

CANADA / JUDGMENT

Further Detention of Things Seized (Re)

2024 BCSC 354

COURT

Supreme Court of British Columbia

DECIDED

29 February 2024

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2024 BCSC 354 Further Detention of Things Seized (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Further Detention of Things Seized (Re),

2024 BCSC 354

Date: 20240229

Docket: 90992-1

Registry: Nanaimo

In the Matter of an Application Pursuant to s. 490(3) of the

Criminal Code for an Order for the Further Detention of Things Seized

Corrected Judgment: The text of the judgment was redacted throughout on April 17, 2024

Before: The Honourable Mr. Justice Riley

Unredacted Reasons for Judgment

Counsel for the Applicant:

B. Kozulin

Counsel for Respondent :

Respondent :

No Appearance

Respondent :

No Appearance

Respondent :

No Appearance

Place and Dates of Hearing:

Nanaimo, B.C.

January 23, 2024

February 15, 2024

Place and Date of Judgment

with Written Reasons to Follow:

Nanaimo, B.C.

February 15, 2024

Place and Date of Written Reasons:

Nanaimo, B.C.

February 29, 2024

Introduction

- [1] This is a ruling on an application for further detention of things seized in a criminal investigation, brought under s. 490(3) of the Criminal Code, R.S.C. 1985, c. C-46. The things in question were seized from a number of different locations in and around Nanaimo, B.C., on various dates commencing on 20 May 2021, and continuing thereafter, in connection with a murder investigation. The investigation is not complete, and a decision has yet to be made on whether charges will be laid. Against this backdrop, the police seek further detention of the seized things under s. 490(3) of the Criminal Code, for an additional six months from the date of the application, until 24 May 2024.

Facts

The Supporting Affidavits

- [2] The evidence in support of the application for further detention is set out in two affidavits, both sworn by Cst. Gray of the Royal Canadian Mounted Police (RCMP), Nanaimo Serious Crime Section. There is the original affidavit, and a supplementary affidavit with updates between the date when the application was first filed in this court and the date of the hearing. I will explain at this point that there are multiple versions of Cst. Gray's affidavits in the court file. The originals are unredacted and sealed by court order pursuant to s. 487.1, to protect the details of the ongoing investigation. There are then four other versions of the affidavits, one for each of the respondents. In each affidavit, the details relating to that

respondent and the items seized from that respondent are unredacted, but the details relating to the other respondents are redacted. The net result is that each respondent has been given the evidence relating to the police handling of the items seized from that respondent, but does not have access to the evidence relating to the other respondents or the handling of the items seized from them.

- [3] In these reasons, I have avoided reference to most of the details in the redacted versions of the affidavits. The only exception has to do with details in the version of the affidavits that have been furnished to . I have referenced those details because 's counsel appeared at the s. 490(3) hearing and argued against the further detention of the items seized from him. Even the particulars of the evidence relating to , while properly given to him so that he could have a meaningful sense of what the police had done with the items seized from him, reveal details of the ongoing investigation that are sensitive and therefore ought not to be disseminated any more than necessary for the court to address the issues in this application. Accordingly, while some reference to these details is required in these reasons, it may be necessary to later edit the reasons to redact certain details before placing the reasons for judgment in the court file.

The Investigation

- [4] As noted, the offence under investigation is murder. The pertinent details of the crime are set out in Cst. Gray's first affidavit, affirmed on 14 November 2023, and can be summarized as follows:
- (a) On the afternoon of 20 May 2021, there was a targeted shooting in the parking lot of a restaurant on Island Highway in Nanaimo. The victim, Mr. Khan, was fatally wounded.
 - (b) .
 - (c) .
 - (d) .
 - (e) .
 - (f) .
 - (g) The police proceeded to conduct a series of searches and seizures. I am not going to spell out the details in these reasons, because the investigation is ongoing and there is no reason for me to say more than necessary for the reader to understand the issues that I have to decide on this application.
 - (h) The supporting affidavit sets out the particulars of the police seizures, the individuals from whom things were seized, and the connection between those individuals and the murder investigation. As explained above, I am going to focus in my reasons on the details with respect to the respondent , .

