

CANADA / JUDGMENT

Further Detention of Things Seized (Re)

2024 BCSC 2133

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 2133 Further Detention of Things Seized (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Further Detention of Things Seized (Re),

2024 BCSC 2133

Date: 20241125

Docket: 3835-1

Registry: Dawson Creek

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

And

In the Matter of an Application Pursuant s. 487.3 of the Criminal Code for a Sealing Order

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Crown:

R.A. Kemp

Counsel for the Respondent:

M.R. Shapray

Place and Date of Hearing:

Prince George, B.C.

October 9, 2024

Place and Date of Judgment:

Prince George, B.C.

November 25, 2024

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Introduction

- [1] These reasons are protected by a sealing order pursuant to s. 487.3 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] based on the legal infancy of the respondent. Only necessary facts have been included in these reasons to protect the identity of the respondent in these circumstances.
- [2] These are reasons for judgement on an application for the further detention of things seized under s. 490 of the Code in a criminal investigation. This application is brought under s. 490(3) of the Code, as the application seeks an order authorizing detention beyond one year from the original seizures with no charges having been laid. As there is some dispute as to whether the application was perfected before the expiry of the prior order authorizing detention of things seized, s. 490(9.1) of the Code may also be engaged. This case deals with a Samsung cellphone (the "Cellphone").
- [3] The Respondent submits that the within application should be dismissed as the Applicant has not satisfied the "complexity" requirements for further detention under s. 490(3) of the Code and the "interests of justice" requirements under s. 490(9.1) of the Code.

Factual Background

- [4] This application arises from a report on January 21, 2023 from Snapchat, a social media platform, to the National Centre for Missing and Exploited Children. The report stated that suspected child pornography (the "Media") was uploaded to Snapchat on that same date. The Media was uploaded by a user associated with a specific email address (the "IP address"). The user's date of birth indicated they were 12 years old at the time of the report. The geo-lookup determined the IP address was located in a town in northern B.C. and the Internet Service provider was Telus Communications Inc. ("Telus"). The Media was alleged to contain child pornography. Telus was advised to retain its records related to the Media.
- [5] On March 6, 2023, an RCMP member ("the investigator") reviewed the Media and he concluded that the Media contained evidence of offences including possession, making and distributing child pornography contrary to the provisions of the Code.
- [6] On March 11, 2023, a production order was granted by a judicial justice, and Telus provided records which allowed RCMP to identify the address of the registered owner of the Cellphone (the "Residence").
- [7] On April 4, 2023, the investigator twice drove by the Residence and noted a vehicle with a BC licence plate and a travel trailer, both parked in the driveway of the residence. The identity of the registered owner of the vehicle was determined by a search of Canadian Police Information Centre ("CPIC") records. On the second "drive-by" on April 4, 2023, the investigator observed three children playing in the front yard of the Residence, apparently supervised was a woman of approximately 30 to 35 years of age.
- [8] After April 4, 2023, no action was taken on this file until June 27, 2023, because of what the investigator referred to in his affidavit as family emergencies and a critical incident. No details whatsoever were provided of either of these matters. Also, the investigator gave evidence that the town where the Residence was located was evacuated because of a wild fire for the period from June 8 to June 15, 2023. There was no evidence in the affidavit of the investigator which explained the effect of the wild fire on this particular investigation.
- [9] On June 27, 2023, the investigator conducted a further drive-by of the Residence and noted the same motor vehicle in the drive way. On June 30, 2023, the investigator conducted a further drive-by where a second motor vehicle was located in the driveway. That motor vehicle was licenced to the same individual as the first vehicle.
- [10] On July 6, 2023, a judicial justice granted a search warrant authorizing a search of the Residence. On July 7, 2023, the search warrant was executed on the Residence and the Cellphone was seized.
- [11] Initially, 27 other items were seized from the Residence, but on further investigation, those 27 items were returned to the Residence as they had no relevance to the investigation.

