

CANADA / JUDGMENT

Further Detention of Things Seized (Re)

2023 BCSC 454

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Supreme Court of British Columbia

DECIDED

23 March 2023

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2023 BCSC 454 Further Detention of Things Seized (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Further Detention of Things Seized (Re),

2023 BCSC 454

Date: 20230323

Docket: 34483-1

Registry: Terrace

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

And

In the Matter of an Application for a Sealing Order pursuant to Section. 487.3
of the Criminal Code

Before: The Honourable Mr. Justice Punnnett

Reasons for Judgment

Counsel for the Attorney General of Canada on behalf of the Royal Canadian Mounted Police:

P.W. Shyba

Counsel for the Respondent:

M.L. Cacchioni

Place and Date of Trial/Hearing:

Terrace, B.C.

March 3, 2023

Place and Date of Judgment:

Terrace, B.C.

March 23, 2023

Introduction

- [1] The Royal Canadian Mounted Police ("RCMP") apply pursuant to s. 490(3) of the Criminal Code, R.S.C. 1985, c. C-46 for the further detention of things seized, specifically a portion of a right mirror assembly from a Ford F-350 owned by a person of interest in a motor vehicle-caused pedestrian death. A sealing order pursuant to s. 487.3 of the Criminal Code is also sought.
- [2] The respondent opposes the application for further detention but not the sealing order application.

Background

- [3] On November 18, 2018, the Terrace, British Columbia RCMP were dispatched to the site of a report of a deceased male found in the ditch of Highway 16 near New Remo, a rural subdivision about 4 kilometers west of Terrace. Highway 16 continues from there to Prince Rupert, British Columbia.
- [4] The deceased suffered severe injuries consistent with being struck by a motor vehicle.
- [5] Debris at the site included a piece of a heating element used in the side mirrors of 2011-2016 Ford F-350 pickup trucks. Also found with the element were a large number of small pieces of plastic believed at the time to be consistent with the plastic used in such side mirrors. However, subsequent testing by the RCMP Forensic Investigation Section and the Vancouver Police Department Firearms Laboratory has not, at this time, established the pieces of plastic were from the item sought to be detained.
- [6] Video evidence was obtained showing a light-coloured flatbed Ford F-350 towing a boat heading westbound through Terrace towards Prince Rupert between 2:50 and 3:00 a.m. on November 18, 2018 with an intact passenger side mirror. CCTV evidence in Prince Rupert at approximately 8:23 a.m. that same day showed the F-350 with the side mirror broken off.
- [7] Police located the vehicle on Haida Gwaii on November 20, 2018. It had a damaged passenger side mirror. What remained of the mirror on the vehicle was a mirror housing with some wires. Large parts of the mirror were gone including the glass, the main mirror box frame, the heating element and the mechanism to move the mirror.

- [8] On November 26, 2018, a search warrant was obtained. The police executed it on the F-350 and seized the remains of the mirror housing which became exhibit #1811029E-2, the item sought to be detained.
- [9] The exhibit was first ordered detained by a Judicial Justice who signed a detention order on February 12, 2019. On March 22, 2021, a second detention order valid for two years was obtained in this Court pursuant to s. 490(9.1) of the Criminal Code. That order was consented to. It expires on March 22, 2023.
- [10] The other exhibits detained have been determined to have no evidentiary value and hence are not relevant to the investigation. The F-350 was returned to the registered owner (the person of interest) on December 12, 2018 and two computers found in the F-350 were returned in March of 2019. The person of interest was part of a group of seven hunters travelling together in the F-350 and another vehicle. The other truck, a boat and a trailer owned by another individual were initially seized but were returned to the owner on November 23, 2018. The police had also seized seven cell phones from all seven of the hunters, but they were returned between January and March of 2019. The data from those cell phones is subject to a separate, ongoing application before the Provincial Court.