- (i) , the police interviewed and seized his cell phone, "in plain view". On 6 June 2021, the police obtained a warrant to search 's phone. The following day, an imaged copy of the data on 's phone was placed on a USB stick, which the police then retained for their investigation

Handling of the Seized Items

- [5] After the data on 's phone was copied and placed on a USB stick, the police made efforts to return the phone itself to , but has never attended the police station to retrieve it. The police are not seeking further detention of the phone itself.
- [6] The police initially did not file a report to justice for the USB stick containing data extracted or seized from 's phone. However, on 3 August 2023 (more than two years after the data was downloaded from 's phone), the police obtained and executed a "remedial search warrant" to "correct the lack of reporting".
- [7] I pause here to note that this step, the remedial warrant, was evidently undertaken as a result of emerging case law holding that where the police search a computer device and obtain data from the device, the data is a "thing", the seizure of which the police are obliged to report under the relevant provision of the Criminal Code, which I believe is s. 489.1. The police evidently determined that it was necessary to get a remedial warrant after conducting what is referred to in Cst. Gray's affidavit as a "file audit" that began in January 2023. So, to highlight the obvious, this means the police had the data from 's phone since 7 June 2021, but did not report the seizure or take any steps to account for the seized "thing" - the data on the USB stick - until 3 August 2023, a period of more than two years.
- [8] On 3 August 2023, the police filed a report to justice with respect to the USB stick and on the same date a justice of the peace issued a detention order under s. 490(1), authorizing detention of the seized thing for a period of three months.
- [9] On 1 November 2023, a Provincial Court Judge made an order under s. 490(2) of the Criminal Code authorizing further detention of the USB stick containing the data seized from 's phone until 20 November 2023. It appears that the intention of the police at that time was to secure a detention order for this particular item, the USB stick containing the data from 's phone, up until the point of the current application in this Court.
- [10]
- [11] Meanwhile, with respect to a number of the other items seized by the police in the course of the investigation, the police filed reports to justice and obtained initial detention orders and orders for further detention up to one year under s. 490(2). On 18 May 2022, which would have been just prior to one year after the initial seizures, Justice Baird granted an order for further detention of seized things beyond one year under s. 490(3). One year after that, on 18 May 2023, Justice Crossin granted a second order of further detention under s. 490(3), and on 5 September 2023, Justice Baird granted yet another order for further detention under s. 490(3). The expiry date for this last order of further detention was 20 November 2023.

- [12] On 16 November 2023, the Crown filed the current application, in this Court, for orders under s. 490(3) authorizing the further detention of all of the remaining, unreturned things seized by the police from the commencement of the investigation on 20 May 2021. This includes the things that were the subject of the most recent s. 490(3) order made by Justice Baird, and the USB stick containing data seized from 's phone per the "remedial search warrant" executed on 3 August 2023.

Current Status of the Investigation

- [13] Paragraph 50 of Cst. Gray's first affidavit sets out what he refers to as the "pending tasks" in the homicide investigation. There are three paragraphs. The first two are redacted from the version of the affidavit disclosed to . The only task that is not redacted from the affidavit is in the one described in paragraph 50(c), which indicates that that the police are still finalizing their Report to Crown Counsel.
- [14] Paragraphs 66 to 70 of Cst. Gray's first affidavit set out the basis for the request for further detention. These paragraphs contain additional detail about the work yet to be done in the investigation and the amount of time required to complete that work. Among other things:
- (a) Cst. Gray deposed that the police have used and continue to use a wide variety of analytical techniques, and then the officer goes on to recount some of those techniques. The details are redacted, but I have read the un-redacted version of Cst. Gray's affidavit, and I will take this evidence into account in considering the statutory criteria for an order of further detention as discussed later in these reasons.
 - (b) Cst. Gray also indicated that the police are continuing with aspects of their investigation pertaining to multiple USB sticks containing forensic copies of data obtained from cellular phones. Again, the details are redacted, but I have seen the un-redacted version of Cst. Gray's affidavit and I will once again take this evidence into account.
 - (c) The file co-ordinator is required to continue reviewing the uncleared tasks and updating the Report to Crown Counsel accordingly. Cst. Gray explained that the file co-ordinator had yet to clear 425 open task folders, containing a total of 12,872 digital files. To put this in context, the file co-ordinator had already cleared 5,939 task folders, containing a total of 936,069 digital files. In consultation with the file co-ordinator, Cst. Gray indicated that this process was expected to be complete by the end of 2023, and it was projected that the Report to Crown Counsel would be completed and delivered to the Crown by late December 2023 or early January 2024.
 - (d) Cst. Gray deposed that in his experience, with respect to an investigation of the scale and complexity of this one, it will likely take three to six months for the Crown to review the Report to Crown Counsel and make a decision on charge approval.