- [12] The Cellphone belonged to a 12-year-old boy. The birthdate of the child was confirmed by police at the time of the search when the mother provided them with the child's birth certificate. The birthdate contained in the Snapchat account in issue made the child appear exactly one year older than his legal age. The investigator indicated that, on prior occasions, young persons had employed false birthdates to suggest they were older than was the case.
- [13] On November 14, 2023, the investigator applied for and obtained a search warrant authorizing a search of the Cellphone.
- [14] On December 22, 2023, the investigator sent a request to have the Cellphone unlocked and data analyzed by the Digital Forensic Services section of the RCMP ("DFS"). No explanation for the delay between November 14, 2023 and December 22, 2023 was provided. DFS replied, on an unspecified date, instructing the investigator to maintain the exhibit in the evidence locker at his detachment and to await further instructions from DFS.
- [15] On June 18, 2024, DFS instructed that the exhibit should be sent to DFS, who would then try to unlock the Cellphone and analyze its contents "as quickly as possible". The exhibit was sent to DFS via courier on June 19, 2024. No explanation of the lack of activity between December 22, 2023 and June 18, 2024 was provided by the RCMP.
- [16] On July 3, 2024, the investigator requested an update by email of the progress of DFS with the investigation. DFS responded that the analysis of the exhibit had just begun and the time for completion of the analysis of the Cellphone could not be estimated.
- [17] The investigator provided evidence that he had been working on an affidavit in support of an application to seek an extension of the detention order for the Cellphone before the year expired. The investigator then stated that there was a miscommunication on his part when he failed to respond to an email in a timely manner. The investigator did not provide any evidence as to the date of the email. The significance of this email and how it relates to the delay in seeking an extension is unclear. No indication of the subject matter of the email referred to was provided by the investigator, nor was any information concerning the timing or timeliness of the email to which the investigator failed to respond. The only reference to timing of this error suggests the error was detected by the investigator on July 2, 2024, a day before the request for an update was sent by the investigator to DFS.

Prior Detention Orders

- [18] The police had submitted a Report to a Justice (Form 5.2) pertaining to items seized on July 7, 2023, which included the Cellphone.
- [19] On September 30, 2023, a further detention order was granted with respect to items seized on July 8, 2023, which order expired on July 7, 2024. Effectively, that order lapsed.
- [20] On July 26, 2024, a Notice of Application was filed for a further detention of things seized. That application sought to detain the item seized until March 7, 2025.

Applicable Law

The Purpose of s. 490 of the Code

- [21] In *Further Detention of Things Seized (Re)*, 2021 BCSC 1323 [Re 1323], Justice Riley (then of this Court) wrote:
- [56] The overall purpose of s. 490 of the Criminal Code is to provide for the administration and judicial supervision of things seized in connection with criminal investigations, in a manner that achieves a balance between the societal interest in the investigation of crime on the one hand, and the property and privacy interests of individuals with an interest in things that have been seized in a criminal investigation on the other hand. The scheme includes a requirement for investigators to report the initial seizure to a justice (per s. 489.1), and sets out the steps required to obtain orders authorizing detention of seized things for various periods of time (per ss. 490(1), (2), and (3) prior to the commencement of proceedings in which the seized things will be required. However, s. 490 does not purport to impose a timeline for the conduct of criminal investigations: *Alberta (Attorney General) v. Black*, 2001 ABQB 216 at para. 20-21. Rather, the statutory scheme provides for judicial supervision of the periods of time in which seized things can be detained, up to the point where either proceedings have been instituted in which those things are required, or investigative authorities determine that the seized things are no longer required. The regime "aims for the expeditious return of seized items because the lawful owner may want or need those items": *Further Detention of Things Seized (Re)*, 2019 BCSC 1345 [Re: *Further Detention and S.B.*] at para. 16. The scheme also provides for other aspects of the administration of seized things, including a process for interested parties to access or view the seized things (per s. 490(15)), and process for lawful disposition of seized things after the periods of detention provided for in the statute have expired (per s. 490(9)).
- [22] The Honourable Associate Chief Justice Holmes, in *Further Detention of Things Seized (Re)*, 2019 BCSC 1345 [Re 1345], describes the operation of s. 490 as follows:
- [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 seized items indirectly forces and 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 noncomplex investigation that investigators have had insufficient time to complete? The former leads to further detention. The latter does not.
- []
- [16] The regime in s. 490 invokes the court's supervisory powers to ensure that privacy and other Charter-protected interests are respected in the course of criminal investigations: *Okorafor* at para. 18. It aims for the expeditious return of seized items because the rightful owner may

want or need those items: *Alberta (Attorney General) v. Black*, 2001 ABQB 216. In my view, the Supreme Court of Canada's decision in *R. v. Jordan*, 2016 SCC 27 imbued the s. 490 regime with additional significance, because the regime provides a context for assessing and bringing into balance the efficiency of the process and other important goals of justice and fairness, as *Jordan* requires:

27 Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so. As D. Geoffrey Cowper, Q.C., wrote in a report commissioned by the B.C. Justice Reform Initiative:

the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realized: they are, in practice, independent.

