

CANADA / JUDGMENT

## R. v. Alkhalil

2022 BCSC 1106

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1106 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2022 BCSC 1106

Date: 20220704

Docket: 27393-160

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil) and

**Larry Ronald Amero**

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Before: The Honourable Justice Maisonville

Ruling re Application No. 160 - Lost Evidence / Stay of Proceedings (Count 2)

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

May 17-19 and June 21, 2022

Place and Date of Ruling:

Vancouver, B.C.

July 4, 2022

## Introduction

- [1] The applicant, Larry Amero, seeks an order that the loss of two BlackBerry devices, police exhibits 18LW and 19LW, while in the custody of the Vancouver Police Department ("VPD") has rendered it impossible for him to make full answer and defence in regards to Count 2 and that a stay of proceedings be entered on that count. The sole issue at this stage is whether the loss of the two exhibits constitutes unacceptable negligence on the part of the VPD. The question of remedy, in the event the Court finds unacceptable negligence, will be deferred until after verdict.

The Agreed Statement of facts

- [2] The parties argued this application on the basis of an agreed statement of facts, which I set out in its entirety below.

## Background

- [3] In the Indictment before the Court, 27393-2, Mr. Amero stands charged with 2 counts of conspiracy to commit murder: Count 2 involves a conspiracy to murder Sandip Duhre and Count 3 involves a conspiracy to murder Sukhveer Dhak.
- [4] During a search conducted on August 8, 2012 at PH6 - 555 René-Lévesque in Montreal (the "Montreal Residence"), several electronic devices were seized by Det. Lisa Wu from the residence, including two devices identified as 18LW and 19LW, found in Room #2 (alleged to be Mr. Amero's bedroom). On August 9, 2012, another device, 58LW, was seized from a Mercedes CLS located in the underground parking of the Montreal Residence. The seized items were secured in a police exhibit locker.
- [5] Agent William Carson took photographs of 18LW on August 8, 2012.
- [6] On August 10, 2012, Det. Wu removed the seized exhibits from the locker, including police exhibits 18LW, 19LW, and 58LW and packed them in sealed boxes for shipping. She sent them by Purolator Courier to the VPD at 3585 Graveley Street. When Det. Wu unpacked the boxes on arrival at the VPD, the sealing tag was intact. The boxes were stored in the Homicide Project Room.
- [7] The electronic devices seized from the Montreal Residence by Foglietta were put in silver "Faraday" bags, as opposed to the Ottawa exhibits which were put in clear plastic exhibit bags.
- [8] On August 17, 2012, some of the electronic exhibits, including police exhibits 18LW, 19LW, and 58LW, were shipped from the VPD to the "A" Division of the Integrated Technological Crime Unit ("ITCU") in Ottawa, and transferred to Alain Grondin for processing, triage, and analysis. On August 21, 2012, Grondin photographed and resealed these devices.
- [9] On October 10, 2012, Grondin sent police exhibits 18LW, 19LW, and 58LW back to the VPD. These devices were locked and, at the time, the expertise of the RCMP Technical Analysis Team ("TAT") with RDX did not allow decryption of encrypted PGP content.
- [10] Police exhibits 18LW, 19LW, and 58LW arrived at the VPD on October 11, 2012 and were locked in the Homicide Project Room until January 28, 2013, when they were logged into the VPD Property Office for the first time.
- [11] On July 11, 2013, at 10:40 a.m., Sgt. Hans Dykman sent an email to the VPD Property Office, asking for the release of various exhibits to Mr. Amero or his lawyer, Lawrence Myers. These items included four BlackBerry devices, police exhibits 15LW, 18LW, 19LW, and 22LW. Approximately twenty minutes later, a technician at the VPD Property Office responded to Sgt. Dykman with the word, "done".

- [12] On July 15, 2013, at 10:27 a.m., Sgt. Dykman sent another email to the VPD Property Office, asking that they change back the status of police exhibits 15LW, 18LW, 19LW, and 22LW to "Hold Evidence". Approximately twenty minutes later, a technician at the VPD Property Office responded to Sgt. Dykman with the word, "Updated".
- [13] The VPD Property Office has procedures in place for the storage of police exhibits, including procedures for exhibits being submitted and signed out of the VPD Property Office. These were in place at all material times relevant to this application.