Position of the RCMP

- [11] Further detention of the exhibit is sought due to the nature of the investigation because:
- a) The mirror is believed to have been directly involved in the collision and was the part of the vehicle that struck and killed the victim. It is therefore critical evidence.
 - b) The police are working towards charges but are awaiting the analysis of a recently discovered biological sample of blood from the mirror collision debris believed to be from the F-350 mirror. Analysis was expected to be complete by late February 2023 but as of the date of hearing of this application had not yet been received.
 - c) There are additional investigative avenues being explored by the RCMP detailed in a sealed supplemental affidavit filed but because of the sensitive nature of the investigation they seek to have it remain sealed.
- [12] Pursuant to s. 490(3) of the Criminal Code the RCMP request an order for a further detention of the detained item for another two years ending March 22, 2025.
- [13] A sealing order is also sought pursuant to s. 487.3 of the Criminal Code prohibiting access by members of the public to all court records relating to this application. The basis for such an order is described by the applicant as follows:
- a) The ends of justice would be subverted, as disclosure of the information would prejudice the interests of innocent persons due to the high amount of media attention this investigation has gained (locally, provincially and nationally). Any of the named persons could come under intense media scrutiny that may tarnish or harm that person's reputation.

- b) This investigation is on-going, if some facts of the investigation became public knowledge, investigative techniques would be compromised.

Position of the Respondent

- [14] The respondent submits there is a paucity of material regarding what steps have been taken over the past two years since the last detention order. For example, the recent discovery of organic material (blood) on the plastic pieces is not explained. He submits there is an inference to be made that the police have been dilatory. He notes it has now been four years since the incident and there are still no charges laid. He is not opposed to a short delay of a few months but submits that the Court should articulate now why only a short further detention is appropriate.

Discussion

Further Detention

- [15] Section 490(3) of the Criminal Code provides:

- (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 a 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.

- [16] The test focuses on the complexity of the investigation. Counsel for the RCMP submits this case has the hallmarks of complexity that clearly show it is not a "run of the mill" investigation. He notes the significant resources and time that have been devoted to the investigation. The complexity is said to arise from the many officers involved in multiple jurisdictions as well as other police agencies, the many exhibits and a large volume of investigative tasks, as well as reliance on third party responses. He notes as well that there are other aspects of the investigation ongoing such as the proceedings in Provincial Court involving data from cell phones.

- [17] The analysis of complexity was addressed by Associate Chief Justice Holmes in *Further Detention of Things Seized (re)*, 2019 BCSC 1345 at paras. 8 and 9:

8 As has been noted in many cases, within the first year (and absent charges having been laid), authority to detain items seized may be given under s. 490(2) if the justice is satisfied that further detention is warranted "having regard to the nature of the investigation". The basis for detention

after a year (absent charges) under s. 490(3) is more specific, and depends on a judge being satisfied that further detention is warranted "having regard to the complex nature of the investigation". An applicant under s. 490(3) must therefore establish that the investigation is complex, and that the complexity requires the further detention of the seized items for the period sought

9 Durno J. in *Canada Revenue Agency v. Okoroafor*, 2010 ONSC 2477 helpfully reviewed and analyzed the case authorities that have considered when investigations are complex within the meaning of s. 490. He noted that the focus is always on whether the investigation itself is complex, not on the complexity of the potential charges or the number of hours required for the review of the material seized. For this reason, an investigation can be extensive, involving large numbers of documents, without necessarily being complex: see *Re Moyer* (1994), 95 C.C.C. (3d) 174 (Ont. Gen. Div.) at 177. Durno J. identified numerous factors that have supported conclusions that investigations are complex (or not), but emphasized that the analysis goes beyond a mathematical tally of factors: the court gives appropriate weight to the case specific and other relevant factors in an assessment that is individualized for the particular case (paras. 26-27).

10 Although s. 490 does not place time limits on investigations, its focus on whether the complexity of the investigation requires the further detention of the seized items indirectly forces an examination of the work yet to be done, the estimated time for completion, and whether the work should reasonably have been done before. Durno J. put the matter "bluntly" in this way:

[19] Put bluntly, is it 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.

[18] There is no evidence of "foot dragging" or other delay or procrastination, nor is there evidence of insufficient resources being assigned to the investigation. The respondent argues that such inferences can be drawn from the time the investigation has taken and the lack of evidence explaining the chronology of the efforts to date. However, from the sealed material along with the supporting unsealed affidavit it is clear significant resources and time have been devoted to the investigation.