(*A Criminal Justice System for the 21st Century* (2012), at p. 75)

The Burden on the Applicant under s. 490(9.1) of the Code

[23] Section 490(9.1) allows for applications for further detention to be brought after the expiry of a previous detention order. The burden on the applicant is somewhat higher under s. 490(9.1): *Further Detention of Things Seized (Re)*, 2024 BCSC 297 at para. 62 [Re 297]. The inquiry under this section has two components. First, the court must be satisfied that the items are required reasonably for the purposes of the investigation. This is an objective test. Second, the court must be satisfied that the further detention of these items for a further period from the expiry of the previous order is in the interests of justice. As noted in *Re 297*, there is no appeal from an order under s. 490(9.1): para. 63.

[24] In *Re 297*, Justice Donegan (then of this Court) stated the following with regard to applications under s. 490(9.1):

[105] As Justice Riley held in *Re 1323*, this higher burden is required because "investigators should not be able to place themselves in a better position by bringing an application out of time than they would have been in had they complied with the law by bringing the application in time": para.111.

[25] In para. 107 of *Re 297*, the following appears:

[107] Under this first branch of the test under s. 490(9.1), the Attorney General must establish that the further detention of Seized Items is "reasonably required" for a purpose under ss. 490(1) or (4), namely for the purpose of an "investigation or preliminary inquiry, trial or other proceeding". Parliament's use of the word "reasonably" here imports an additional objective element of reasonableness into the analysis. In this way I am to decide whether Constable Sharma's stated reasons for requiring further detention of the Seized Items is objectively reasonable. This is one of the ways in which the burden under s. 490(9.1) can be seen as higher than the burden on an applicant under ss. 490(2) or (3): *Re 1323* at para. 113.

- [26] This court must also be satisfied that the granting of the further orders for detention would be in the interests of justice: Re 1323 at para. 112. Consideration of the interests of justice requires the court to weigh both the rights of the person from whom things have been seized against the right of authorities and the public to a proper investigation of alleged crimes: Re 1323 at para. 117. It also requires the court to weigh the requirements for further detention under s. 490(3): Re 1323 at para 118; Re 297 at paras. 115 to 118.

Complexity of the Investigation Aspect of the Test

- [27] The distinction when considering detention beyond one year under s. 490(3) and detention up to one year under s. 490(2) is the "complex nature of the investigation". The Applicant must establish that the investigation is complex, as required by s. 490(3)(a), and that the complexity requires the further detention of the seized items for the period sought: *Canada Revenue Agency v. Okoroafor*, 2010, 259 C.C.C.(3d) 87 (Ont. S.C.J.) [Okoroafor]; Re 1345 at para. 8.
- [28] The consideration of complexity is in relation to the investigation and not the complex nature of potential charges. The volume of the investigation is not necessarily sufficient to make the investigation complex. The applicant should provide the court with the nature and volume of investigation yet to be completed, the anticipated time required for completion and whether that work could have been accomplished at an earlier time: Re 1323 at para. 120 and Re 1067 at para. 11.
- [29] It is noteworthy that counsel for the parties were essentially in agreement with respect to the applicable law which applies in this case.

The Facts of the Present Case

- [30] In the affidavit of the investigator, it was noted that the search warrant was granted on July 6, 2023, and was executed the following day, July 7, 2023. The report to justice and application was filed with the court in the appropriate territorial jurisdiction on July 8, 2023.
- [31] On July 10, 2023, the detention order for things seized was signed by a judicial justice which expired on October 5, 2023.
- [32] On September 30, 2023, an order for further detention of things seized was signed by a judicial justice, which expired on July 7, 2024.
- [33] On November 14, 2023, a search warrant was granted for the search of the Cellphone. This was four months and one week after the seizure of the cellphone.
- [34] On December 22, 2023, the investigator sent a request to DFS for the Cellphone to be unlocked and the data therein analysed. The request was sent to DFS five weeks after the granting of the search warrant.

