

CANADA / JUDGMENT

R. v. Gill

2021 BCSC 377

COURT

Supreme Court of British Columbia

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2021 BCSC 377 R. v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gill,

2021 BCSC 377

Date: 20210302

Docket: X080640

Registry: New Westminster

Regina

v.

Samandeep Singh Gill

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These Reasons have been edited for publication purposes

Before: The Honourable Mr. Justice D.M. Masuhara

Oral Ruling on Exclusion of Evidence

Charter s. 24(2)

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Place and Date of Hearing:

New Westminster, B.C.

February 3-5, 2021

February 11-12, 2021

February 16, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 2, 2021

I. BACKGROUND

- [1] Mr. Samandeep Gill was charged in May 2018 with second-degree murder and attempted murder. The charges stem from a shooting on April 27, 2011, that appears to have resulted from a road-rage incident between strangers. The altercation occurred as a result of a collision between two vehicles travelling in the same direction in adjacent lanes on a highway in Surrey, BC. The issue at trial is the identification of the shooter.
- [2] In the course of the incident Mr. Manbir Kajla was shot and killed. Mr. Kajla had left his vehicle to speak to the driver of the vehicle with which he had collided. As he approached the other vehicle, the driver of the other vehicle fired shots, fatally striking Mr. Kajla. The shooter then shot at Ms. A.B., Mr. Kajla's wife, who had left the vehicle to approach the shooter's vehicle from the passenger side. Fortunately, he missed. The Crown alleges that the accused was the shooter.
- [3] This ruling deals with a defence application seeking exclusion of evidence under s. 24(2) of the Charter of Rights and Freedoms (the "Charter"). At issue is evidence derived from an iPhone, two BlackBerry phones, and a home video surveillance system ("SVAT") seized during the execution of a search warrant at the accused's place of residence on May 14 and 15, 2011.

- [4] On May 25, 2011, a production order for the iPhone's cell phone records was obtained for the service provider. Those records indicated that the iPhone's phone number was 604-365-4455, and that it was registered to Jaswant Gandham (the accused's brother-in-law, married to the accused's sister, Malkit Gandham). Mr. Gandham informed police that the accused was the user of the iPhone. Mr. Gandham was also the registered owner of the vehicle with which Mr. Kajla allegedly collided on the night of the shooting.
- [5] Though two cell phones were presented by the Crown as being at issue at the outset of this voir dire (an iPhone and a single BlackBerry), the Crown advised during closing arguments that a third cell phone (another BlackBerry) was necessary to their case. One of the BlackBerrys was registered to a "John Dough" and was allegedly used by the accused.
- [6] Of central importance to the Crown case is an audio recording on the iPhone that allegedly captures the shooting. The recording is about one minute in length and was played back during this hearing.
- [7] The Crown's theory is that the audio recording was created as the result of a "pocket dial" from one of the two BlackBerrys. The Crown alleges that the applicant had the iPhone and one of the BlackBerrys in his possession at the time of the shooting, and that the audio recording of the crime was inadvertently captured on the iPhone.
- [8] The SVAT seized during the search of the accused's residence contains footage from the day of the murder depicting a male individual departing the residence in a Toyota 4 Runner, the type of vehicle allegedly belonging to the shooter, about an hour before the shooting.
- [9] The Crown acknowledges that the accused has a privacy interest in the cell phones and SVAT and that he therefore has standing to bring on this application.

A. Previous applications and rulings

- [10] A number of applications have been brought by the parties to this point. They include:
- a) A defence application challenging the validity of the subject search warrants issued in this case. I ruled that the warrants were valid.
 - b) A Crown Vukelich application which was denied.
 - c) A defence over-seizure application regarding items seized during the search of the accused's residence. I ruled that the defence had established an over-seizure contrary to s. 8 of the Charter.
 - d) A defence challenge to the constitutional validity of s. 490(9.1) of the Criminal Code, R.S.C. 1985, c. C-46 (the "Code"). Although I have heard the parties' submissions, I have not ruled on this application.

- e) A defence application alleging that the police contravened s. 8 of the Charter by non-compliance with ss. 490(2) and (3) of the Code. I ruled that the defence had established a s. 8 infringement.
- [11] Relevant to the present s. 24(2) analysis are the two established s. 8 breaches.
- [12] With regard to the over-seizure, I ruled that the indiscriminate seizure of all nine cell phones located in the residence the accused shared with several family members was unreasonable. S/Sgt. Gorgichuk acknowledged in her testimony on that hearing that the police conducting the search had no idea which, if any, of the phones they located belonged to the accused. As such, they were unable to determine if any of them was the phone listed in the search warrant. Because none of the phones could therefore be seized pursuant to the warrant's authorization to seize a single cell phone, their seizure fell under s. 489(1)(c).
- [13] Section 489(1)(c) requires "reasonable grounds" for seizure of items not listed in a search warrant, a standard requiring: (1) subjective belief that one has reasonable and probable grounds to seize the subject items, and (2) the existence of objectively reasonable and probable grounds. Reasonable and probable grounds are established at "the point where credibly-based probability replaces suspicion"; a mere possibility does not amount to a credibly-based probability: *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 167. The fact that "reasonable grounds" imparts the same standard as "reasonable and probable grounds" has been confirmed by the Supreme Court of Canada on multiple occasions: see e.g. *Baron v. Canada*, [1993] 1 S.C.R. 416 at 446; *R. v. Loewen*, 2011 SCC 21 at para. 5.
- [14] The admission by S/Sgt. Gorgichuk that the police had no idea who each of the phones belonged to indicates that they did not satisfy the subjective or objective prongs of the "reasonable grounds" test in relation to the nine seized cell phones. The seizure of a video surveillance system not listed in the warrant was similarly ruled an over-seizure, as S/Sgt. Gorgichuk's testimony indicated that grounds for its seizure were derived from an unlawful search of the system.
- [15] With regard to the over-holding in contravention of ss. 490(2) and (3) of the Code, I ruled that the failure of the police to secure judicial authorization for continued detention according to s. 490 time limits was unreasonable and constituted a s. 8 Charter infringement. The items at issue were ultimately held for more than 6.5 years without appropriate judicial supervision. This was initially due to a policy of systematic non-compliance with ss. 490(2) and (3) of the Code maintained by the RCMP's Integrated Homicide Investigation Team ("IHIT") from 2007 until 2014. However, even after the policy was lifted the RCMP continued to detain the items without seeking judicial authorization until 2018.
- [16] The case ultimately went "cold" with IHIT and was transferred to the RCMP's Unsolved Homicide Unit ("UHU") in 2016. It was UHU that ultimately sought a continued detention order under s. 490(9.1).

B. Evidence

- [17] The evidence on this voir dire is comprised of documentary evidence, including an Admission of Facts, and the testimony of S/Sgt. Gorgichuk.
- [18] In her testimony, S/Sgt. Gorgichuk (then Constable), the file coordinator for the investigation at the time of the search of the accused's residence, acknowledged her awareness of the IHIT direction not to comply with ss. 490(2) and (3) of the Code. She testified that, to her knowledge, no extension orders were applied for in any of the 50 to 80 homicide files she was involved in during her tenure at IHIT from November 2009 to August 2014.
- [19] The Admission of Facts relates to legal advice sought and received by IHIT from senior Crown and RCMP counsel in 2007 regarding the necessity of compliance with s. 490 of the Code. The admissions were agreed to as a compromise to avoid further disclosure requests and to dispense with the need to call the authors of the related reports, memos, and opinions. I quote some of the most pertinent admissions below, as they are important to the s. 24(2) analysis:
1. In 2007, senior management of the Integrated Homicide Investigation Team ("IHIT") provided direction to IHIT officers with respect to extending detention orders for exhibits seized pursuant to section 490 of the Criminal Code.
 2. Specifically, senior management of IHIT directed IHIT officers not to seek any extensions of detention orders once the initial 90-day detention order pursuant to section 490(1) expired, notwithstanding the fact that they continued to detain those items.
 3. In the summer of 2007, senior Justice of the Peace Louise Turner ("JP Turner"), at the Surrey Provincial Court Registry advised Sgt. Ross of IHIT that while there were varying levels of compliance with respect to the submissions of the initial Form 5.2 -- Reports to Justice, there was virtually no compliance with respect to seeking subsequent detention orders once the original 90-day detention expired. At the time of that conversation with JP Turner, with the exception of IHIT Team 4, no subsequent detention orders required under section 490 were on file at the Surrey Courthouse.
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5. After advising Sgt. Ross of the facts in paragraph 3 above, JP Turner referred him to Senior Crown Counsel in Surrey, John Labossiere for clarification of the specific cases which had been jeopardized due to the failure of the police to comply with legislative mandates.
 6. Sgt. Ross then met with Mr. Labossiere. They reviewed the relevant sections of the Criminal Code together, including section 490. Mr. Labossiere advised Sgt. Ross that the legislation was clear with respect to the obligations of police with respect to seizure, retention, and disposal of exhibits.

7. Specifically, Mr. Labossiere told Sgt. Ross that section 490 is clear in its direction. Mr. Labossiere also told Sgt. Ross that "ALL exhibits seized by the police, whether the identity of those who have a property interest is known or unknown, are subject to reporting requirements of Section 490 'of process'. That is to say that found items, those accompanied by a Relinquish of Claim, those turned over by various institutions, () and all others are subject to Section 490 because the 'process' requires it."
8. Mr. Labossiere provided legal advice to Sgt. Ross. Specifically, Mr. Labossiere advised Sgt. Ross that he could not advise the police to ignore the legislation of section 490.
9. Mr. Labossiere confirmed that at least two firearms cases in Ontario were dismissed directly as a result of the police ignoring the mandates of section 490. Mr. Labossiere advised him that "[i]n one case the Judge of the Ontario Supreme Court excluded the exhibits due to a lack of detention orders, and found that 'the police were flagrantly and systematically ignoring the legislation' set forth in Section 490".
10. Mr. Labossiere opined Ross that it was only a matter of time until some defence counsel raised the issue of police non-compliance with section 490, forcing the police to speak to a systemic failure to comply with the legislation. Mr. Labossiere also noted that the legislation allows no latitude for covert police operations.
11. Sgt. Ross was aware that the police were required to seek court orders authorizing the detention of seized items after the initial 90-day detention period had expired. Sgt. Ross was also aware that section 490 required three clear days' notice of an application for continued detention to be provided to persons from whom the thing detained was seized. Sgt. Ross was also aware section 490 did not provide for a deferral of notification.
12. During the summer and fall of 2007, Sgt. Ross had on-going discussions with Senior Crown Counsel in Vancouver, Terry Schultes (now Schultes J. of the British Columbia Supreme Court).
13. Mr. Schultes, like Mr. Labossiere, advised Sgt. Ross that the requirements of section 490 were clear. Mr. Schultes also told Sgt. Ross that he could not advise the police to ignore the legislation.
14. Mr. Schultes warned Sgt. Ross that the police should anticipate that the consequences of non-compliance with section 490, which had been demonstrated in court decisions from Ontario, would soon reverberate in British Columbia. Mr. Schultes specifically warned Sgt. Ross that failure to comply with section 490 could "become problematic in court". Mr. Schultes also warned that failure to comply with the legislation is "especially problematic in long term investigations where no one is charged." Mr. Schultes also warned that the courts have historically turned a deaf ear to police arguments of resourcing, temporal consideration, and investigative priorities.

