

CANADA / JUDGMENT

R. v. Monteith

2024 BCSC 1929

COURT

Supreme Court of British Columbia

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2024 BCSC 1929 R. v. Monteith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Monteith,

2024 BCSC 1929

Date: 20241022

Docket: X083817

Registry: New Westminster

Rex

v.

Carlos Nathaniel Monteith

Corrected judgment: These reasons have been redacted for publication purposes on March 20, 2025.

Corrected Judgment: The text of the judgment was corrected at para. 68 on March 20, 2025.

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment re:

Voir Dire #8 - Nokia Phone; Form 5.2s

Counsel for the Crown:

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G.M. Ng

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Place and Dates of Hearing:

New Westminster, B.C.

September 23, 2024

Place and Date of Judgment:

New Westminster, B.C.

October 22, 2024

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I. Introduction

- [1] Carlos Nathaniel Monteith, (the "accused" or the "applicant") applies for an order excluding evidence obtained by police resulting from searches of data from a Nokia cell phone (the "Nokia phone" or "the phone").
- [2] The applicant is charged with the first-degree murder of Kristijan Coric occurring on or about September 28, 2019 at or near Surrey, BC. A trial with judge and jury is scheduled to commence February 3, 2025.

- [3] The defence contends that, although the searches of the data contained on the phone were authorized by search warrants, the police failed to prepare reports to a justice in Form 5.2 as required by s. 489.1 of the Code, in respect of the results of the data searches. The Crown concedes that the police failed to do so, and that the applicant's s. 8 Charter rights of the accused were breached.
- [4] Therefore, the issue before me is whether the phone data should be excluded from evidence at the trial, pursuant to s. 24(2) of the Charter.
- [5] The Crown alleges that the phone belongs to the accused. There appears to be no room for doubt about that, and the defence application assumes this fact. The phone was seized in a lawful search of the accused's hotel room in Vancouver on November 19, 2019, carried out pursuant to a judicial warrant. The search of the hotel room was carried out for purposes of an investigation being conducted by the New Westminster Police Department ("NWPD") into the shooting of DD (these are not the witness' actual initials) that occurred in New Westminster on November 17, 2019. DD survived the shooting, and had identified the accused as the shooter.
- [6] After the phone's seizure the NWPD prepared a report to a justice in Form 5.2 as required by s. 489.1 of the Criminal Code, indicating that the phone and other items seized on the search of the hotel room were being detained for purposes of an investigation, preliminary inquiry, trial or other proceeding, and obtained an order authorizing further detention of the items, under s. 490(1)(b) of the Code. No issue has been raised relating to the further detention of the phone.
- [7] The phone data was later searched by the NWPD, in connection with the DD shooting. The phone data was then searched again by the Integrated Homicide Investigation Team ("IHIT"), for purposes of its investigation into the Coric homicide. These data searches were authorized by search warrants.
- [8] However, in respect of the data obtained from the searches of the phone, neither the NWPD nor IHIT prepared further reports to a justice in Form 5.2 under s. 489.1.
- [9] IHIT is comprised of police officers from all police agencies in the Lower Mainland, with the exception of the Vancouver and Delta police departments: *R. v. Teixeira*, 2022 BCSC 344, [Teixeira No. 1], at para. 12.

II. Background

- [10] The Crown and defence have agreed on the relevant facts relating to this application. The agreed facts are set out in detail in a detailed Agreed Statement of Facts ("ASF"). In addition, the parties agree that evidence adduced in previous voir dieres in this matter may be relied upon in connection with this application. There was no viva voce testimony on this voir dire.
1. The Crown's case, and the Nokia Phone Evidence

[11] I issued reasons for judgment in this matter indexed as 2024 BCSC 1445 (the "DCE reasons") which dealt with the Crown's application for admission of discreditable conduct evidence ("DCE"). Since much of the Crown's case consists of evidence that can be considered discreditable, those reasons set out much of the Crown's anticipated evidence at trial, including some references to the Nokia phone evidence, and commentary regarding how that evidence relates to other aspects of the Crown's case. For purposes of this application, I adopt the DCE reasons.