16LW

- [14] A BlackBerry device identified as police exhibit 16LW was found on the bed in Room #2 of the Montreal Residence and seized by investigators. It was among the devices shipped from the VPD to ITCU in Ottawa on August 17, 2012. It was also triaged and photographed by Grondin on August 21, 2012. Although it was locked, it had a known data recovery forensic solution and so it was sent off to TAT for further analysis. TAT later determined the device, which was not encrypted, did not require their expertise and it was sent back to Grondin at the ITCU for analysis. Data was extracted from the device and it was determined the device belonged to Lyndsey Black.

18LW

- [15] On February 19, 2014, Lyndsey Black attended at the VPD Property Office to collect a number of exhibits that had been seized from the Montreal Residence. She presented a Power of Attorney on behalf Mr. Amero, authorizing her to receive property belonging to him. A receipt was issued by the VPD Property Office and signed by Ms. Black, indicating several items were returned to her.
- [16] Police exhibit 18LW was not listed as an item returned to Ms. Black.
- [17] For reasons unknown, Ms. Black did not take an iPod that was eligible to go back to her (exhibit 17LW). The iPod was disposed in 2017 as it was unclaimed property.
- [18] A copy of the receipt was disclosed to counsel for Amero on July 11, 2019.
- [19] In the early morning hours of September 19, 2018, Sgt. Dykman sent a request to the VPD Property Office, requesting the release of five devices, including police exhibits 18LW, 19LW, and 58LW. Further advancements in technology gave the police reason to believe that several devices, including police exhibits 18LW, 19LW, and 58LW, might have a data recovery forensic solution.
- [20] At approximately 8:14 a.m., VPD Property Office custodian Matthew Usui received the request from Sgt. Dykman and proceeded to sign out the five devices from file 12-8885 (including police exhibit 18LW), changing the storage location to that of "INVEST" and referenced Sgt. Dykman. However, when Mr. Usui went to retrieve the five devices, he could not locate police exhibit 18LW with the corresponding property office label 302.

- [21] Later that morning, Acting Manager of the VPD Property Office, Justin Hull, was advised that police exhibit 18LW was missing. As a result, he changed the storage location from "INVEST" to "LOCUNK" indicating "location unknown".
- [22] Mr. Hull then informed Sgt. Dykman of the missing exhibit and several emails were sent back and forth between the two of them in an attempt to clarify the continuity of the exhibit.
- [23] On September 20, 2018, Mr. Hull instructed staff at the VPD Property Office to:
- gather all other exhibits from file 12-8885 and search all boxes for any sign of police exhibit 18LW;
  - do a cursory search of the numerous boxes from the file; and
  - search the immediate vicinity of the storage location SB-196, the last known location that the exhibit was stored.
- [24] This search yielded negative results.
- [25] Mr. Hull also conducted an analysis on the box that had the VPD Property Office label 302 in an effort to locate police exhibit 18LW. A photograph was taken of the labeling on the box. This photograph shows that label 302 was crossed out, as was the corresponding label for police exhibit 19LW, label 305. It is the procedure in the VPD Property Office to cross out labels when an exhibit is removed from the box. This is so that the label is not scanned when there is an audit and to indicate the exhibit is no longer inside the box.
- [26] From the analysis of label 302, it was learned that the label was scanned during a June 2016 audit. The audit report showed that the label was located in SB-196, the last known location of police exhibit 18LW. It is the procedure of the VPD Property Office to not scan labels if they are crossed out.
- [27] During the course of the search for police exhibit 18LW in September and October 2012, Mr. Hull was unable to locate some of the internal VPD Property Office documents related to file 12-885, including receipts from 2014. He searched extensively for these records, including looking in other files, in attempt to locate them.
- [28] October 2, 2018, Mr. Hull provided a report detailing the VPD Property Office's efforts to locate police exhibit 18LW to date, along with an explanation and possible theory that the device had been inadvertently returned to Ms. Black on February 19, 2014.
- [29] Between October 2 and 9, 2012, the VPD Property Office took further steps to locate police exhibit 18LW, which yielded negative results. These steps included analyzing PRIME (Police Records Information Management Environment) property module notes to glean as much information regarding when the item arrived at the VPD Property Office, who may have signed it out, where it was stored, and when it was last touched. As well, the VPD Property Office staff conducted an extensive search of all areas of the facility, excluding the DNA freezer and fridge.