15. Mr. Schultes advised Sgt. Ross that the police had to bring themselves into compliance with the requirements of section 490.

....

18. In 2007, Sgt. Ross spoke to Les Rose, counsel for the RCMP at the time.
19. Like Mr. Labossiere and Mr. Schultes, Mr. Rose also told Sgt. Ross that he could not advise police to ignore the requirements of section 490.
20. Mr. Rose also advised Sgt. Ross that to his knowledge there had never been an exclusion of real evidence at a homicide trial tied to the failure of the police to file the appropriate detention orders. He also noted that Section 490 does not speak to the admissibility of evidence.
21. In his conversation with Sgt. Ross, Mr. Rose expressed the view that the police should be able to demonstrate "balanced risk management" in order to minimize the likelihood of real evidence being excluded.
22. Mr. Rose also advised Sgt. Ross that "while, in the past, some might attempt an argument that the general police population was unfamiliar with the legislative requirements, with the passage of time these arguments would hold less weight."

....

24. In either 2007 or January 2008, Sgt. Ross conducted an audit of 24 randomly selected homicide files under the conduct of the Surrey office of IHIT. He found that three of the 24 files contained the necessary subsequent detention orders. The remaining files were in non-compliance with section 490.
25. Following his 2007 meetings with Mr. Labossiere, Mr. Schultes, and Mr. Rose, in 2008 Sgt. Ross distributed a memorandum reminding all members of IHIT of the requirement to comply with section 490.

....

27. On January 11, 2008 Sgt. Ross produced a memorandum addressed to Superintendent Wayne Rideout outlining the facts contained in paragraphs 3--26 (the "Memorandum").
28. In the Memorandum, Sgt. Ross wrote:

While at the present time, I am not aware of IHIT facing this issue in any judicial proceedings, it is an issue which was initially raised by a Justice of the Peace in one of the largest cities in the Lower Mainland and recognized by Crown to be a foreseeable risk. While I anticipate that the probability of real evidence being excluded in a homicide trial is low, there would seem to be an increased possibility of exhibit lists (previously sealed for investigational integrity) being released to members of the public, including defense lawyers. We rely on the good graces of the various Justice's of the Peace to notify us of any such application, far from a fool proof method. In the

end do we want to face these possibilities at any time in the future with respect to homicide trials?

....

32. In 2014, Staff Sergeant Dwayne McDonald (now Superintendent McDonald) became Officer in Charge of IHIT. Reversing the 2007 direction described in paragraphs 1--2, he provided a new direction to IHIT officers to seek section 490 extensions of detention orders "that had, or were about to expire and in which the things seized were still required to be detained".

In the case at bar, no section 490 orders were sought or obtained after the expiration of the initial 90-day detention obtained by Cst. Wick in August 2011, until January 17, 2018.

- [20] Sgt. Ross's memo to IHIT was appended to the admissions. It includes the following excerpt indicating a desire to avoid seeking detention orders in cases where doing so would draw judicial attention to non-compliance with s. 490 and "place files in jeopardy":

Finding 5:

Until a legislative amendment is enacted which will bring some "workability" to this issue it is problematic to prioritize exhibits which place files in jeopardy (filing the appropriate detention and sealing orders), without highlighting for the courts the failure of the police to comply with the legislation. Risk management risks, as suggested in Finding 1 emphasizing our lack of compliance.

- [21] Also relevant to the matter before me is the application filed by the Crown in January 2018 seeking a two-year detention order pursuant to s. 490(9.1) of the Code. In an ex parte and in camera proceeding, the order was granted by Mr. Justice Jenkins (the "Jenkins Order").

- [22] The affidavit in support of the application provided the following explanation for why extensions were not sought following the expiration of the initial 3-month detention order:

All of the Report to Justice (Form 5.2) filled out by Cst. WICK expired in 2011, three months after all of the exhibits were seized. Subsequent Report to Justice forms were never filled out for the following reasons:

A. On October 11, 2017, I read an email from Assistant Commissioner Dwayne MCDONALD regarding 5.2 extensions in 2011 within IHIT. The email stated, in part, the following:

- i. On XXXX, 2011, Staff Sergeant Dwayne MCDONALD was a Team Commander at the Integrated Homicide Investigation Team (IHIT), responsible for the investigation of the murder of XXXX KAJLA. Since 2007, the senior management at IHIT had provided direction with respect to applications for the extension of 5.2 Detention Orders. Specifically, that no extension of the initial 5.2 Detention Order would be sought upon its expiry after 3 months [I believe the two XXXX references by Assistant Commissioner Dwayne MCDONALD in his email were as a direct result of him not remembering the exact information];

- ii. The rationale provided was that the extension process, whereby the person from whom the thing(s) detained were seized would be advised of the items seized, could compromise the integrity of the investigation;
 - iii. Senior management felt this process was incompatible with a homicide investigation in which a suspect was unaware of their status in an investigation and would be alerted to this fact through the application for extension process;
 - iv. In addition, the suspect could be advised of specific evidence, often obtained covertly as in the case of cast-off DNA, which may serve to impede and/or compromise the investigation;
 - v. Later, in 2014, Staff Sergeant Dwayne MCDONALD, now Superintendent, became the Officer in Charge of IHIT, and directed that the aforementioned policy of not applying for Extension Orders would cease and that Extension Orders would be sought for all 5.2 Detention Orders that had, or were about to expire and in which the things seized were still required to be detained.
- [23] On February 28, 2018, a search warrant was obtained to examine the contents of the iPhone. In the execution of that warrant the police discovered the recording that is the primary focus of this voir dire.

II. KEY PROVISIONS

- [24] For the purposes of this application, the key provisions are ss. 8 and 24(2) of the Charter, and ss. 489(1), 489.1, and 490(1)-(3) of the Code.
- [25] The Code provisions read as follows:

Seizure of things not specified

489(1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, anything that the person believes on reasonable grounds

- (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
- (b) has been used in the commission of an offence against this or any other Act of Parliament;
or
- (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Restitution of property or report by peace officer

489.1(1) Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,

- (a) where the peace officer is satisfied,
 - (i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and
 - (ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or
- (b) where the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii),
 - (i) bring the thing seized before the justice referred to in paragraph (a), or
 - (ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained to be dealt with by the justice in accordance with subsection 490(1).

Restitution of property or report by peace officer

- (2) Subject to this or any other Act of Parliament, where a person, other than a peace officer, has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, that person shall, as soon as is practicable,
 - (a) bring the thing seized before the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, before a justice having jurisdiction in respect of the matter, or
 - (b) report to the justice referred to in paragraph (a) that he has seized the thing and is detaining it or causing it to be detained,to be dealt with by the justice in accordance with subsection 490(1).

Form

- (3) A report to a justice under this section shall be in the form set out as Form 5.2 in Part XXVIII, varied to suit the case and shall include, in the case of a report in respect of a warrant issued by telephone or other means of telecommunication, the statements referred to in subsection 487.1(9).

Detention of things seized

490(1) Subject to this or any other Act of Parliament, where, pursuant to paragraph 489.1(1)(b) or subsection 489.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,

- (a) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
- (b) where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.

Further detention

- (2) Nothing shall be detained under the authority of paragraph (1)(b) for a period of more than three months after the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless
 - (a) a justice, 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 that, having regard to the nature of the investigation, its further detention for a specified period is warranted and the justice so orders; or
 - (b) proceedings are instituted in which the thing detained may be required.
- (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 any 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.

[26] Sections 8 and 24(2) of the Charter provide:

8. Everyone has the right to be secure against unreasonable search or seizure.

24.(2) Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

III. Section 24(2) Framework and Analysis

[27] Section 24(2) sets out two separate requirements. In order to exclude evidence, the court must be satisfied that:

- (a) The evidence was obtained in a manner that infringed or denied a Charter right; and
- (b) The admission of the evidence in the proceedings would bring the administration of justice into disrepute.

These have been described as the "threshold" and "evaluative" stages of the s. 24(2) analysis, respectively: *R. v. Robertson*, 2019 BCCA 116 at para. 51. If the applicant succeeds at the threshold stage, the s. 24(2) analysis moves on to the evaluative stage.

[28] The evaluative stage of analysis engages the three separate avenues of inquiry set out in *R. v. Grant*, 2009 SCC 32, to determine whether admission of the evidence would bring the administration of justice into disrepute. These avenues of inquiry include:

- (1) The seriousness of the Charter-infringing state conduct;
- (2) The impact of the breach on the Charter-protected interests of the accused; and
- (3) Society's interest in an adjudication on the merits.

[29] The evaluative stage is where the cumulative effect of multiple constitutional breaches over the course of an investigation, including those committed in relation to third parties, may be considered: *Robertson* at para. 52. As stated at paras. 72-73 of *R v. Fan*, 2017 BCCA 99:

[72] The seriousness of a Charter breach is not determined in a vacuum. On the contrary, the cumulative effect of multiple breaches is a relevant consideration. Where a breach is part of a larger pattern of abuse or disregard for Charter rights, this exacerbates its seriousness: *R. v. Bohn*, 2000 BCCA 239 (B.C. C.A.) at paras. 45, 47; *R. v. Lauriente*, 2010 BCCA 72 at para. 27. Accordingly, when evaluating the seriousness of a breach for s. 24(2) purposes, a court should consider the cumulative effect of multiple breaches: [*R. v. Spence*, 2011 BCCA 280] at para. 51.

[73] A pattern of breaches tends to support exclusion because courts need to distance themselves from the behaviour: *Grant* at para. 75. However, a finding of cumulative breaches will not necessarily result in the exclusion of evidence under s. 24(2): *R. v. Trieu*, 2010 BCCA 540 at para. 93. Each case turns on its own facts.