- [35] On June 18, 2024, DFS instructed police to send the Cellphone for unlocking and analysis. This instruction was given seven months after the request for that service was provided to DFS.
- [36] On June 19, 2024, the Cellphone was sent to DFS for unlocking and analysis.
- [37] On July 7, 2024, the order granted on September 30, 2023, expired.

Crown Submissions

- [38] Crown counsel noted that assistance from DFS was required to obtain the passcode to obtain access to the data in the Cellphone. Counsel also noted that there was no evidence of any backlog in the work performed at DFS.
- [39] Further Detention of Things seized (Re), 2020 BCSC 1067 [Re 1067] involved five respondents being investigated for activities including the importation and trafficking of controlled substances into and within Canada as well as exportation of controlled substances to foreign countries. Search warrants were executed at four different locations and a substantial amount of evidence was seized. Police filed a 303-page report to Crown which contained more than 12,000 items, a Dataset holder containing 8150 documents, 2665 multimedia files and 1811 tasks. The sheer volume of materials, along with the onset of the COVID-19 pandemic, caused Crown delay. The delay in that case was explained and the case was properly characterized as complex.
- [40] At para. 14 of Re 1067, Justice Williams cited nine principles, drawn from Okoroafor, which applied to complexity in the context of a s. 490(9.1) application:
- 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.
- [41] In Re 1323, it was noted that the marshalling of forensic evidence, such as computer analysis, indicates some degree of investigative complexity: para. 123.
- [42] Crown counsel in the case at bar noted the unexplained time gap between mid-July and September 2023. It was suggested that in summer vacation periods "things do not move as quickly" and that in a small town there are likely staffing problems that affect enforcement. These suggestions are not reflected in the evidence presented or in the provisions of the Criminal Code.
- [43] Crown counsel suggested that DFS has control over investigation once the item is in their possession. I accept that suggestion as true.
- [44] Re 1067 is wholly distinguishable from the case at bar. This case involves the locking and analysis of a single Cellphone, and there is not yet any sort of report to Crown counsel. There is no suggestion that the report to Crown counsel, should one be prepared, is likely to involve hundreds of pages of written reports or the same extent of disclosure as was the case in Re 1067. Justice Williams' points relating to complexity are nonetheless helpful and ought to be applied to the facts in the case at bar.
- [45] Those points are reviewed below in comparison to the facts of the case at bar:
- 1) As noted above, the applicant bears the onus of establishing the complexity of the investigation and the need for further detention. There are no time limits placed on police investigations in the Code.

- 2) While DFS is a specialized investigative unit, there is a single Cellphone to be unlocked and analyzed. There may be a heavy workload at DFS, but in this case, the analysis of the Cellphone, would not likely occupy considerable time. In any event, there is no evidence put forward which would demonstrate the extent of analysis.
 - 3) The court is permitted, when assessing complexity of an investigation, to consider work yet to be done. However, the court should not be asked to make an assessment in complete darkness without any information about the estimated time for completion of the investigation.
 - 4) There is no explanation of how the "family emergencies", the "critical incident" or the days in which the town was evacuated impacted delay. This may not be evidence of deliberate delay, but the reasons for delay should not be left to the court to speculate without a factual basis.
 - 5) The seriousness of child pornography as an offence is obvious and there is a significant public interest in the proper investigation of offences alleged in relation thereto. That said, there has been delay in this investigation without explanation and there has been, to date, so little progress that the police missed a detention deadline without any investigative steps being taken. In addition, no suggestion has been provided as to how much further time the DFS investigation might take.
- [46] Overall, this is not a complex case requiring further detention. This is non-complex investigation that police submit they had an insufficient amount of time to complete. As stated in *Re 1067* and *Okoroafor*, these are not adequate grounds for requiring further detention.

Conclusions

- [47] Both the application under s. 490(3) and the application under s. 490(9.1) are dismissed. As discussed with counsel, there is no application for the return of the Cellphone, particularly given its potential contents. There was no formal application for disposal of the seized item under s. 490(9). That said, I am simply dismissing the application herein for an order for the further detention under s. 490(3) and s. 490(9.1), as that is the only application that is now before me. I do understand that the applicant is prepared to consent to the destruction of the Cellphone, and I will leave that to the parties to resolve.

"Ball J."

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