[30] On October 9, 2018, Sgt. Dykman was informed by the VPD Property Office that their attempts to locate police exhibit 18LW were unsuccessful. In a letter dated the same day, Mr. Hull summarized the steps taken to locate police exhibit 18LW:

1. Opened and/or inspected approximately 2800 small individual boxes.
2. Consolidated all exhibits from 12-8885 to a central location. cursory search of all boxes performed. Staff did not open any sealed envelopes or packages as per MCS directive.
3. Searched all envelope storage trays, consisting of approximately 1500 individual trays that store a number of individual files inside.
4. Search all computer and cell phone storage locations.
5. Search all "big box" locations.
6. General office search; checked inside all staff desks and other common areas.
7. cursory search of the pallet section. Shrink wrapped exhibits from major files were not disturbed as to not interfere with continuity.
8. VPD Property Office team sessions to brainstorm new search techniques.

[31] Mr. Hull estimated the amount of time the VPD Property Office spent looking for police exhibit 18LW to be upwards of 120 hours, including 42 hours of overtime over the weekend.

[32] During the course of the extensive search for police exhibit 18LW, the VPD Property Office located police exhibits 30 and 16AR from file 12-8885 in storage that showed as being in the possession of investigators. Both of these items were moved to the appropriate storage location with other exhibits from this file.

[33] On October 22, 2018, Sgt. Dykman and other members of the investigative team conducted a physical search of all the Project Reality exhibits and were unable to locate police exhibit 18LW.

[34] On July 11, 2019, the accused were informed that police exhibit 18LW could not be located.

[35] On June 2, 2022, as part of an ongoing investigation into the disappearance of police exhibit 18LW, Mr. Hull located the missing internal VPD Property Office documents related to file 12-8885, including the receipt from Ms. Black referred to above.

[36] As of the date of this application, police exhibit 18LW has not been located.

19LW

[37] In October of 2018, the VPD were granted warrants to search police exhibits 19LW and 58LW, along with 2AR, 22LW, 3LW, 4AR, and 4LW (collectively referred to as the "2018 Warrant Devices").

- [38] On November 30, 2018, Det. Antonel retrieved the 2018 Warrant Devices and delivered them to the Surrey ITCU so they could be shipped to TAT in Ottawa for analysis. Photographs were taken of the external packaging upon arrival at the Surrey ITCU but the packages were not opened. The 2018 Warrant Devices were then shipped to TAT in Ottawa, but the packages were not opened due to an intervening Crown decision that the devices should not be examined. TAT sent the items back to Surrey ITCU, and they were received by Surrey ITCU on January 15, 2019. Photographs were taken again of the external packaging upon receipt at Surrey ITCU but the packages were not opened. On January 17, 2019, Det. Antonel secured the 2018 Warrant Devices at the VPD Property Office.
- [39] By letter dated January 15, 2019, counsel for Mr. Amero and Mr. Alkhalil were advised of the Crown decision not to have the 2018 Warrant Devices examined and the Crown rationale for not doing so.
- [40] On September 29, 2021, counsel for Mr. Alkhalil filed NOA 107, seeking the release of police exhibits 19LW and 58LW for an examination. The reason given for bringing the application was that on August 25, 2021, Mr. Alkhalil had advised his counsel that these devices contained "exculpatory messages".
- [41] On October 6, 2021, Det. Wu retrieved police exhibits 19LW and 58LW from the VPD Property Office and transferred them to Sgt. Dykman. Sgt. Dykman sent the devices to TAT in Ottawa so that they could be analyzed in the event that NOA 107 was successful.
- [42] On November 2, 2021, this Court dismissed NOA 107 (R. v. Alkhalil, 2021 BCSC 2150).
- [43] On November 2, 2021, counsel for Mr. Alkhalil wrote to Crown and asked that police exhibits 19LW and 58LW be brought to court so defence counsel could enter them as exhibits at trial.
- [44] On November 8, 2021, the VPD received police exhibits 19LW and 58LW back from TAT in Ottawa. The devices did not undergo any analysis while in Ottawa.
- [45] On November 10, 2021, Sgt Dykman gave the devices to Det. Wu to take to court as had been requested by counsel for Mr. Alkhalil.
- [46] On December 8, 2021, Det. Wu brought police exhibits 19LW and 58LW to court. She testified but was stood down before cross-examination could begin. After court, Det. Wu returned the devices to the VPD Property Office.
- [47] On January 27, 2022, Det. Wu retrieved police exhibits 19LW and 58LW in anticipation of her continued testimony.
- [48] On March 10, 2022, during the course of cross-examination, Det. Wu tendered police exhibits 19LW and 58LW. It was discovered that these devices were not the ones seized at the Montreal Residence on August 8 and 9, 2012, as they had different IMEI numbers. These devices were entered as trial exhibits 205 and 206 respectively.