[30] Whether a cumulative analysis is appropriate depends on a consideration of the details of each Charter breach and their relationship to one another. Thus, I will consider both the over-seizure and over-holding separately under the threshold and evaluative stages of analysis before addressing the issue of cumulative assessment.

IV. THRESHOLD ANALYSIS

[31] The threshold stage investigates whether a connection exists between the subject Charter violation and the obtaining of evidence: *R v. Reilly*, 2020 BCCA 369 at para. 68. This connection can be causal, temporal, contextual, or some combination of the three: *R v. Wittwer*, 2008 SCC 33 para. 21. The entire chain of events leading to discovery of evidence is relevant to the analysis, and all evidence gathered following a Charter violation should be included in the s. 24(2) analysis: *R v. Pino*, 2016 ONCA 389 at paras. 50, 52; *R v. Lauriente*, 2010 BCCA 72 at paras. 43-44. A failure to meet this threshold standard will defeat a s. 24(2) application and prevent it from proceeding to the evaluative stage.

A. Over-seizure

[32] The Crown concedes that the Charter-infringing conduct in the over-seizure of the cell phones and SVAT meets the threshold standard under s. 24(2).

B. Over-holding

1. Positions of the parties

(a) Crown position

[33] The Crown argues that the over-holding of evidence is not sufficiently connected to the discovery of the impugned evidence on the phones and SVAT to render that evidence "obtained in a manner" that infringed the accused's Charter-protected rights. Specifically, the Crown submits that following the over-holding in breach of s. 8, the Jenkins Order brought detention of the subject items back into compliance with the Charter and constituted a "fresh start". The Crown submits that, therefore, the subsequent search of the detained items pursuant to warrant, leading to the discovery of the impugned recording, cannot be causally, temporally, or contextually linked to the s. 8 breach. The Crown submits that this engages the "fresh start" principle recognized and applied in several of their case authorities. For example:

· In *Wittwer*, police informed the accused of his right to counsel after originally neglecting to do so. This was deemed to provide a "fresh start", bringing the police back into compliance with the Charter. The court found that while statements obtained from the accused after the "fresh start" could be admitted, those obtained while in breach of the Charter could not. The police ultimately committed a second Charter breach in this case by employing information obtained while in breach to question the accused after the "fresh start".

- R v. Manchulenko, 2013 ONCA 543, similarly dealt with a failure by the police to advise an individual of his right to counsel, this time in the context of an arrest for drunk driving following a traffic stop. After an initial breath sample was taken, the accused spoke to his lawyer. A second sample was taken following this discussion. Though the accused was never informed of his right to counsel, the fact that he exercised that right was deemed to constitute a "fresh start", and the second sample was deemed admissible.
- R v. Simon, 2008 ONCA 587, involved a failure to advise the accused of his right to counsel in relation to an offence different from the one for which he had initially been detained. However, prior to giving a saliva sample, the accused was provided and signed a form explicitly waiving his rights under s. 8 of the Charter. This was deemed to constitute a "fresh start", with the saliva sample admissible into evidence.
- In R v. Beaver, 2020 ABCA 203, the s. 9 and s. 10(a) and (b) Charter rights of the two accused were violated due to (i) detention without sufficient nexus between the accused and the crime, (ii) a failure to notify the accused of their legal jeopardy, and (iii) persistence in questioning one of the accused after he requested to speak to his lawyer. These breaches occurred during informal questioning of the accused following a murder. The accused were subsequently arrested at the police station for the murder with probable grounds. They confessed in the course of an interrogation following their arrest. The arrest on probable grounds was deemed to provide a "fresh start", rendering the subsequent confession admissible.
- R. v. Andel, 2014 BCCA 179: Though not a "fresh start" case, Andel involves a finding of an insufficient connection between the subject Charter-infringement and the obtaining of evidence. This case involved Charter breaches of the accused's s. 9 right against arbitrary arrest and s.10(b) right to retain counsel without delay. The accused was arrested after he ran from police, abandoning the vehicle he was driving in order to flee on foot. While his subsequent arrest was unlawful, the court found that the arrest had no causal connection to the police determination that the truck and trailer the accused had been driving were stolen. Thus, that information was not "obtained in a manner" that infringed the accused's Charter rights.

(b) Defence position

- [34] The defence contends that the "fresh start" principle is inapplicable to the circumstances in the case at bar. They note that the "fresh start" analysis is a fact-specific inquiry that must identify a clear severance between the Charter-infringing conduct and the obtaining of the relevant evidence. They argue that, by contrast, there are clear causal, temporal, and contextual connections between the over-holding of the seized items in contravention of s. 8 and the obtaining of the impugned evidence.
- [35] The defence submits that the cases relied upon by the Crown with regards to the "fresh start" can be thoroughly differentiated from the case at bar. They note that each of the "fresh start" cases involves a breach from a failure to warn or advise an individual of his or her rights upon arrest or detention rather than a search or seizure carried out in an unconstitutional manner. In particular, the defence contrasts what they claim to be ongoing,

deliberate, and systemic infringing conduct under the IHIT policy to inadvertent failures to advise individuals of certain rights in the Crown authorities.

[36] Regarding the Crown authorities, the defence submits that Reilly provides a complete response. In that case, the police "entered the home of a suspect, entered his closed bedroom, tackled and arrested him, all without a warrant and without exigent circumstances": at para. 3. They conducted a clearing search of the home, finding certain items of interest in the process. These actions were deemed to have violated the suspect's s. 8 Charter rights. The police used the observation of certain items in the course of the unlawful search to obtain a search warrant authorizing their seizure. These items were admitted into evidence, and the accused was convicted at trial.

[37] Though Griffin J.A. determined on appeal that the search warrant subsequent to the Charter breach was valid, she determined that the evidence obtained from its execution was not admissible under s. 24(2) of the Charter. Regarding the link between the Charter-infringing conduct and the obtaining of the evidence in question, Griffin J.A. stated at para. 82:

The sequence of police conduct was temporally and contextually linked to the obtaining of the evidence: in the course of investigating two armed robberies, they unlawfully entered the appellant's home, arrested him and did a clearing search of the home, and then they drafted the ITO for a search warrant of the home. The ITO included the evidence viewed by the police during the clearing search of the residence. The police obviously considered the unlawful entry, arrest and clearing search to be part of the same investigation as that for which they sought the warrant. They did not seek the warrant until they unlawfully entered and saw the evidence in the home, and they targeted the warrant to the evidence they saw in the home. They conducted the search pursuant to the warrant within hours of the unlawful entry into the home.

[38] She further determined at para. 102 that the trial judge had:

erred in principle in treating the Charter-compliant conduct of other officers as attenuating the seriousness of Constable Sinclair's misconduct. The Charter-compliant conduct could not mitigate or offset the seriousness of the Charter breaches. Rather, it simply did not further aggravate the already serious Charter breaches.

[39] Griffin J.A. compared the case to *R v. Côté*, 2011 SCC 46, in which the validity of telewarrants used to obtain key evidence was given little or no significance in the trial judge's decision to exclude that evidence. Rather, in Griffin J.A.'s words, the trial judge "relied on the fact that the totality of the search process was tainted by the unconstitutional searches that preceded the issuance of the warrants": Reilly at para 78. In *Côté*, Justice Cromwell made a similar determination, finding that warrantless searches can "taint" subsequent lawful searches such that evidence obtained pursuant to a lawful search may be inadmissible.

- [40] The defence contends that the circumstances and principles outlined in Reilly and Côté are applicable to the case at bar, while the "fresh start" cases provided by the Crown are not. In particular, they argue that the Charter-infringing over-holding of evidence "taints" the collection of evidence pursuant to search warrants following the Jenkins Order in the same way that the warrantless search in Reilly "tainted" the collection of evidence pursuant to a subsequent warrant.
- [41] The defence submits that, as in Reilly, the execution of the subsequent lawful warrant was dependent on the prior Charter-infringing activity: in this case, the unlawful detention served to maintain police possession of those items such that they could later be searched. They further argue that the Crown used the policy of non-compliance as a justification for securing the Jenkins Order, noting the reference to the policy in the Skelton affidavit and in the hearing before Justice Jenkins. Thus, the defence contends that the "taint" of the Charter-violating detention extends beyond the Jenkins Order to any subsequent search warrants, regardless of their validity, establishing a causal and contextual connection between the Charter-infringing conduct and the obtaining of the impugned evidence.
- [42] Another key authority in the defence submissions is that of Pino, endorsed by Griffin J.A. at para. 76 of Reilly. Pino frames the approach to the s. 24(2) threshold analysis with the following principles derived from case law at paras. 50-68:
- the approach should be generous, consistent with the purpose of s. 24(2);
 - the court should consider the entire "chain of events" between the accused and the police;
 - the requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct;
 - the connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections;
 - but the connection cannot be either too tenuous or too remote.

The defence submits that these principles clearly indicate that the s. 24(2) threshold analysis is not meant to be onerous, and that the case at bar meets this inclusive standard when taking into account the relevant chain of events.

2. Analysis

(a) The "fresh start"

- [43] I do not accept the Crown submission that the Jenkins Order constituted a "fresh start", severing the procurement of evidence from the "taint" of the over-holding. Giving consideration to the intent of s. 490(9.1) and the context of the Jenkins Order, I find that they cannot produce a "fresh start". In saying this I am not impugning the validity of the Jenkins Order.