Legal Principles

- [15] The overall purpose of s. 490 of the Criminal Code is to provide for the administration of and judicial supervision over 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 in respect of things that have been seized in a criminal investigation on the other hand. 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 have been detained, up to the point where either proceedings have been instituted in respect of which those things may be required, or the 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 1345] at para. 16.
- [16] The current application is governed by s. 490(3), which provides that detention of seized things for more than one year after the date of seizure may be authorized by a superior court judge. The judge must be satisfied, having regard to the complex nature of the investigation, that further detention for a specified period of time is warranted. The analysis thus requires the judge consider whether the investigation is complex in nature, and whether, in view of that complexity, further detention of the seized things is warranted: *Re 1345* at para. 8.
- [17] The concept of complexity has been discussed at length in the case law. The issue is the complexity of the investigation, not the complexity of the potential charges. The sheer size of the investigation, or the sheer volume of material in issue, is not necessarily enough to make the investigation complex in nature: *Further Detention of Things Seized (Re)*, 2021 BCSC 1323 [Re 1323] at para. 120, citing *Canada Revenue Agency v. Okoroafor*, 2010 ONSC 2477 at para. 26-27 and *Re: Moyer* (1994), 95 C.C.C. (3d) 174 (Ont. Gen. Div.) at p. 177.
- [18] In *Re: Tran*, 2004 BCSC 339 at para. 29, Justice Allan adopted the language from *R. v. Westmorland Fisheries Ltd.* (1995), 168 N.B.R. (2d) 395 (Q.B.), *aff'd* 178 N.B.R. (2d) 138 (C.A.) describing the concept of complexity as "something intricate and composite, something requiring analysis and reflection before moving forward to results and always considering the implications". Allan J. referred to a non-exhaustive list of factors that can be indicative of complexity: *Tran* at para. 30. I will not repeat that list of factors here, but I nevertheless consider it to be helpful and I have taken it into account in my analysis.
- [19] I have said before, and I will repeat here, that for my part I would not regard the notion of complexity as a binary concept, as in an investigation either being complex or not complex. There will be some investigations that are manifestly not complex. A straightforward allegation of theft or assault with one or two witnesses to the crime comes to mind. However, when it comes to investigations that are more involved, there may well be degrees or levels of complexity. Certainly, to justify further detention for a specified period of time

beyond one year, the investigation must have elements of complexity, that is, something beyond a run of the mill criminal investigation with elements of the sort considered in the case law discussed above, such that the police are unable to successfully complete the investigation and make a decision on whether or not to lay charges, or otherwise return the seized things within one year of the date of seizure.

- [20] Complexity in the investigation is only part of the analysis under s. 490(3). The court must be "satisfied", having regard to the complex nature of the investigation, that further detention of the seized things is required for a specified time. The burden is on the applicant to adduce evidence satisfying the court that the test is met, although the burden of persuasion is "not onerous": Re 1323 at para. 58. Thus, it is necessary to consider not only complexity, but also whether having regard to that complexity, further detention of the seized things is required, and if so for how long. In addressing these questions, the court may consider the work yet to be done, the estimated time for completion, and whether the work should reasonably have been done earlier: Re 1345 at para. 10; Further Detention of Things Seized, 2020 BCSC 1067 at para. 14, both citing Okoroafor at para. 19.

Analysis

- [21] This application relates to a number of different things seized at various points in time from four named respondents, , , , and . The application for further detention of things seized from , , and is unopposed, but the court must still be satisfied that the statutory test under s. 490(3) is satisfied. I will come back to the application for further detention of things seized from these three respondents in due course.
- [22] The application for further detention of things seized from is opposed. , on behalf of made a number of specific arguments. I only need to deal with one of them because I find it to be dispositive. points out that the only thing connected to for which the police seek continued detention is the USB stick containing data obtained from 's cell phone by way of the remedial search warrant that was executed on 3 August 2023. submits that since this particular "thing", the data, was seized less than one year ago, and since the police are only seeking an order of further detention until 16 May 2024, this application should have been brought under s. 490(2), and not s. 490(3). Relying on the authority of In the Matter of An Application for Further Detention of Things Seized, 2023 BCSC 1769 [Re 1769] at para. 76-79, submits that in these circumstances this Court has no jurisdiction at this stage of the process to consider further detention of the data seized or extracted from 's phone under s. 490(3).
- [23] In response to this submission, counsel for the applicant, whom I will refer to for ease of reference as Crown counsel, submits that since there are many seized things which the police seek to detain well beyond one year, and since the investigation is complex, and since the police also require further detention of the data from 's cell phone until the investigation is complete, it is appropriate in the interests of efficiency and rationality for this Court to entertain the application for further detention of all of the seized items at one time, in one application. Crown counsel submits that it would be an unnecessary use of police and

Crown resources, and court time, and it would cause unnecessary added procedural complexity and delay to require the police to bring a s. 490(3) application in respect of things seized more than one year ago, while more or less concurrently pursuing a s. 490(2) application for things for which continued detention is sought for less than one year.