- [49] On April 7, 2022, counsel for Mr. Alkhalil filed NOA 154, seeking the release of trial exhibits 205 and 206 for examination.
- [50] On April 14, 2022, the Court ordered that trial exhibits 205 and 206 be released to the VPD for the limited purpose of powering them up in a Faraday room to determine if they were accessible. That same day, S/Cst. Nancy Yingling of the VPD Digital Forensics Unit, determined that trial exhibit 205 was not locked and therefore accessible, and that trial exhibit 206 was locked and therefore not readily accessible.
- [51] On April 20, 2022, the Court ordered that Trial Exhibit 205 be released to the VPD for further examination. On April 21, 2022, S/Cst. Yingling generated a Cellebrite extraction report from a forensic image of the device. The report did not include log entries, which can show internal activity on the device. The report revealed that there was no user-created content on trial exhibit 205, except two items identified in the "Notes" section of the report. Note #1 had been marked for deletion and was titled "J" but had no content in the body. Note #2 was in French and titled "Reunion" and contained content in the body.
- [52] A certified translation of Note #2 has been prepared.
- [53] On April 25, 2022, S/Cst. Yingling prepared a triage report, including photographs of trial exhibit 205.
- [54] On May 4, 2022, Det. John Bjornson of the Cybercrime Unit, conducted a more detailed examination of trial exhibit 205 and generated a Cellebrite extraction report from the forensic image of the device, which included log entries this time.
- [55] On May 31, 2022, the Crown sent some written follow-up questions to Det. Bjornson and. on June 3, 2022. he replied back with written answers. The document containing the questions and answers was disclosed to the accused on June 4, 2022.
- [56] The main information obtained from Det. Bjornson written answers in respect of trial exhibit 205 can be summarized as follows:
- There was a secure wipe on June 9, 2021 at 9:36:37 UTC+0. ["Wipe: Wsec" entry at line 4462, page 557].
  - Factory default settings were restored after the June 9, 2021 secure wipe. ["Hello from your new BlackBerry!" at line 4603, page 562].
  - A secure wipe permanently erases all user-created data. This includes all notes, emails, messages, photos, video, internet history, etc.
  - Note #1 and Note #2 must have been added to the device sometime after the secure wipe on June 9, 2021.
  - Note #1 was subsequently deleted. Note #2 remains the only user-created content in the device that has not been deleted.

- The device date/time settings indicate Aug 7, 2012 at 3:37 pm, time zone Casablanca (GMT), and is set to "Manual". This was a manual backdating.
- There are multiple date/time setting changes and all of them must have occurred after the secure wipe on June 9, 2021.
- All activity in the Timeline portion of the Cellebrite report with dates/times in 2012 must have occurred after the secure wipe on June 9, 2021.
- There are artifacts on the device showing user activity between June 9, 2021 at 9:36:37 pm UTC+0 until June 23, 2021 at 12:13:00 am UTC+0.

[57] As of the date of this application, police exhibits 19LW and 58LW have not been located. There is an ongoing investigation regarding the replacement of these devices, as well as the disappearance of 18LW.

the positions of the parties

[58] Mr. Amero submits that based on the agreed facts, he has established that 18LW and 19LW have been lost, and that the burden is on the Crown to prove that their loss was not due to unacceptable negligence.