- [44] In particular, I find that s. 490(9.1) cannot offer a "fresh start" where s. 490 was deliberately contravened pursuant to an established policy of non-compliance. The Crown agreed with my view that s. 490(9.1) is meant to remedy circumstances in which s. 490 deadlines have been missed by inadvertence. In my view, if this were not the case, s. 490(2) and (3) would be without real purpose.
- [45] The police failure in the case at bar was the antithesis of inadvertence. The over-holding resulted from a clear, deliberate decision of IHIT leadership to direct non-compliance with the mandatory provisions. The direction continued for many years despite the police having sought legal advice from three senior counsel in 2007, each of whom independently advised that s. 490 could not be ignored. The decision to usurp legislated judicial oversight over the detention of property seized by the state cannot be severable from future detention or searches simply through the action of s. 490(9.1).
- [46] The Crown's authorities do not persuade me that a "fresh start" can be found in the circumstances before the court, and none deal with circumstances particularly comparable to the case at bar. The Crown's "fresh start" authorities deal with failures to notify individuals of their rights rather than breaches related to unreasonable search and seizure. Furthermore, in none of the cases was there a clear causal link between the initial breach and the obtaining of evidence.
- [47] Consider, for example, the reasoning in *Wittwer*. In that case, the advisory of a right to counsel was found to render all subsequent questioning of the accused Charter-compliant so long as it did not rely upon any of the information obtained while in breach, prior to the advisory. In such cases, the advisory fully interrupts the causal impact of the original breach on the subsequent obtaining of evidence. So long as the police do not rely upon evidence obtained while in breach, it is difficult to argue a meaningful causal link between the breach and evidence obtained subsequent to the advisory.
- [48] I do not find that the Jenkins Order could have causally or contextually severed any subsequent search warrants from the more than 6.5-year Charter-infringing detention that preceded them. The relevant circumstances in this case are not those in which an advisory can bring police action back into compliance with the Charter and sever subsequent actions from the previous infringement. In this case, the lengthy unlawful detention is the very reason that police had continued possession of the seized items in 2018, allowing them to seek further detention orders and to search them. Thus, in the case at bar, the obtaining of the evidence was dependent upon the preceding breach, as it was in *Côté and Reilly*.
- [49] The Crown has suggested that such a causal connection cannot be found in the instant case because the police could have sought judicial authorization for the detention, and that if they had done so they would have received it. I find this submission to be at odds with the Crown's acknowledgement in oral argument that there was no plan for utilizing the seized items in the investigation during the period of the breach. I cannot find it likely that the authorizations would have been continually renewed by the courts over a nearly 7-year

period when the Crown concedes that there was no plan for the several years.

- [50] I further note that even if this was a case in which the "fresh start" principle could apply, I am not convinced that the ex parte in camera hearing before Jenkins J. would have provided it. Several characteristics of the s. 490(9.1) hearing before Jenkins J. would weigh against such a finding. The hearing occurred without notice, without submission to the issuing judge that it was to "reset" a Charter breach and, as a result, without consideration of the issue by Jenkins J. It also occurred without a thorough discussion of the privacy interests engaged by s. 8 and without specific particularization to the case at bar. On the latter point, though Cpl. Skelton's affidavit outlines the police's reasons for the need for continued detention in this case and specifically Mr. Gill, they are generic.
- [51] Also, importantly, the Crown appears to have indicated in the s. 490(9.1) hearing that they were not addressing the "fresh start" principle. The Crown submissions before Jenkins J. recognized the possibility of Charter remedies at trial related to the breach (at page 16, lines 26-33 of the transcript):

And I might add, as well, that if there is an issue with noncompliance, in terms of a Charter application that may be made at trial, that's still something that may be available if it is advanced and litigated, so there is perhaps still a remedy that a court could afford -- something less than simply saying, "Well, no, I'm going to end the detention of all of these items".

This passage suggests that the Crown was not seeking dispensation for Charter breaches and the remedy of a "fresh start".

(b) Threshold determination

- [52] Pino requires a causal, temporal, or contextual connection between the Charter-infringing detention and the evidence obtained from the subject items to meet the threshold under s. 24(2). Pino also endorsed a "generous" approach to the threshold analysis, requiring consideration of the "entire chain of events" between the accused and police. This is an inclusive standard. As I have already stated, I find that clear causal and contextual connections exist. Thus, I find that the Charter-infringing detention in the case at bar sufficiently tainted the subsequent detention order and search that the evidence gathered in that search was "obtained in a manner" that infringed the accused's Charter rights.

V. EVALUATIVE ANALYSIS

- [53] Once through the threshold, the court must consider whether the admission of the evidence will "bring the administration of justice into disrepute". Grant discusses precisely what this phrase means at paras. 68-70:
- [68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to

whether the overall reputation of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

- [69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the reputation of the justice system.
- [70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term reputation of the justice system.
- [54] The evaluative stage allows for a broad, contextual analysis of the Charter breach and its implications. Justice Fitch stated the following in *Robertson*:
- [60] *Lauriente* and the cases that have followed it recognize that it may be important, at the evaluative stage, to address an individual Charter breach in a broader context to properly determine whether the evidence should be excluded. That contextual inquiry may be relevant in at least two ways. First, where a breach is part of a larger pattern of disregard for Charter rights, its seriousness is exacerbated. Second, the existence of a pattern of breaches may increase the court's concern about distancing itself from the unconstitutional conduct in order to maintain the good reputation of the administration of justice.
- [55] As stated previously, *Grant* sets out three avenues of inquiry that guide the evaluative analysis. I describe these below.

A. Seriousness of the Charter-infringing state conduct

- [56] *Grant* sets out several factors that may increase the seriousness of Charter-infringing conduct. At para. 72, *McLachlin C.J.* and *Charron J.* state:

[t]he more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[emphasis added]

The court in *Grant* determined that deliberate police conduct in violation of established Charter standards "tends to support exclusion of the evidence", as does evidence that such conduct was "part of a pattern of abuse": at para. 75. Similar reasoning applies to cases of flagrant disregard for Charter rights. Other relevant considerations include whether the violation is part of a systemic pattern of violations and, as the Crown acknowledged, the length of the breach.

B. Impact of the breach on the Charter-protected interests of the accused

[57] This stage of the analysis requires an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of the breach on the accused's Charter rights may range from "fleeting and technical to profoundly intrusive": *Grant* at para. 76.

[58] An unreasonable search contrary to s. 8 may impact the protected interests of privacy and, more broadly, human dignity: *Grant* at para. 78.

C. Society's interest in an adjudication on the merits

[59] This avenue of inquiry considers "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": *Grant* at para. 79. This analysis must take into account the seriousness of the offence and the reliability of the evidence in question, though admitting evidence solely based upon its perceived reliability regardless of how it was obtained is inconsistent with the Charter. As stated at para. 80 of *Grant*:

Exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[60] This third inquiry generally weighs in favour of admission: *Reilly* at para. 116. However, if the first two inquiries taken together "make a strong case for exclusion, the third inquiry will seldom if ever, tip the balance in favour of admissibility": *R v. Le*, 2019 SCC 34 at para. 142; *R v. McGuffie*, 2016 ONCA 365 at para. 63; *Reilly* at para. 148.

D. Balancing

[61] Having regard to the preceding three avenues of inquiry, the court must then determine "whether, on balance, the admission of the evidence obtained by Charter breach would bring the administration of justice into disrepute": *Grant* at para. 85. Underpinning this analysis, as per *R v. Jones*, 2013 BCCA 345 at para. 45, is the "long-term sense of maintaining the integrity of, and public confidence in, the justice system".

VI. THE OVER-SEIZURE: EVALUATIVE ANALYSIS

A. Positions of the parties

1. Defence position

(a) Seriousness of the Charter-infringing state conduct

- [62] The defence spent the majority of their written and oral submissions discussing the seriousness and impact of the police over-holding pursuant to the IHIT policy. Thus, relatively fewer elements of the over-seizure were raised in the context of the avenues of inquiry under Grant.
- [63] The defence cites S/Sgt. Gorgichuk's testimony that it was common practice in her experience to simply seize all of the cell phones located in the course of a search where it was unclear which (if any) of them was the phone (or phones) listed in the warrant. They submit that this suggests the over-seizure in the case at bar is indicative of a broader police practice, aggravating the seriousness of the police conduct.
- [64] The defence further contends that S/Sgt. Gorgichuk's testimony aggravates the seriousness of the breach. They note that in the prior decision on over-seizure, I determined that S/Sgt. Gorgichuk was not a credible witness and that she engaged in advocacy, though I did not find that she intentionally misled the court. The defence characterizes her testimony as misleading and notes that both *R v. Harrison*, 2009 SCC 34 at para. 27, and *Pino* at para. 102, single out misleading testimony as particularly antithetical to the integrity of the justice system.
- [65] Citing *R. v. Pawar*, 2020 BCCA 251, at paras. 52-53, the defence also submits that S/Sgt. Gorgichuk's misleading testimony and the fact that I found her actions in the course of the search not to have been objectively reasonable precludes a finding of good faith with regard to her actions.

(b) Impact of the breach on the Charter-protected interests of the accused

- [66] As I stated above, the defence submissions do not include a particularized section dealing with the over-seizure under the Grant analysis. However, certain arguments relevant to the impact of the over-seizure are evident. The defence notes that the reasonable expectation of privacy with respect to cell phones is high, increasing the potential impact of related privacy breaches. One's home, the location from which the accused's items were unlawfully seized, also attracts a high expectation of privacy. They cite *R v. Paterson*, 2017 SCC 15 at para. 49, for the proposition that where Charter-infringements arise from circumstances in which there is a high expectation of privacy, it will weigh in favour of exclusion.
- [67] The defence further cites *R v. Reeves*, 2018 SCC 56, for its discussion of the nature of the privacy interest that is intruded upon by the seizure of items in the absence of an examination of their contents. This informational privacy interest is related to control of those contents, and the fact that they are necessarily preserved while in state custody. Thus, the over-seizure implicated the accused's privacy interests even without an examination of the seized items.

(c) Society's interest in an adjudication on the merits

[68] The following can be considered the defence's submissions on this avenue of inquiry for both the over-seizure and the over-holding.

[69] In their submissions on the third Grant inquiry, the defence emphasizes that where the first two Grant criteria weigh strongly in favour of exclusion, it will be difficult if not impossible for the third to overcome their influence at the balancing stage. They argue that the perceived reliability of the evidence and the seriousness of the offence should not lead to admissibility where the evidence would not have been obtained but for the unconstitutional conduct of the police: *R v. Burlingham*, [1995] 2 S.C.R. 206 at 236-237. They further note that in *Burlingham* at 239, the court stated that admitting evidence in such cases would "effectively [eviscerate] the Charter of most of its protective value to the accused", noting that even individuals accused of the most heinous crimes are afforded the full protection of the Charter.

[70] The defence also submits that when evaluating whether hearing a case on its merits is in society's interest, the court must consider the societal benefits of appropriately responding to police conduct that undermines constitutional rights. The defence cites *McGuffie* at para. 67 for the principle that "the police are expected to comply with the law, especially the Charter", arguing that admitting the impugned evidence would undermine the rule of law and signal to the police that the ends justify the means.

(d) Balancing

[71] Similarly, the defence did not make submissions regarding the balancing of the Grant considerations that are specific to the over-seizure. Thus, while the defence argues that the over-seizure and over-holding warrant exclusion of evidence when considered together, I cannot attribute balancing arguments to the defence regarding either of the breaches in isolation. A full summary of their submissions on balancing the Grant inquiries given the impact of both the over-seizure and over-holding is included in the discussion below on over-holding.