- [24] I raised with Crown counsel some concern about the fact that the test for further detention up to one year under s. 490(2) is different from the test for further detention beyond one year under s. 490(3). In particular, the latter provision requires a consideration of the complexity of the investigation whereas the former does not. Thus, the issue is not simply a matter of a different forum for the application, but also a different legal test. Crown counsel responded to this concern by submitting that if this Court is prepared to entertain a single application for further detention of all the items, that is, those for which detention beyond one year is sought and those for which detention for less than one year is sought, then the Court should conduct a single analysis in relation to all of the seized items, applying the more onerous test in s. 490(3). Thus, Crown counsel says, even in respect of the things for which detention is being sought for less than one year, the Court should still ask the question whether, having regard to the complex nature of the investigation, their further detention is required for a specified time.
- [25] I have some sympathy for the concerns about inefficiency and lack of rationality of multiple concurrent applications as suggested by the Crown. The Crown's argument about applying the same statutory test to both categories of seized things is a little more difficult to get one's head around, considering that when entertaining an application under s. 490(3) of the Criminal Code this Court is performing a statutory function. Criminal Code s. 490 is meant to establish a comprehensive regime or complete code for the handling of things seized in a criminal investigation. It may not achieve that legislative purpose with great aplomb, but even so, it is not for the Court to pick and choose which provisions to apply, as if ordering from a menu.
- [26] It seems to me there are arguments going both ways. On the one hand there is nothing in the text of s. 490(3) that limits an application to things for which detention is being sought for less than one year. In other words, the text of s. 490(3) is open-ended and does not contain any express limit that would bar consideration of an order for further detention of things for less than one year. On the other hand, as I say, it is a statutory scheme, and on its face s. 490(2) is clearly meant to govern applications for detention up to one year, while s. 490(3) is meant to govern applications for detention beyond one year.
- [27] In the end, I consider myself bound by Re 1769. The ruling in that case was given quite recently and it resolves the very legal point that is being asserted by 's counsel and opposed by Crown counsel in the case at bar. Indeed, it was the very same context, that is, an application for further detention of data that had been extracted or seized from computer devices, where the computer devices themselves were governed by s. 490(3) but the data from the devices had been seized or extracted more recently and thus could be dealt with under s. 490(2). Justice Smith was not convinced that this Court had jurisdiction to deal with

the seized data under s. 490(3). Based on principles of judicial comity as discussed in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), recently endorsed by Justice Kasirer writing for a unanimous court in *R. v. Sullivan*, 2022 SCC 19 at para. 6, I consider myself bound to follow the decision in *Re 1769*. None of the exceptions set out in *Re Hansard Spruce Mills* are engaged.

[28] I would therefore dismiss the application for further detention of the single seized thing in which the respondent is interested, that is, the USB stick containing data extracted or seized from 's cell phone. I do so for lack of jurisdiction, because detention of that thing is sought for less than one year, such that this seized thing can be dealt with under s. 490(2). If the police wish to seek further detention of this particular thing, they must do so in the provincial court under s. 490(2). I should add that because of the dismissal of this application and the lapse of the prior order, the police may also have to resort to s. 490(9.1) in any such application.

[29]

[30] With regard to the balance of the seized things, for which detention beyond one year is being sought under s. 490(3), I would grant the application. My reasons for doing so will be cast in very general terms, in part because none of the named respondents have appeared in court either in person or by counsel to argue against the order sought, and also because setting out the details could impair the investigation, which is not yet concluded, although it is nearing its conclusion. I am satisfied that the investigation has elements of complexity, and that further detention of the seized things is required having regard to that complexity. The seized things are required for the investigation and in contemplated criminal proceedings arising out of the investigation. I am satisfied that the police and the Crown require time to complete the remaining steps, up to and including the Crown's assessment of any possible charges, such that further detention until the specified date is warranted.

"Riley J."

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