[59] The Crown readily acknowledges the loss of the exhibits while in the possession of the VPD and the consequent burden it bears but says that it has provided a satisfactory explanation for the disappearance of the exhibits. It points to an admission at trial (Ex. 310) that "the police extracted data from trial exhibit 205 and located a user-created file indicating that the substitution of police exhibit 19LW for trial exhibit 205 was a deliberate act by an unknown party". The Crown says that the VPD Property Office was deliberately targeted and infiltrated, and that exhibits were stolen and replaced in an attempt to pervert the course of this trial. It further submits that it is not at all clear that the infiltration of the VPD Property Office ought to be characterized as an act of negligence, let alone unacceptable negligence, on the part of the VPD.

[60] As for 18LW, the Crown says that the situation is less clear as the circumstances in which it went missing are not known. While possible explanations are that it was misplaced by police or given to Lyndsey Black in error, neither seem likely on the facts. The most likely explanation in the Crown's view is that it was stolen, as was the case with 19LW and 58LW.

[61] The Crown contends that the facts support the conclusion that the police took their duties to secure the investigative evidence seriously, had procedures in place to do so, and followed those procedures. Even the best practices, followed assiduously, "may be vulnerable in the face of a saboteur intent on obstructing justice". Accordingly, the Crown says that it has established, on a balance of probabilities, that the loss of the exhibits was not due to unacceptable negligence.

law

- [62] The legal principles regarding lost evidence are settled and not in dispute.
- [63] The key decision in this area is *R. v. La*, [1997] 2 S.C.R. 680, where the Court held:
- [20] This obligation to explain arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in [*R. v. Stinchcombe* (1994), 88 C.C.C. 557] ("*Stinchcombe* (No. 2)), recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the Charter. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.
- [21] In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.
- [22] What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 78-81, per Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.
- [64] Justice Doherty conveniently summarized the governing principles in *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.) at para. 30:

[30] The trial judge also erred in concluding that there had been no breach of the appellant's constitutional rights. The proper approach where any accused claims that the failure to preserve material in the possession of the Crown results in a breach of a Charter right is found in *R. v. La*, supra. That approach is conveniently summarized by Roscoe J.A. in *R. v. F.C.B.* (2000), 142 C.C.C. (3d) 540 at 547-48 (N.S. C.A.):

- (1)The Crown has an obligation to disclose all relevant information in its possession.
- (2)The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
- (3)There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
- (4)If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
- (5)In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
- (6)If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
- (7)In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of the evidence was deliberately for the purpose of defeating the disclosure obligation.
- (8)In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in *O'Connor*.
- (9)Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
- (10)In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

[65] Many decisions have addressed what is meant by "unacceptable negligence". In *R. v. Peterson*, 2022 ABQB 365, for example, Justice Renke explained (at paras. 26-27):

[26] If the evidence supports the loss or destruction of evidence through error, the trial judge must determine whether the Crown has established that the loss or destruction was not caused by "unacceptable negligence." "Unacceptable negligence" requires a greater degree of fault than mere or simple negligence or civil negligence: *R v Adem*, 2017 ABQB 6, Gates J at para 87; *R v MacNeil*, 2022 ABQB 309, Jerke J at para 26(7); *R v Dessouza*, 2012 ONSC 465, Ricchetti, J at para 107.

[27] In making the determination,

- the trial judge must have regard to all the circumstances.
- the main consideration is whether the Crown or police took reasonable steps in the circumstances to preserve the evidence for disclosure.
- the degree of care required is proportional to the materiality (significance) and the nature of the evidence.

See *La* at paras 20, 21; *Janeiro* at para 108; *R v Hersi*, 2019 ONCA 94, Doherty JA at para 26, app. for ext. of time to file app. for leave to appeal denied (and app. for leave to appeal would have been denied regardless), 2020 CanLII 27697 (SCC); *R v Abreha*, 2019 ONCA 392 at para 11; *R v Cloutier*, 2011 ONCA 484 at para 71; *Bero* at para 30; *KDS* at paras 60, 84-85; *R v Cathcart*, 2019 SKCA 90, Kalmakoff JA at paras 27 to 29; *FCB* at para 10; *Adem* at para 85; *MacNeil* at para 26(6); *R v Mathieu*, 2016 ABQB 604, Tilleman J at paras 52-53.