2. Crown position

(a) Seriousness of the Charter-infringing state conduct

[72] The Crown submits that because the phones they wish to enter into evidence were those listed in the search warrant, the seriousness of their seizure is mitigated. They argue that, therefore, the seizure of the phones is relatively less serious than the seizure of the SVAT, which was not listed on the warrant. I note that although Crown written submissions state that the phones, plural, were listed in the warrant, the warrant in fact lists one phone belonging to the accused. I am not sure if this was a mistake or if Crown is arguing that seizure of all three phones would have been warranted because each of them allegedly belongs to or was used by the accused.

[73] The Crown also argues that the seriousness of police conduct is limited by the fact that, while S/Sgt. Gorgichuk did not provide credible testimony, she did not set out to mislead the court. They further submit that the reasonable manner in which the search was carried out bears upon the seriousness of police conduct. They note that the police considered the subject search to be "high risk", and yet the officers carried it out without anyone being injured or mistreated. They also note that the police limited their search to areas listed in the warrant.

(b) Impact of the breach on the Charter-protected interests of the accused

[74] The Crown argues that the original over-seizure minimally impacted the accused's Charter-protected privacy interests. They argue that because a cell phone belonging to the accused was listed in the valid search warrant executed on the accused's residence, the courts had already authorized an intrusion upon the accused's privacy interests involving the seizure of cell phones. Thus, in relation to those phones, the over-seizure had no impact on the accused's privacy interests. They reason that, but for the breach, the three phones from which evidence is to be tendered would have nonetheless been seized. The Crown submits that the accused has no privacy interest at all in the other six seized phones.

[75] The Crown concedes that the seizure of the SVAT stands on a different footing from the phones. This is because it was not listed in the search warrant. However, they argue that its seizure did not significantly impact the accused's Charter rights because the SVAT recorded the exterior of the accused's residence, and therefore captured information that could be obtained by anyone who happened to be outside on the street.

(c) Society's interest in an adjudication on the merits

[76] The Crown submits that the seriousness of the charges in the case at bar, coupled with the reliability of the evidence in question, weigh profoundly in favour of admission. The Crown alleges that the iPhone seized from the accused's residence contains an audio recording of the shooting of Mr. Kajla and the attempted shooting of his wife. The Crown theory is that one of the two BlackBerry phones made the phone call to the iPhone that recorded the murder, and that information about the whereabouts of the accused on the night of the murder can be determined from the SVAT footage. In making their case for the reliability of the evidence, the Crown played the alleged audio recording of the incident for the Court.

[77] The Crown repeatedly emphasized the importance of this evidence in their written and oral submissions. They have indicated that exclusion of the impugned evidence would result in the case against the accused not proceeding. To quote Crown submissions, "[i]f the iPhone is excluded from evidence, the Crown will be unable to proceed with this prosecution". Thus, there would be no adjudication on the merits.

(d) Balancing

[78] The Crown submits that the first two avenues of inquiry do not pull strongly in the direction of exclusion. They argue that they do not outweigh the significant societal interest in an adjudication on the merits, given the seriousness of the offence and the reliability of the evidence.

3. Analysis

(a) Seriousness of the Charter-infringing state conduct

[79] S/Sgt. Gorgichuk's (i) apparent confusion regarding what she was warranted to seize and (ii) her apparent lack of awareness regarding the reasonable and probable grounds standard indicate a concerning misunderstanding or disregard of the Charter standards governing search and seizure. S/Sgt. Gorgichuk testified several times that she had no idea who any of the nine individual phones in the residence belonged to, yet chose to seize them all. This indicates a lack of subjective belief in reasonable and probable grounds by indicating that the seizure of the phones occurred pursuant to the mere possibility that they (i) were the phone listed in the warrant or (ii) would have provided evidence in respect of an offence.

[80] The indiscriminate seizure of the cell phones is made more serious by the fact that no attempt was made to determine which of the phones belonged to the accused. In my mind this was unreasonable, particularly given that phone numbers had been provided to the police for the accused's phones by his mother and brother when they were questioned in the course of the search. It cannot be acceptable for the police to seize all items of a certain class when they cannot determine which, if any, have been warranted to be seized. To condone such a practice would incentivize broad over-seizures designed to increase the odds of seizing certain warranted items when they cannot be identified.

[81] Furthermore, while the police could have sought a revised warrant to seize more phones or used certain means (such as dialing the numbers provided by the accused's mother and brother) to identify the accused's phone, they did not. The fact that they could have done so does not mitigate the seriousness of the subject conduct. It is worth noting that on the same evening a member of the search team left the search to swear an ITO to revise the search warrant for the vehicle allegedly driven by the shooter which was at a different location. Requiring revision in the search warrant for the vehicle was a transposed license plate number. Thus, while the over-seizure of the phones and SVAT was occurring, an officer decided to press pause on the search of the vehicle to correct a relatively technical error. This casts the failure of the police to reflect on the potential need for a revised warrant for the phones or SVAT in even starker relief.

[82] Also troubling is S/Sgt. Gorgichuk's testimony that in her experience it was common practice for police to seize all phones at a location when it was unclear which ones, if any, were those described in a warrant. This indicates a certain level of institutional and systemic disregard for the standard of reasonable and probable grounds as set out in Hunter.

- [83] The SVAT was also seized during the search following an unlawful examination of its contents. At the hearing on over-seizure, S/Sgt. Gorgichuk tried to justify the search by describing it as an attempt to determine how the device worked. The fact that the police seem to have recognized that a search was necessary in order to determine if the SVAT was relevant to their investigation further suggests a misunderstanding or disregard of the application of the reasonable and probable grounds standard.
- [84] I cannot accept the Crown suggestion that the reasonable nature of some police conduct in the search of the accused's residence can meaningfully impact this stage of the Grant inquiry. As noted in Reilly at para. 102, Charter-compliant conduct of the police does not attenuate the seriousness of their Charter-infringing conduct. Furthermore, I must note that in their discussion of the search, the Crown neglected to mention questionable conduct, such as the detaining and questioning of the accused's mother in the back of a police vehicle without Charter-ing her or indicating that she could leave (instead telling her that she needed to "tell the truth").
- [85] I must also consider the defence argument that S/Sgt. Gorgichuk misled the court, and that this should be considered an aggravating factor under this portion of the Grant assessment. As I have stated, I did not find S/Sgt. Gorgichuk to be a credible or reliable witness. I found that she engaged in advocacy, and that she refused to acknowledge errors in her testimony even when confronted with clear evidence. While I found that she fell short of intentionally misleading the court, her testimony was nonetheless misleading, combative, and at times contradictory.
- [86] Thus, in spite of the fact that I did not find that she intended to mislead the court, I find that her testimony was problematic, particularly for a professional witness, and that it constitutes an aggravating factor in the case at bar. Pursuant to the decision in Harrison, though the shortcomings of her testimony do not amount to a breach in themselves, they aggravate the seriousness of the breach related to the over-seizure. The court must dissociate itself from her misleading testimony.
- [87] In light of (i) the seizure of phones of ambiguous ownership, (ii) the apparent lack of any attempt to determine which phone was the one described by the warrant, (iii) the seizure of the SVAT pursuant to an unlawful search, and (iv) the testimony of S/Sgt. Gorgichuk, I deem the Charter-infringing conduct related to the over-seizure to be serious.
- (b) Impact of the breach on the Charter-protected interests of the accused
- [88] Regarding the over-seizure, I cannot accept the Crown's argument that there was no impact on the accused's privacy interests because the phones at issue were the subject of the search warrant.

- [89] I note that the search warrant lists a single phone belonging to the accused. I accept the Crown's argument that the listing of one of the phones in the search warrant constitutes judicial authorization to intrude upon the accused's privacy interests by seizing that phone. As such, the seizure of that phone in the course of the search, though part of an over-seizure, does not meaningfully implicate the accused's privacy interests.
- [90] However, the Crown now wishes to enter three phones (of the nine phones total) that were seized into evidence, two of which were not listed in the warrant. The intrusion upon the accused's privacy rights caused by their unlawful seizure was not judicially authorized. While their seizure does not impact privacy rights as significantly as a search of their contents would have, the loss of control over their informational content substantively intrudes upon the accused's privacy interests, as per Reeves.
- [91] Taking the foregoing into account, and considering that the accused has a high expectation of privacy in his cell phones and place of residence, I find the impact on the accused's s. 8 privacy rights resulting from the over-seizure to be substantive. However, given (i) the judicial authorization to seize one of the accused's cell phones and (ii) the fact that the phones were not searched in the execution of the warrant, the impact was not serious.
- (c) Society's interest in an adjudication on the merits
- [92] Second-degree murder and attempted murder are among the most serious offences in the Code. Though I have not heard evidence about the reliability of the recording that was played in court, for the purposes of this application I will consider it to be reliable. I take note of the Crown's submission that the recording "is crucial for the Crown's case to proceed" and that exclusion of evidence from the phones and SVAT "would result in a dismissal of the charges and no adjudication on the merits of this case".
- [93] The defence submits that this portion of the Grant analysis "cuts both ways", as society has significant interest in ensuring that police are acting within their lawful authority: Grant at para. 84; McGuffie at para. 73. While I take this point, I nonetheless find that the seriousness of the offence and the perceived reliability of the evidence weigh in favour of admission.
- (d) Balancing
- [94] As I have stated, the seriousness of the Charter-infringing police conduct regarding the over-seizure and the impact of that conduct on the accused's Charter rights lean in favour of excluding the impugned evidence. I have found the relevant police conduct to be serious. I have also found that there was a substantive impact on the accused's privacy rights. However, I also note the seriousness of the offence in question and what I perceive to be reliable evidence that is necessary for this prosecution to go forward. I find that a balancing ultimately weighs in favour of admitting the evidence. Thus, in isolation, I do not find the over-seizure to warrant the exclusion of the phones and SVAT.

