court in support of further detention proceedings, I find it hard to conceive of a situation where a justice who is asked to issue a warrant could ever, at the same time, issue a sealing order prospectively applying to such material. I fail to see how a justice asked to issue a warrant could ever determine, before the warrant is actually executed or anything is seized, that it would "subvert the ends of justice" to allow disclosure of or access to material in support of a theoretical application for further detention of seized items. I question whether a justice issuing a search warrant would ever have the capacity to make such a determination on a prospective basis, looking three months or more into the future with respect to material that does not yet exist.
- [21] My conclusion is that although the scope of the phrase "any information relating to the warrant, order, or authorization" is broad enough to apply to materials created and filed in connection with subsequent s. 490 proceedings, it would not be open to an issuing justice to make such a determination at the time of the issuance of a warrant. In my view, an order for the sealing of material created and filed in support of a s. 490 application could only be granted when the materials in question have been filed with the court, or afterward. It is only at that point in time that the presiding justice or judge would be in a position to make an informed determination as to whether disclosure of those materials would subvert the ends of justice for any of the reasons listed in s. 487.3(2).
- [22] That brings me to the second step of my analysis, which focuses on the text and scope of the sealing order itself.
- [23] The language in the order is not particularly precise, in the sense that it uses different phrases throughout. The first paragraph of the recitals states that the applicant is seeking an order prohibiting access to and disclosure of "all court records filed in support of the search warrants". The second paragraph references "the material in support of and resulting from [the search warrant] application". The third paragraph references "all records relating to the above-mentioned search warrants". The fourth paragraph, which sets out the actual terms of the sealing order, states that it applies to "all records relating to the above-mentioned search warrants, including the materials in support of this application", and also states that these materials are to be sealed and kept at the Provincial Court of British Columbia, Surrey Registry. The fifth and final paragraph states that an application to vary may be made on notice to the Attorney General of Canada. I suspect the reference to the Attorney General of Canada is an error, given the nature of the offence investigation, which is a matter that would appear to fall under the jurisdiction of the provincial Attorney General.
- [24] The different phrases used throughout this sealing order are confusing. The very fact that the scope of the recitals does not match up with the scope of the order granted could be used to attack the basis for the order. Since according to the first recital paragraph all that was sought was an order preventing access to and disclosure of the material "filed in support of" the search warrant, one might question whether there was any basis for an order preventing disclosure of not just the material filed in support of, but also the material "resulting from" the warrant.

- [25] I will focus the balance of my discussion on the fourth paragraph of the order, which in my view sets out the scope of the sealing order granted by the Provincial Court Judge. This paragraph states that the order applies to "all records relating to the above search warrant, including the materials in support of this application". The question is whether by using these terms the order prohibits access to and disclosure of not just material filed in support of the warrant, but also material created and filed upon its execution, and material created and filed in further detention proceedings.
- [26] Although the phrase "all records relating to the above search warrant, including the materials in support of this application" is indeed very broad, I would not interpret it to have prospective application - that is, application to things not in existence at the time the order was made - in the absence of specific language indicating that this is what was intended. For the order to apply prospectively in relation to things not yet in existence, it would have to say so expressly.
- [27] The order would have to include language such as "including all material filed with the court in relation to the execution of the warrant". Such language could be interpreted to apply to the report to justice, and possibly the initial detention order issued under s. 490 of the Criminal Code. If the intent was to obtain an order to that effect, it would have been much clearer for the order to expressly identify the documents, or even portions of the documents, disclosure of which is prohibited. Including express terms to that effect in the sealing order would also have made it less susceptible to subsequent challenge by a party seeking access. This is because, as explained in more detail below, the open courts principle as embodied in the statutory test in ss. 487.3(1)-(2) demands that restrictions on access to information go no further than necessary to protect the specified interests or reasons for non-disclosure.
- [28] With respect to whether the language in this sealing order should or can be interpreted to apply to materials filed in the current s. 490(3) application, in my view it cannot. To begin with, I would once again say that a sealing order should not be interpreted prospectively to apply to material not in existence when the order is made, in the absence of express language to that effect. The sealing order would have to include language indicating that it applies to "all materials filed in support of subsequent proceedings for further detention of seized items". I should add that if the order had been drafted and presented to the issuing Provincial Court Judge in that form, I very much doubt that the judge would have granted it, because it would have been in effect a blank cheque for the police to seek orders for further detention by way of sealed court proceedings.
- [29] This brings me to my next point regarding the scope of this sealing order, a point which is dispositive of the entire matter and ties back to my earlier analysis of the text of s. 487.3(1) itself. As explained above, in my view a justice or judge dealing with a search warrant application could never properly determine, before the warrant is executed or anything is seized, months in advance of an entirely hypothetical application for further detention under s. 490(2) or (3), that access to or disclosure of material filed in support of that

hypothetical s. 490 application would somehow subvert the ends of justice as contemplated in s. 487.3. If a justice or judge presiding over an initial search warrant application did issue a sealing order on those terms, I would question its lawfulness. If not void ab initio, such a sealing order would in my view never withstand a subsequent challenge to its scope and validity insofar as its purported application to further detention materials is concerned.