[19] In *Further Detention of Things Seized (Re)*, 2022 BCSC 1803 at para. 97, Justice Harvey noted that time alone is not evidence that an investigation has been in abeyance or abandoned.

[20] I note as well that given the accident involved an apparently innocent individual walking on the roadside there is significant public interest in the matter being investigated and concluded.

[21] As noted by Harvey J. at para. 99 of his decision, Holmes A.C.J. in her 2019 decision granted the order for detention, where she stated:

- [19] This is in part because I am satisfied that the investigation has been adequately resourced, has proceeded with reasonable diligence, and has been streamlined to try to reduce it (and the potential prosecution's) length.
- [22] In this instance the unsealed affidavit filed in support notes the biological analysis that remains outstanding.
- [23] The sealed supplementary affidavit provides additional detail regarding the complexity of the investigation and the volume of material and tasks required as part of the investigation. There is no indication there has been a lack of resources--indeed there is evidence to the contrary--nor is there evidence of a lack of diligence. I am satisfied the investigatory process has been ongoing, although ideally more chronological information would better assist the Court in determining the complexity of an investigation and deciding such an application. In addition, the sealed supplemental affidavit sets out contemplated investigational steps. To release such information would imperil the investigation. This leaves the reader in the unfortunate position described by Justice Goldstein in *R. v. Canadian Broadcasting Corp.*, 2018 ONSC 5167:
- [26] This answer, of course, is highly unsatisfactory: I am reduced to simply saying: "I've looked at the confidential parts and you're just going to have to trust me when I say they can't be released." "Trust me" is rarely a satisfactory answer when it comes from the government. I sympathize with Mr. Gilliland's dilemma, which is the dilemma of any counsel faced with evidence that cannot be accessed. And yet, when there is a clash of values, we often delegate authority to judges to evaluate evidence that some parties just cannot see
- [24] The police believe the item is the most significant exhibit in the investigation and will likely be produced in evidence at trial and that new evidence such as mirror debris may be discovered, requiring the item for further analysis, although the latter is speculative.
- [25] What is lacking in the material is more detail of the steps taken that permits consideration of the reasons for the time taken to date and the assessment of whether the investigation has been pursued with reasonable diligence. However, there is evidence in the sealed material that the investigation remains active, that the RCMP has taken significant investigatory steps throughout and that such are ongoing.
- [26] I am satisfied that the investigation is complex and ongoing and that more time is required to complete the investigation and provide a report to Crown counsel. I accept the item sought to be detained may be required as evidence at trial.
- [27] Of some significance is the nature of the item sought to be detained. It is a broken piece of a truck mirror. It is difficult to see how it has any value or use to the owner. As a result, when weighing the continuing interference with his property rights caused by continued detention, I take into account the negligible value (if any) to the owner of the item being detained.

- [28] In my view s. 490 addresses the lawful possessory rights of an owner in a thing seized. There is an assumption such rights involve something of significance or value to the owner. In this case a right to a broken unusable piece of a mirror assembly is of little weight in the application of s. 490.
- [29] It is estimated that another 24 months is required to complete the investigation, report to Crown Counsel and obtain charge approval. The latter, because of the complexity and length of the investigation, is estimated to take up to six months of that 24-month estimate.
- [30] As noted, the respondent says at most a few more months is sufficient, however given the material filed and the sealed information I am satisfied that more than a few months are justified.
- [31] The issue of a shorter period of detention and the possible need for further applications draws on resources better spent on the investigation: *Further Detention of Things Seized (Re)*, 2022 BCSC 1240 at paras. 34-35, 41.
- [32] The sealed material justifies an extension of the detention of the item, however I am not satisfied on the material provided that two years will necessarily be required. In my view a one-year extension is appropriate based on the material before me. Whether a further extension may be required is left for another day.

Sealing Order

- [33] The RCMP seek an order sealing all of the court records relating to this application because:

The ends of justice would be subverted, as disclosure of the information would prejudice the interests of innocent persons due to the high amount of media attention this investigation has gained (locally, provincially and nationally). Any of the named persons could come under intense media scrutiny that may tarnish or harm that person's reputation.

This investigation is on-going, if some facts of the investigation became public knowledge, this would compromise investigative techniques.