VII. THE OVER-HOLDING: EVALUATIVE ANALYSIS

A. Positions of the parties

1. Defence position

(a) Seriousness of the Charter-infringing state conduct

[95] The defence submits that the Charter-infringing conduct in the case at bar falls at the most serious end of the spectrum. They contend that one can identify "almost every" aggravating feature identified in the jurisprudence in the facts before the court. In particular, they argue that the impugned police action was deliberate, longstanding, systemic, and consisted of multiple breaches. Their submissions relating to each of these aggravating factors can be summarized as follows:

- Deliberate: Quoting Grant at para. 75, the defence contends that the case at bar involves "deliberate police conduct in violation of established Charter standards". They note that the police sought and received opinions from Crown and RCMP counsel in 2007 regarding the unlawfulness of non-compliance with ss. 490(2) and (3) of the Code and were told by senior counsel that they had to comply or face possible Charter-related consequences. They suggest that the possibility of Charter-related consequences is acknowledged in Sgt. Ross's memo, which explicitly refers to the likelihood of evidence exclusion (though he suggests that it is low). They further argue that if there was any doubt regarding the accuracy of these opinions, it should have been removed by reference to the decisions in *R v. Pickton*, 2006 BCSC 1098, and *R v. De Bortoli*, 2012 BCSC 1529 (prior to and following the advice from counsel, respectively).
- In *Pickton*, Williams J. stated that compliance with s. 490 was mandatory and that non-compliance would result in a Charter breach, finding that "the RCMP's failure to comply with the mandatory Code requirements and the resultant continued detention of Mr. Pickton's clothing [constituted] a breach of s. 8 of the Charter": at para. 60. De Bortoli is similarly clear, stating at para. 99 that "[t]he relevant authorities support the conclusion that a failure to comply with s. 490 amounts to a breach of s. 8 rights".
- Therefore, the defence argues that IHIT's policy of non-compliance with s. 490 carried on in spite of case law and legal opinions shared with the entire department via Sgt. Ross's memo that clearly impugned the practice's legality and suggested that it infringed the Charter. As such, the defence contends it must be found to constitute a deliberate flouting of established Charter standards, an aggravating factor under Grant. By reference to the decision in *R v. Ippak*, 2018 NUCA 3, the defence argues that such deliberate conduct necessarily places the conduct at the serious end of the spectrum. They further cite *R v. Stillman*, [1997] 1 S.C.R. 607, for the proposition that where lawful means exist to obtain the evidence in question, the "failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of evidence": at 666.

- Longstanding: Citing *R v. Moyles*, 2019 SKCA 72 at para. 73, the defence contends that the fact the breaches continued for a significant amount of time is relevant to determining the seriousness of the Charter-infringing conduct. They note that in *R v. Kramshoj*, 2017 ONSC 2951, the court found that the length of time (six months) that the police were out of compliance with the s. 489.1 and s. 490 detention regime due to a failure to file a Form 5.2 exacerbated the breach, rendering it serious.
- Multiple breaches: The defence argues that this is not a case in which the breaches in question can or should be compartmentalized. They suggest that to do so would be out of step with *R v. Adler*, 2020 ONCA 246, which states at para. 39 that "artificial" compartmentalization is inappropriate under a s. 24(2) analysis and endorses a more holistic approach to evaluating multiple breaches. Thus, they argue that the over-seizure and unlawful over-holding by the police must be understood to have cumulative, aggravating effects on the seriousness of the Charter-infringing conduct. I note that I will address the "multiple breaches" factor toward the end of these reasons in my discussion of whether a cumulative assessment of breaches is warranted in this case.
- Systemic: The defence submits that the IHIT policy of systematic non-compliance with s. 490 represents a systemic pattern of violations. They note that, pursuant to *McGuffie* at para. 67 and *Harrison* at para. 25, systemic violations are an aggravating factor under this part of the Grant analysis. They further cite *R v. G.T.D.*, 2017 ABCA 274 at para. 110, for the principle that section 24(2) is specifically aimed at addressing systemic concerns. In that case, while the Charter-infringing conduct of an individual officer was deemed not to be serious, the fact that it stemmed from a systemic failure to train officers in how to comply with Charter requirements rendered the conduct serious. The defence submits that the IHIT policy of non-compliance represents a similar systemic failure.

(b) Impact of breach on the Charter-protected interests of the accused

[96] The defence contends that the unlawful over-holding in the case at bar deprived the accused of the ability (i) to learn what was seized from him, (ii) to oppose its continued detention, (iii) to apply for their return or assert his Charter rights, and (iv) to obtain a meaningful remedy. They note that, pursuant to *Moyles*, the ongoing nature of the nearly 7-year detention in breach of the Charter renders its impact more serious. Citing *Reeves* at para. 30, the defence submits that the fact the items were not searched during this period does not mean the accused's privacy was not impacted by the continued Charter-infringing detention. Though they allege fewer aggravating factors at this stage of analysis by comparison, the defence submits that their absence is not a mitigating force in the Grant assessment.

(c) Society's interest in an adjudication on the merits

[97] The relevant defence submissions regarding society's interest in an adjudication on the merits are identical to those discussed in the over-seizure analysis above.

(d) Balancing

- [98] The defence submissions contain a single, broad balancing analysis that considers the cumulative impact of both the over-seizure and over-holding.
- [99] The defence contends that society's interest in adjudication cannot overcome the Charter breaches in the case at bar, and that therefore the impugned evidence should be excluded. Regarding the over-seizure, the defence asserts that the police flouted well-established Charter standards with regard to reasonable and probable grounds. Regarding the over-holding and the IHIT policy, the defence notes that IHIT acted contrary to specifically sought legal advice and explicit requirements under the Code, indicating that the policy's implementation was informed, calculated, and occurred with knowledge of the potential Charter consequences.
- [100] The defence invokes Harrison for the principle that the long-term reputé of the administration of justice must be considered at this stage, and submits that the types of serious and systemic violations in the case at bar are inconsistent with this long-term goal. They further note that the systemic nature of the Charter non-compliant IHIT policy has likely impacted many other individuals, and that it is necessary to consider the broad impact of tacitly condoning the over-seizure and over-holding by admitting the evidence.

2. Crown position

(a) Seriousness of Charter-infringing state conduct

- [101] The Crown submits that several contextual factors mitigate the seriousness of the over-holding and related IHIT policy, in particular: (i) the unsettled law and unclear advice from counsel regarding whether contravening s. 490 constituted a Charter breach; (ii) the fact that the police could have applied for continued detention, and would likely have received authorization had they done so; and (iii) the fact that compliance with s. 490 would have put IHIT investigations at risk.

(i) Unsettled law and unclear advice

- [102] In support of the proposition that the law at the material time was unsettled with regard to whether failure to comply with s. 490 constituted a breach of s. 8, the Crown cites *R. v. Craig*, 2016 BCCA 154, where Bennett J.A. observed that the question "had received inconsistent judicial consideration": at para. 163. She ultimately concluded that failure to file a 5.2 Report engaged s. 8 of the Charter. While the Crown acknowledges that *Craig* settled the law in this province, they argue that authorities such as *R. v. Lafrance*, 2017 ABQB 746 demonstrate that nationally the law remained unsettled as late as 2017. In that decision, Ackerl J. declined to follow the determination that s. 490 non-compliance was a Charter-infringement in *Craig* and *R. v. Garcia-Machado*, 2015 ONCA 569, instead describing the s. 490 regime as administrative in nature. Though that determination was later overturned by the Alberta Court of Appeal, the Crown submits that the lower court's decision indicates that s. 490 attracted inconsistent judicial scrutiny in a way that attenuates

the seriousness of IHIT's policy of deliberate non-compliance.

[103] The Crown further argues that the legal advice received from Crown and RCMP counsel that was relayed in Sgt. Ross's memo did not explicitly state that contravening s. 490 constituted a breach of the Charter or that it would necessarily attract Charter remedies. In oral argument, the Crown also argued that legal opinions such as these are only useful for a limited amount of time given the evolving nature of the law.

[104] Related to this argument is the Crown's submission that intent to breach the Code does not amount to intent to breach the Charter. Given the aggravating role of deliberate and flagrant conduct in the Grant analysis, whether or not the police actions constitute deliberate contravention of "established Charter principles" is important. I understand the Crown to argue that the unsettled state of the law and the absence of direct references to the Charter in the advice from Crown and RCMP counsel indicate that only the policy's contravention of the Code - not the Charter - can be considered intentional.

(ii) Existence of lawful avenues for compliance and the "Catch-22"

[105] The Crown submits that legitimate investigative concerns animated IHIT's policy for failing to comply with s. 490, as set out in the affidavit filed in support of the Jenkins Order, at para. 53(a)(ii)-(iv):

(ii) The rationale provided was that the extension process, whereby the person from whom the thing(s) detained were seized would be advised of the items seized, could compromise the integrity of the investigation;

(iii) Senior management felt this process was incompatible with a homicide investigation in which a suspect was unaware of their status in an investigation and would be alerted to this fact through the application for extension process;

(iv) In addition, the suspect could be advised of specific evidence, often obtained covertly as in the case of cast-off DNA, which may serve to impeded and/or compromise the investigation.

[106] The Crown says that the difficulties arising from the lack of a provision in s. 490 to defer notice in on-going investigations have since been recognized by the courts. In *Further Detention of Things Seized (Re)*, 2018 BCSC 2506 at para. 8, for instance, Schultes J. stated:

The second argument is that a careful examination of s. 490, in the context of the search provisions of the Code, reveals a gap in the legislation, which will lead to an absurd outcome if it is not supplemented to allow notice to be dispense with. In essence, when the police are conducting complex and sensitive investigations that exceed the initial permitted periods of detention, they will be forced either to violate the Charter by refusing to seek an extension of the detention period, or to allow the suspects to become aware of the continuing investigative interest in them, which could have serious harmful effects.

- [107] Justice Schultes went on to conclude that despite the unambiguous language of s. 490(3), permitting a deferral of notice in such circumstances was a necessary exercise of the court's inherent jurisdiction.
- [108] The Crown submits that in the present case, the police should have applied for a deferral of notice together with a detention order rather than unilaterally ignoring the extension provisions of s. 490. However, they argue that the fact that a lawful alternative to non-compliance was available is a valid s. 24(2) consideration, citing *Garcia-Machado* at para. 63. The Crown further contends that given the legitimate concerns informing the IHIT policy, their non-compliance in the circumstances is not egregious.
- (b) Impact of the breach on the accused's Charter-protected rights
- [109] The Crown submits that non-compliance with s. 490 also minimally impacted the accused's Charter rights. The Crown submits, pursuant to *R v. Cole*, 2012 SCC 53 at para. 41, and *R v. Marakah*, 2017 SCC 59 at paras. 16-17, that the subject matter at issue when evaluating the impact of the over-holding is not the items seized from the accused's residence but the information they contain. They quote *R v. Villaroman*, 2018 ABCA 220 at para. 24, for the principle that, therefore, "an individual's privacy rights are not infringed by the continued detention of the property per se, but instead, by the search of the contents of the electronic device". They further note that Bennett J.A. in *Craig* stated at para. 193 that "the failure to file a Form 5.2 did not affect [the accused's] rights at all". Therefore, because no search of the impugned items occurred while they were unlawfully detained, the Charter-infringing conduct of the police had extremely limited impact on the Charter-protected privacy interests of the accused.
- [110] It is important to note that the Crown conceded in both their written and oral submissions that the accused had a privacy interest in the impugned items that was infringed by the unlawful detention even though their contents were not examined. The Crown further conceded that this breach was made worse by the passage of time - in this case, by the nearly seven years that the items were held in contravention of the Code and Charter.
- (c) Society's interest in adjudication on the merits
- [111] The Crown's submissions regarding society's interest in an adjudication on the merits are identical to those discussed in the over-seizure analysis above.
- (d) Balancing
- [112] The Crown argues that admission of the evidence at issue would not bring the administration of justice into disrepute and would serve the truth-seeking function of the criminal trial process. They argue that the breach was not serious, that its impact on the accused's Charter rights was low, and that balanced against the seriousness of the charge and reliability of the evidence, the evidence must be admitted.