- [30] I am bolstered in my view by what happened in this case. When the initial application for further detention under s. 490(2) was brought before a Judge of the Provincial Court in May 2019, the Crown applied for and was granted a sealing order with respect to the supporting materials. Obviously both the applicant and the presiding Provincial Court Judge took the view that the s. 490(2) materials were not governed by the original sealing order issued in conjunction with the warrant. Hence, a fresh sealing order was sought and granted to prohibit access to or disclosure of the materials filed in support of the s. 490(2) application.
- [31] Finally, in addition to everything else I have said above, there is one more reason why the original sealing order could not be interpreted to apply to the materials filed in support of the present s. 490(3) application. Even if the original sealing order were broad enough to cover not just material related to the warrant, but also material related to its execution, and material related to the s. 490 proceedings, the initial order in this case could only ever apply to materials filed in the Surrey Registry of the Provincial Court of British Columbia. This is reflected in the listing of the file number and registry at the top of the initial sealing order, and in the final paragraph of the sealing order, stating that all of the sealed materials to which the order applies are to be held at the Surrey Registry of the Provincial Court of British Columbia. That sealing order does not apply to the materials now filed in the present application for further detention under s. 490(3) and s. 490(9.1), which materials were filed in and continue to be held by the New Westminster Registry of the Supreme Court of British Columbia.

(ii) Whether the Court Should Grant a Sealing Order in Respect of the Materials Filed in Support of the Present Application for Further Detention

- [32] I have explained above why in my view the ambit of the phrase "any information relating to the warrant, order, or authorization" in Criminal Code s. 487.3 is broad enough to apply to materials filed in support of an application for further detention. The key point is with respect to timing. A presiding justice or judge who is asked to consider the issuance of a sealing order made at or after the s. 490 materials have been filed with the court will be in a position to examine the materials to determine whether the statutory test for a sealing order is met. That is the situation I am facing as regards the Crown's request for a fresh sealing order in respect of the materials filed in support of the present application for further detention under Criminal Code s. 490(3).
- [33] The decision as to whether a sealing order should be granted is a matter within the discretion of the justice or judge before whom the application is brought. That discretion must be exercised judicially on application of the test in s. 487.3(1) and the factors listed in s.

487.3(2), viewed in the context of the open courts principle as discussed in the leading cases of *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76. These two decisions taken together produced what has become known as the *Dagenais/Mentuck* test.

- [34] The application of the *Dagenais/Mentuck* test in the context of pre-charge investigative procedures was addressed in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 [Toronto Star]. In that case the Court held that the test must be applied with some degree of flexibility in the pre-charge context. There are several reasons for this. It is recognized that sometimes risks to the proper administration of justice may be difficult to demonstrate in a concrete manner at the pre-charge investigative stage, as discussed in *Toronto Star* at para. 8. Moreover, and this is my own observation and not something discussed in *Toronto Star*, to the extent that the materials make reference to confidential informers the court is not in a position to make an informed assessment of what information will or will not be likely to identify an informer. When considering informer information, the presiding judge or justice will be guided by the position set out by the affiant - provided that it is grounded in the record - as to what information could reveal the informer's identity.
- [35] Although the court in *Toronto Star* acknowledged that the *Dagenais/Mentuck* test must be applied flexibly in the pre-charge context, the court also held that to be meaningful, the test requires compelling case-specific evidence. The test cannot be satisfied by generic assertions or broad generalizations. For example, simply advancing the general proposition that pre-trial publication of the details of a police investigation could taint future witness statements is not enough to establish that disclosure would compromise an ongoing investigation: *Toronto Star* at paras. 36-39.
- [36] Applying the statutory test in Criminal Code s. 487.3(1) and the principles discussed above, I am not satisfied that a basis has been shown for the issuance of a sealing order with respect to the materials filed in support of the application for further detention in this matter. The investigating officer's affidavit indicates that the seized items relate to a homicide investigation. The affidavit contains little more than a basic recitation of the circumstances in which the deceased was discovered, along with evidence of recent association between the deceased and the respondent whose premises were the subject of the search warrant, and a description of the potential utility of the seized items in advancing the investigation. There is no reference to informer information or sensitive investigative techniques. There is an indication of an ongoing or continuing investigation, but little discussion of the details, and no case-specific explanation by the affiant of how the disclosure of the contents of the affidavit sworn in support of the application for further detention could impair that investigation.
- [37] What is more, the Crown's position in the case at bar is that it is appropriate to disclose the contents of the affidavit sworn in support of the s. 490(3) application to the respondent. That position is understandable and entirely reasonable. However, insofar as the application for a sealing order is concerned, the Crown's position appears to be that it is appropriate to

disclose the contents of the supporting affidavit to a suspect in the investigation, but not to the public. If disclosure of the details to a suspect would not impair the ongoing investigation, it is hard to understand how allowing for public access would have that effect in the absence of specific concerns raised by the Crown.

[38] In a single paragraph of the supporting affidavit, the affiant asserts that disclosure of the affidavit's contents could impair the ongoing investigation by alerting potential witnesses to aspects of the investigation that might influence their subsequent statements to the police. This is the kind of "general assertion that publicity can compromise investigative integrity" which the Court in *Toronto Star* found to be insufficient to satisfy the requirements of the *Dagenais/Mentuck* test: *Toronto Star* at para. 41.

[39] The supporting affidavit does not include any case-specific detail as to how public access to or disclosure of the affidavit sworn in support of the current application for further detention would impair the police investigation. Nor does the supporting affidavit identify any other basis for denying access to or disclosure of the materials in issue. I conclude that the statutory test for issuance of a sealing order under Criminal Code s. 487.3 has not been met.

"Riley J."

[1] In *Tran*, the court went on to consider a publication ban with respect to the s. 490(3) proceedings, and the supporting materials, under the common law.

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