[66] Similarly, in *R. v. Janeiro*, 2022 ONCA 118, Paciocco J.A. wrote:

[107] Where a Charter applicant has shown that disclosable evidence has been lost, a Charter breach contrary to s. 7 will be found unless the Crown has provided a satisfactory explanation for that loss, thereby demonstrating that an abuse of process has not occurred. The Crown may do so by establishing that the evidence has not been destroyed or lost by unacceptable negligence, that is, negligence that goes beyond mere negligence. This can be accomplished by showing that reasonable steps were taken in the circumstances to preserve the evidence, bearing in mind the relevance that the evidence was perceived to have at the time it was lost or destroyed: *R. v. La* [1997] 2 S.C.R., at paras. 20-22; *R. v. Hersi* 2019 ONCA 94, 373 C.C.C. (3d) 229, at para. 30.

## DISCUSSION

[67] There is no dispute that 18LW and 19LW were in the possession of the VPD at the time they went missing. The Crown must therefore satisfy the Court that their loss was not occasioned by unacceptable negligence. As the authorities make clear, the heart of the inquiry is whether the police took reasonable steps in the circumstances to preserve the evidence, which necessarily takes into account its perceived importance.

[68] I start from the proposition that the two BlackBerry devices, capable of storing large amounts of personal data, constituted potentially important evidence. The fact that the Crown's case against Mr. Amero rests substantially on data extracted from other BlackBerry devices seized from the same residence makes the point. Given the potential significance of the exhibits, at least until they were forensically examined, a high degree of care in their handling was warranted.

[69] The VPD had detailed procedures in place at the material time for the intake and sign out of exhibits from its VPD Property Office. They are set out in a document entitled "VPD Property and Forensic Storage Services", which reads in material part:

Police Member or Special Municipal Constable Activity related to tagging items

- The Police Member or SMC will enter the items in the Versadex Records Management System (RMS) Property Module;
- The Police Member or SMC will add an evidence continuity report in the RMS Property Module, tracking the exhibit from the point of seizure to the Report Writing Room at the Property Office;
- The Police Member or SMC will print an appropriate barcode label for the specific exhibit, each exhibit/item will have an individual and unique barcode related to the entry within the RMS Property Module;
- The Police Member or SMC will place the items into an appropriate package suitable for the type of exhibit;
- The Police Member or SMC will affix the barcode onto the exhibit;
- The Police Member or SMC will enter the exhibit in the log book; and
- The Police Member or SMC will place the exhibit in a suitable pass-through locker (or other receptacle specifically used for the type of exhibit (Fridge/Freezer/one-way drop box etc.) and locks the locker.

At this point, the exhibit is now ready to be received by the custodial team.

### **Property custodian Team Activity related to receiving property**

- The Lead Property Custodian, or their designate, will open from the warehouse side, the pass-through lockers that the Police Member or SMC placed the property into;
- OR the Property Custodian will attend to the Report Writing Room and access the other receptacles for exhibits that are secured in a location other than the pass-through lockers (Fridge/Freezer/one-way drop box etc.)
- The custodian will scan the affixed barcode, adding a new evidence continuity entry into the RMS Property Module, removing the items from the Report Writing Room (OR) locker into the Property Office (PO) general location;

- The Property Custodian will place the exhibit(s) on the counter, which is situated by the work stations of the property custodians;
- The Property Custodian will then move the exhibit(s) to the appropriate storage location in the warehouse; and
- The Property Custodian will then update the storage location in the RMS property module.

The property is then secured within the facility until such time as it is required for examination, submission to court, return to an owner or destruction if it meets purging requirements.

### Sign-out Process

- A Police Member will attend the police counter at the Property Office Report Writing Room and request an exhibit from a Property Custodian;
- The Property Custodian will query the file within the RMS Property Module, confirm the exhibit location and that it is in fact within the Property Office Facility as opposed to being out to another location such as Court, Digital Forensics Lab, Forensic Ident Unit, etc.;
- The Property Custodian will retrieve the exhibit from the warehouse based upon the location that it is stored. If the exhibit is in a box with other exhibits, the custodian will black out the label on the box to show that the exhibit is no longer being stored in the box and so that the bar code should not be scanned again;
- The Property Custodian will add an evidence continuity report, showing the movement of the exhibit from the Property Office location to the member as a location. The reason for these transfers will be listed such as "invest", "Court", "Return to Owner", etc.;

If items return to the Property Office after being signed out, they will generally follow the path above describing the original submission. The only other way that they can be "returned" to the Property Office is by the member returning the item directly to a Property Custodian (when the PO front counter is open) who will assist them with printing a new barcode label if required, and entering the item into the RMS property Module.