B. Analysis

[113] For the purposes of this analysis I will consider the two breaches separately under the Grant framework. I will then assess whether they should be evaluated as having cumulative impact on the s. 24(2) analysis.

(a) Seriousness of the Charter-infringing state conduct

[114] For the reasons that follow, I assess the police failure to seek the appropriate detention orders for the subject items to constitute serious Charter-infringing conduct at the high end.

[115] The failure to apply for extension orders under sections 490(2) and (3) in this case was in accordance with a broader IHIT policy. When questioned about her experiences at IHIT, S/Sgt. Gorgichuk indicated that she was not aware of a single continued detention application brought in any of the 50 to 80 files she worked on. When considered alongside Sgt. Ross's audit in 2008 that found just three of 24 files to be in compliance with s. 490, S/Sgt. Gorgichuk's testimony indicates that there were likely hundreds of files impacted by the blanket non-compliance policy while it was in effect from 2007-2014. I recognize here that not all cases would have engaged privacy-related interests. However, it is reasonable to infer that a significant number likely did, resulting in a significant number of Charter breaches. This is serious conduct that is particularly disappointing given that IHIT, as acknowledged by S/Sgt. Gorgichuk, is held out to represent the "gold standard" for RCMP investigations.

[116] Furthermore, though the subject items were originally unlawfully detained pursuant to the IHIT policy, this unlawful detention continued for several years after the policy was lifted in 2014. Thus, it continued even after appellate decisions such as *Craig* and *Garcia-Machado* clearly affirmed the conclusion in *Pickton* (a case on which IHIT worked) and *De Bortoli* that violations of s. 490 infringed s. 8 of the Charter. As the state of the law regarding s. 490 crystallized, the RCMP did not act quickly to mitigate the potential consequences of the unlawful detention policy.

[117] I do not accept the Crown's argument that the seriousness of the policy is significantly tempered by any ambiguity in the law when the policy was in force, by the nature of the advice from Crown and RCMP counsel in 2007, or by the perceived necessity of non-compliance to protect police investigations.

[118] Regarding the state of the law, the 2006 decision in *Pickton* clearly indicated that non-compliance with s. 490 would result in a Charter breach. This determination was reinforced in *De Bortoli* and several other decisions in the years that followed. It is worth noting that *Craig's* discussion of the differing judicial treatment of s. 490, cited by the Crown, only cites cases from 1992 or prior for the proposition that s. 490 is administrative in nature (the case authorities in *Craig* for the proposition that it will sometimes or always result in a breach are more recent). Between the statements of the law in these decisions and the advice from Crown counsel indicating that (i) evidence had been excluded in Ontario pursuant to s. 490

breaches and (ii) action should be taken to ensure exclusion did not happen in homicide cases, I am not persuaded by this uncertainty argument.

- [119] The specific advice sought and obtained by IHIT from senior Crown and RCMP counsel is significant to this case. I find that there is no ambiguity in the legal direction provided to IHIT. Though there may have been uncertainty at the time regarding the specific consequences for breaching s. 490, consequences are regularly presented as uncertain in the context of legal opinions. This is because they tend to be highly dependent on the unique facts of each case. Thus, I find that the seriousness of the IHIT policy is only marginally mitigated by the fact that they were not explicitly told that every breach of s. 490 would infringe the Charter and attract Charter remedies.
- [120] The key fact is that there was no uncertainty regarding the necessity of compliance: each of the three senior counsel whose opinions were sought explicitly told IHIT that they needed to comply with s. 490. This advice was engaged with and considered, and suggested potential Charter implications for non-compliance. This is evident from the actions of Sgt. Ross, who subsequently sent an unheeded memo to members of IHIT stating that compliance was required in order to protect their investigations. His memo to IHIT leadership indicates his awareness of potential Charter consequences such as exclusion of evidence.
- [121] Though the seven-year policy of non-compliance would constitute even more egregious Charter-infringing conduct if the legal opinions received had, for example, stated that "s. 490 non-compliance is a s. 8 Charter breach that will result in exclusion of evidence from homicide cases", I cannot accept that the lack of such a statement meaningfully attenuates the seriousness of the IHIT policy.
- [122] I similarly cannot accept the Crown's argument that the legal advice from Crown counsel was only "good" for a certain period of time, and that it may have been reasonable not to consider it authoritative after a certain amount of time had passed. There is no evidence here that this was a consideration by IHIT.
- [123] I also cannot accept the argument that the seriousness of police conduct is significantly attenuated by the fact that the wording of s. 490 put the police in an allegedly untenable situation by forcing them to either comply with the law or risk tipping off suspects via the notice requirement under ss. 490(2) and (3). When the alleged conflict is between compliance with the law, clearly written and clearly explained by counsel, and non-compliance based on unilateral prioritization of investigative practices and preferences, there is no legitimate conflict.
- [124] The IHIT policy of non-compliance amounts to systemic, flagrant disregard for Charter-protected rights. While I cannot with certainty attribute to the police a deliberate decision not to comply with the Charter, I find that the RCMP was at best wilfully blind towards the Charter implications of the policy and of the over-holding generally. The advice of RCMP counsel explicitly recognized the possibility of evidence being excluded from homicide files

(though other advice stated this had not occurred up to that point in 2007), a Charter remedy, and advised compliance with s. 490 to minimize that likelihood. The logical inference to be drawn from this advice is that breaching s. 490 tends to engage Charter interests and therefore may result in Charter remedies.

- [125] I do not find that the fact that there were lawful avenues for continued detention attenuates the seriousness of the over-holding in this case. This is particularly the case given that the Ross memo explicitly suggested that continued detention orders not be sought in cases that had been out of compliance with s. 490 for a significant period of time to avoid drawing judicial attention to them and jeopardizing them. If anything, the existence of lawful avenues for continued detention that were intentionally not followed reinforces a finding of deliberate, calculated non-compliance and it could be that the police were skeptical of their chances for success in such applications.
- [126] These are not circumstances in which the "inevitability" principle from *Garcia-Machado* and *Cole* applies. The fact that, as the Crown acknowledges, there was "no plan" for the evidence following the expiration of the original detention period indicates that this was not a case like *Garcia-Machado*, in which the necessity of the subject blood sample and doctor's report to the investigation was patently obvious, rendering judicial approval of detention "inevitable". Under the circumstances of the case at bar, the deliberate flouting of and interference with the supervisory role of the courts exacerbates the seriousness of the breach.
- [127] In a similar vein, the Crown argued that even if a judge had ordered the return of the seized items, s. 490(13) would have allowed the Crown to copy and retain copies of the data on the seized devices. Section 490(13) allows for copying of seized documents prior to their return. In support of this argument, the Crown cites the determination in *R v. Bromley*, 2002 BCSC 149, that the Crown could make and retain copies of "material printed from the imaged copies on the hard drive and copies of the harddrive" prior to returning the seized items in question: at para. 27. I am not persuaded by this argument. The process of extracting and copying data from digital source like a phone or surveillance system is a search. Pursuant to *R v. Vu*, 2013, SCC 60, warrants are required for the search of a cell phone or computer. Thus, I do not find that the police could simply have copied the items in question under the authority of s. 490(13) without a search warrant.
- [128] Given the flagrant, systemic disregard for Charter rights represented by the IHIT policy I find that the Charter-infringing conduct in the case at bar was at the serious end of the spectrum.
- (b) Impact of the breach on the Charter-protected interests of the accused

[129] Though detention of an electronic device does not impact privacy interests nearly as seriously as a search of its contents, I find that when evaluated in light of the nearly seven-year unlawful detention and the high expectation of privacy in devices such as cell phones, the impact of the over-holding on the accused's privacy interests was serious.

[130] The privacy interests implicated by seizures and by continued detention are not nominal. As stated by the SCC in *Reeves* at para. 30:

[W]hile the privacy interests engaged by a seizure may be different from those engaged by a search, *Reeves'* informational privacy interests in the computer data were still implicated by the seizure of the computer. When police seize a computer, they not only deprive individuals of control over intimate data in which they have a reasonable expectation of privacy, they also ensure that such data remains preserved and thus subject to potential future state inspection.

[emphasis in original]

[131] This portion of *Reeves* expresses a principle that has been endorsed by Canadian courts going back decades regarding the nature of informational privacy interests. For example, citing a definition of privacy found in Alan Westin's seminal text *Privacy and Freedom* (1970), the Supreme Court of Canada has held that control is in fact the essence of informational privacy. For example, in *R v. Tessling*, 2004 SCC 67, the SCC stated:

Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7. Its protection is predicated on the assumption that

all information about a person is in a fundamental way his own, for him to communicate or retain . . . as he sees fit.

(Report of a Task Force established jointly by Department of Communications/Department of Justice, *Privacy and Computers* (1972), at p. 13)

This principle from *Tessling* was more recently cited in *R v. Spencer*, 2014 SCC 42, and *Marakah*.

[132] Given that cell phones create, store, and share extremely personal information, loss of control over a cell phone and its contents seriously implicates the informational privacy of its owner. The importance of control over such devices is intuitive. Their contents fall squarely within the "biographical core" of information that "tends to reveal intimate details of the lifestyle and personal choices" that "individuals in a free and democratic society would wish to maintain and control from dissemination to the state". These are precisely the descriptors used to define the type of information that invites privacy protection under the Charter in *R v. Plant*, [1993] 3 S.C.R. 281 at 293 (endorsed by *Craig* at para. 133).