- [34] Section 487.3 of the Criminal Code states:

Order denying access to information

487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

- (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

- (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

- (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
- (a) if disclosure of the information would
- (i) compromise the identity of a confidential informant,
- (ii) compromise the nature and extent of an ongoing investigation,
- (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
- (iv) prejudice the interests of an innocent person; and
- (b) for any other sufficient reason.

Procedure

- (3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

- (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

[35] In *Further Detention of Things Seized (Re)*, 2021 BCSC 1323, Justice Riley after referring to the open court principle articulated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 1994 CanLII 39, *R. v. Mentuck*, 2001 SCC 76 and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 and stated:

29 Upon consideration of these cases in *Further Detention of Things Seized (Re)*, 2020 BCSC 1100 at para. 33, I held that a decision about whether to grant a sealing order in a s. 490 proceedings is a matter within the discretion of the presiding justice or judge. This discretion must be exercised judicially, having regard to the requirements of ss. 487.3(1) and (2) of the Criminal Code, and the open courts principle as reflected in what has come to be known as the Dagenais/Mentuck test. I further reasoned (at para. 34) that while the test must be applied flexibly in the context of pre-charge criminal proceedings, it nevertheless requires "compelling case specific evidence". A sealing order cannot be justified on the basis of "generic assertions or broad generalizations". It is therefore not enough for the party seeking the order to rely on general propositions, such as a generalized assertion "that access to details of an investigation could taint future witness statements".

97 There may be situations where investigators are not prepared to specify the status of their investigation, or some of the steps in the investigation, out of a concern that disclosure of the details would compromise ongoing aspects of their investigation. In such circumstances, the applicant would be expected to set out in the notice those details which can be disclosed, without compromising any ongoing aspect of the investigation. Exactly where this line is drawn will depend very much on the facts of the case. Investigators may seek to place further details of an ongoing investigation before the presiding judge at the hearing by way of a sealed affidavit, which is either disclosed to the opposing party in redacted form, or not disclosed at all. Of course, it is for investigators to decide how much information about their investigation can be released without compromising future steps. However, investigators must also be mindful of two counterbalancing points. First, any information that is to be placed before the presiding justice in sealed form must meet the test for a sealing order as described above; a sealing order cannot be obtained on the basis of vague generalizations or platitudes about the nature of ongoing investigations. If the judge finds that the test for a sealing order is not met, then the applicant should be given the option to withdraw the sensitive affidavit without relying upon it. Second, at the end of the day, the presiding judge must be given sufficient information to be satisfied that the test for further detention under s. 490(3) has been met.

[36] The RCMP state if the material provided is not sealed the investigation will be compromised. In addition, the individuals named in this application could "come under intense media scrutiny that may tarnish or harm that person's reputation".

[37] I am satisfied, given the contents of the supplementary affidavit, its unsealing would compromise the investigation. As for the rest of the record filed on this application, I note the material filed on the previous application does not appear to have been sealed. Nor am I satisfied the material provided other than the sealed supplementary affidavit will compromise the investigation, or the reputations of other individuals named. As a result, the supplementary sealed affidavit shall remain sealed pursuant to s. 487.3 of the Criminal Code.

[38] The request to seal the remaining materials filed on this application is dismissed.

Orders

- [39] The continued detention of the item seized, Exhibit #1811029E-2, a right mirror assembly from a Ford F-350, is warranted. Pursuant to s. 490(3) of the Criminal Code that item can be detained up to and including March 22, 2024.
- [40] The supplementary affidavit of Cst. Bandurak sworn February 6, 2023 shall not be accessed or disclosed to any interested party or member of the public, with the exception of disclosure to the Crown, until further order of the court. It shall be placed in a sealed packet and kept in a secure place within the Court Registry at 3408 Kalum Street, Terrace, British Columbia, until further order of the court.
- [41] It is further ordered that any interested party or member of the public may apply to me as the judge who made this order or a judge of this court to set aside or vary this order, on three (3) clear days' notice being given to the Attorney General of Canada.
- [42] If there are any concerns that arise if these reasons are published, I ask that counsel arrange within 10 days of today for a short hearing before me.

"The Honourable Mr. Justice Punnett"

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