[70] In my view, the agreed facts do not disclose any clear failure on the part of the VPD to comply with these procedures in relation to the two exhibits, other than the obvious fact that the exhibits are not where they ought to be. While Mr. Amero refers to certain anomalies in the exhibit flowchart in relation to 18LW, they do not appear to me to be of significance. For instance, he points to an entry indicating that the exhibit was "returned" to the VPD Property Office on January 19, 2013, when in fact it was turned in to the VPD Property Office from the Homicide Project Room on that date for the first time. The important point is that the exhibit ended up in the VPD Property Office on that date.

- [71] The absence of 18LW from the VPD Property Office was first noticed on September 19, 2018. The circumstances regarding its disappearance remain unknown despite extensive efforts to locate it by the VPD Property Office and by members of the investigative team. The investigation into its disappearance remains ongoing.
- [72] The situation regarding 19LW is slightly different since the results of the forensic examination of trial exhibit 205 leave no doubt that its substitution for 19LW was, in the language of the trial admission, "a deliberate act by an unknown party". As set out in the agreed statement of facts, the replacement device was wiped on June 9, 2021, a few weeks prior to the commencement of the trial. The device's date and time settings were backdated to August 7, 2012--the day prior to the device's seizure--and a note was added alleging serious police corruption in relation to several of the seized BlackBerry devices. The content of the note strongly suggests that the removal and replacement of 19LW was intended to prejudice, not benefit, the state. Given that 19LW was in the custody of the VPD, these acts would appear to have been undertaken by, or at least with the assistance of, a police or civilian member of the force.
- [73] What occurred here is immensely troubling. It may well be criminal. I do not, however, consider that it was the product of negligence.
- [74] While it may be tempting to consider the fact that interference with 19LW was allowed to occur to be unacceptably negligent, the reality is that no system of procedures or protocols, however robust and however assiduously followed, can entirely protect against human weakness or deliberate action by a determined insider. I am satisfied that, in following the exhibit management procedures, the police took reasonable steps in the circumstances to preserve the exhibit. What then occurred was the result of deliberate conduct on the part of a rogue actor, not negligence on the part of the VPD.
- [75] This highly unusual situation is entirely different from the typical lost evidence scenario. In *Janeiro*, for example, Paciocco J.A. found unacceptable negligence in circumstances where a police officer stored a security video that depicted the charged offence in a paper bag in an unlocked communal filing cabinet along with videos from unrelated cases. In *R. v. Mathieu*, 2016 ABQB 604, a DVD was lost notwithstanding that police followed their standard procedure for retaining such evidence. The Court found that the item had been misplaced accidentally, not due to unacceptable negligence.
- [76] In the circumstances, I do not find that police exhibit 19LW was lost due to unacceptable negligence.
- [77] The fate of 18LW is not known. It is possible that it was misplaced by police, though given the thoroughness of the search for its whereabouts this appears unlikely. I note that during the course of this search, the VPD Property Office found police exhibits 30 and 16AR in storage when they were shown as being in the possession of investigators. While this reveals that the exhibit management procedures are not foolproof and that exhibits do fall through the cracks, it also suggests that 18LW would have been found had it simply been misplaced

or not properly accounted for in the tracking system. Another possibility is that it was given to Ms. Black in error in 2014 when she attended at the VPD Property Office to retrieve a number of exhibits on behalf of Mr. Amero. However, it was not included on the receipt she signed so this explanation is also unlikely. In the Crown's view, the most likely explanation is that 18LW was stolen, as was the case with police exhibits 19LW and 58LW.

[78] I am not able to resolve this issue on the information known, other than to conclude, based on the receipt signed by Ms. Black, that 18LW was not mistakenly returned to her. As for whether it was misplaced or deliberately interfered with, my conclusion regarding unacceptable negligence would be the same. If 18LW were misplaced, I would find its loss to be inadvertent or accidental in circumstances that do not go beyond mere negligence. If it were stolen, then my reasoning regarding 19LW would apply here too.

## conclusion

[79] In all of the circumstances, I conclude that the loss of police exhibits 18LW and 19LW were not occasioned by unacceptable negligence on the part of the VPD.

"Maisonville J."

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