- [133] Thus, while a breach brought about by non-compliance with s. 490 is, generally, less significant relative to a search in breach of the Charter, its seriousness should not be minimized. The breach is substantive rather than merely technical.
- [134] The above passage from Reeves overtakes the decision in Craig to the extent that Craig minimizes the impact of seizure and detention in the absence of a search on Charter-protected privacy interests. That said, I am not certain that Craig stands for this position as strongly as the Crown suggests. It is important to remember that the extent of the impact is a fact-specific inquiry, and that Craig dealt with information (messages sent to other individuals via a third-party website) in which the accused had a lower reasonable expectation of privacy than the accused had in his cell phones.
- [135] The Crown made an effort to differentiate Reeves on the basis that it dealt with an evaluation of a s. 8 breach rather than a s. 24(2) application for exclusion of evidence. I do not agree with this distinction. I find no reason that a discussion of the nature of a breach in a s. 8 application should not be relevant to a consideration of the nature and impact of a breach under s. 24(2). I further note that the impugned evidence was excluded in Reeves despite the device in question being a shared computer, which lowered the accused's expectation of privacy in the device. The personal cell phones at issue in the case at bar attract a higher expectation of privacy.
- [136] The next consideration relative to the impact of the over-seizure on the accused's Charter-protected interests is the duration of the breach. The RCMP held the seized items for nearly seven years prior to seeking a continued detention order under s. 490(9.1). The Crown conceded that there was a relationship between the length of the breach and its impact on the accused's rights. I do not accept the Crown's argument that the police could have complied with s. 490, would have succeeded in obtaining further detention orders, and thus "but for" the breach they would have nonetheless maintained possession of the items, eliminating any potential impact of the breach. As I note above, there is no reason to believe that, given (by the Crown's own admission) IHIT's apparent lack of a plan for or particular interest in the evidence, such applications would have been successful.
- [137] Thus, I find that the over-holding deprived the accused of possession and control of intimate personal information contained on the phones for nearly seven years. Though the impact of the SVAT detention is less significant due to the relative sensitivity of its contents, it similarly compounded over seven years to the point where I cannot ignore it. As a result, I find that the time that elapsed between the expiration of the original detention period and the s. 490(9.1) application rendered the impact of the breach pursuant to the over-holding serious in spite of the fact that it initially had a lesser (though substantive) impact on the privacy interests of the accused.
- (c) Society's interest in an adjudication on the merits

[138] My analysis of this avenue of inquiry in the over-seizure analysis is equally applicable here. As I stated, I find that this element weighs strongly in favour of admission.

(d) Balancing and determination

[139] Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at addressing systemic concerns. The focus of the s. 24(2) balancing process is on the broad impact of the admission of evidence on the long-term reputé of the justice system. In this regard, the authorities are clear in noting that while a decision to exclude evidence may cause public outcry in the short term, it may be required to preserve the reputé of the justice system in the long term.

[140] I have found the Charter-infringing conduct related to the over-holding to be serious, and the impact of the breach on the accused's Charter-protected rights to be significant. I have also found that society has a significant interest in this case being heard on its merits. These three avenues of inquiry are not to be compartmentalized when considering the outcome under s. 24(2); rather, a broad, overall assessment of the analysis of the circumstances of the case is required: Reilly at para. 115. Further, while not determinative, "[w]here the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility": Le at para. 142.

[141] There is something particularly concerning about a police policy of deliberate non-compliance with mandated requirements due to the unilateral prioritization of their preferred investigative methods over following the law. In doing so, they undermined the supervisory role of the court in the state's detention of seized items. The significance of state authorities interfering with and displacing the responsibility of the courts cannot be overemphasized. The fact that the police in this case sought and received legal advice that explicitly deemed compliance mandatory makes these actions more egregious. While a decision to exclude the evidence might cause certain public outcry and clear disappointment to those most interested in the case being decided on its merits, I must consider the long-term public perception related to the perceived endorsement of unlawful police activities. To tacitly condone such egregious, institutional, systemic behaviour in disregard of legislative provisions and Charter interests by a premier homicide investigation unit would have serious implications for the rule of law that I cannot abide.

[142] Having given the Grant avenues of inquiry broad consideration relative to the over-holding of the subject items, I cannot find that the societal interest in hearing the case on its merits can outweigh the strong case in favour of exclusion provided by the first two Grant considerations. I make this difficult decision with clear knowledge that the case against the accused will not proceed. I also make this decision with knowledge that key evidence has been excluded in cases involving other serious crimes in the past: see e.g. R v. Smith, 2014 ONSC 3939 (first-degree murder); R v. Borden, [1994] 3 S.C.R. 145 (sexual assault); Burlingham (first-degree murder); R v. Morelli, 2010 SCC 8 (child pornography); and many

others. As the recent decision regarding the "Surrey Six" murders in *R v. Johnston*, 2021 BCCA 34, states at paras. 422-423:

Regardless of the nature of the offences being investigated, the police have a duty to conduct themselves in accordance with the law and in a manner that gives the public confidence in their methods. To repeat Lamer J.'s comment in *Mack*, while society depends on police "to actively protect us from the immense social and personal cost of crime", there are "inherent limits" on the state's power to "manipulate people and events for the purpose of obtaining convictions": at 940-41.

It is in precisely this sort of high-profile case where the police may be tempted to act contrary to their duties on the basis that "the ends justify the means". This is contrary to the rule of law on which our system of government is founded. The court must always retain the ability to dissociate itself from disreputable state conduct by staying the proceedings, no matter how serious the offence.

[143] Though this passage from *Johnston* deals with the availability of a stay as a remedy for abuse of process, its discussion of the impact of the seriousness of a particular offence on the availability of Charter remedies is apt.

VIII. CUMULATIVE ASSESSMENT

[144] Though my finding above regarding the sufficiency of the over-holding in requiring the exclusion of evidence renders the cumulative assessment question moot, I include it because my findings on this matter reinforce the conclusion I have already made with regards to exclusion

[145] As stated above, the cumulative effect of multiple constitutional breaches over the course of an investigation, including those committed in relation to third parties, may be considered at the evaluative stage: *Robertson* at para. 52. Where appropriate, the court must consider the cumulative effect of multiple breaches when assessing the Charter-infringing conduct: *Adler* at para. 39. As breaches accumulate, they become more serious for the purpose of this analysis: *R v. Bohn*, 2000 BCCA 239 at para. 47. However, the fact of cumulative breaches will not necessarily result in exclusion of evidence: *R. v. Spence*, 2011 BCCA 280 at para. 54.

A. Positions of the parties

1. Defence position

[146] The defence argues that the Charter breaches in the case at bar should be assessed cumulatively under the Grant analysis. They argue that the over-seizure and violation of s. 490 are clearly connected in terms of their subject matter and the underlying police attitude towards the law governing search and seizure by state actors. Citing Lauriente, and Côté, the defence submits that the court must not unnecessarily compartmentalize Charter breaches where there is a sufficient connection between them.

2. Crown position

[147] The Crown submits that no sufficient nexus exists between the over-seizure and unlawful detention to warrant a cumulative assessment of the Charter breaches under this stage of the Grant analysis. They argue that, pursuant to Spence at para. 57, there must be a sufficient temporal connection between breaches in order to consider their impact cumulatively under the Grant analysis. The Crown alleges that the roughly three-month gap between the over-seizure and the failure to apply for continued detention under s. 490(2) is too significant to find a temporal connection requiring cumulative assessment.

B. Analysis

1. Is cumulative assessment appropriate?

[148] On the issue of whether the seriousness and impact of the over-seizure and unlawful detention should be assessed cumulatively under the Grant analysis, I agree with the defence argument that there is sufficient connection between the two breaches to warrant a cumulative assessment. The over-seizure occurred in 2011 against the backdrop of a systemic intentional disregard for individual privacy rights pursuant to the IHIT policy of non-compliance with s. 490. I find that the thematic connection between the two breaches is clear, as they both appear to result from a disregard for clearly established legal standards governing the search, seizure, and detention processes. This disregard was present at both the individual and institutional level, and cannot be ignored as a common thread between the two breaches.

[149] Furthermore, I cannot accept the Crown's argument that one breach can be temporally severed from the other. First, if one characterizes the police Charter breach related to s. 490 non-compliance as ongoing from 2007 to 2014, there is no temporal disconnect because the policy was in place at the time of the over-seizure. Second, if it is necessary only to consider the s. 490 policy in terms of its impact on the impugned items, I am unconvinced that the three-month gap alleged by the Crown between the over-seizure and the expiration of the detention order truly was a "gap" for the purposes of this analysis. The over-seizure was not a simple, instantaneous event that concluded the moment the police ended their search of the accused's residence. *R v. Colarusso*, [1994] 1 S.C.R. 20 at 63, makes clear that a seizure is an ongoing process that extends beyond the initial taking of an item. Thus, the over-seizure continued by virtue of IHIT's detention of the over-seized items in contravention of the Charter, a breach that was continuing at the time the original detention period expired.

[150] Finally, even if a three-month gap was somehow found to exist, I find that the connections between the two breaches noted above would nonetheless suggest a sufficient thematic and temporal link to require cumulative analysis.

2. Cumulative balancing of the Grant avenues of inquiry

[151] As I have stated, the over-holding of the seized items, and in particular the IHIT policy of non-compliance which interfered and displaced the oversight of the courts, require exclusion of the impugned evidence. Given my finding that the two breaches before the court require cumulative analysis, this finding is only strengthened by the seriousness of the over-seizure and its impact on the accused's Charter rights. Taking the two breaches together, and considering that each implicates a certain institutionalized disregard for Charter interests, I find that the conduct at issue under this cumulative assessment is egregious. The breaches in the case at bar represent the type of serious, systemic conduct from which the courts must disassociate themselves in order to protect the long-term reputation of the justice system.

IX. CONCLUSION

[152] Taking a long-term, prospective view of the reputation of justice, and given the foregoing analysis of the s. 24(2) Grant avenues of inquiry, I conclude that admitting the impugned evidence derived from the SVAT and phones seized from the accused's residence would bring the administration of justice into disrepute. While recognizing the policy eventually ended, as indicated above I find that the over-holding in contravention of s. 490 alone is sufficiently serious and impactful on Charter-protected rights to warrant exclusion. This determination is only reinforced by my appraisal of the over-seizure as falling toward the serious end of the spectrum with regards to the seriousness of police conduct, and as having a substantive impact upon the accused's Charter-protected rights. Accordingly, I have made the difficult decision to exclude the SVAT, the iPhone, and the two BlackBerrys from evidence.

"The Honourable Mr. Justice Masuhara"

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