[12] For convenience, I repeat some parts of the DCE reasons:

[5]

29. The theory of the Crown is as follows:

- a. The accused was released from custody on September 4, 2019, in relation to other matters. He completed his parole supervision in Victoria on September 26, 2019. He travelled to Vancouver that same day. [The accused's phone records and bank records indicate that he travelled to the Lower Mainland on September 26, 2019].
 - b. The accused wanted to be a hitman (a killer for hire) as demonstrated by the "hit list" (the "List") he had in his possession in jail on August 16, 2019, his later comments to [DD] and in his jail calls, and the digital evidence.
 - c. The accused had access to firearms and ammunition prior to the murder of Mr. Coric.
 - d. The accused shot and killed Mr. Coric at the Gas Station on September 28, 2019. His getaway driver was Trion Castello (referred to as "Smitty" in the jail calls).
 - e. The accused was paid for killing Mr. Coric; in other words, it was a contracted hit.
 - f. The day after the murder, the accused bought Mr. Castello/Smitty expensive shoes at Holt Renfrew in Vancouver. This is confirmed by the receipt obtained from Holt Renfrew and the shoes and same receipt found at Mr. Castello's girlfriend's residence, as well as the accused's comments in the jail calls.
 - g. The accused bragged about this killing and being a hitter to [DD] and in his jail calls. While at [DD's] home, he obtained a teardrop tattoo to signify that he had killed Mr. Coric.
- [6] The Crown says that, although little is known about the deceased, Mr. Coric, there is evidence which supports the view that his murder was directed and planned, and likely tied up with drug activities. In this regard the Crown refers to the anticipated evidence of [DD], the digital evidence, the jail calls of the accused, and the fact that a tracking device was found under the G-Wagon. Additionally, the G-Wagon was searched after Mr. Coric's murder, and drugs were found inside it, consistent with drug trafficking. The drugs found were tested and found to contain heroin, fentanyl, and cocaine.

- [7] Therefore, the Crown's theory is that the accused was paid to execute Mr. Coric, probably in relation to criminal drug gang activities.
- [17] The Crown's case relies, in large measure, on statements from the accused himself. These statements frequently include references to discreditable conduct on his part. There are many instances in which the accused appears to be bragging or boasting about things he has done or the type of person he is or wants to be. This includes the statements he made to [DD], in his jail calls (including rap lyrics) and in his digital communications, such as text messages, and social media postings.
- [18] Almost all of the Crown's case relies on DCE of various kinds.
- [19] As the evidence the Crown seeks to rely on is highly inter-related, it is necessary for me to first describe or summarize the evidence, before analyzing the issues. The following is not an attempt to describe all of the voluminous evidence in question.
- [34] The Crown seeks to rely on text messages and images obtained from the accused's Nokia mobile phone, seized on a search of the accused's room at the Deluxe Hotel in Vancouver on November 23, 2019. Other digital evidence the Crown seeks to rely on consists of social media posts captured from the accused's social media Instagram and Snapchat accounts.
- [35] The Crown contends that the digital evidence is relevant, as it goes to planning, motive, and identity, and some aspects are party admissions.
- [36] The Crown seeks to rely on text messages sent from the accused's Nokia phone to a contact named "Ian/BOXXER":
- a) On October 18, 2019, the accused wrote to Ian/BOXXER: "It's your evil twin broski I just popped my cherry for 60 racks LMFAOOOO";
 - b) On October 18, 2019, the accused wrote to Ian/BOXXER: "legendary BIG BIG CARLETO CORELONE";
 - c) On October 18, 2019, Ian/BOXXER wrote to the accused "what kind of work did you mosh," to which the accused writes "head shots" and then "Fat 60 k";
 - d) On October 29, 2019, the accused wrote to Ian/BOXXER saying "Until we have new numbers let's not talk heaty". (The Crown contends that "heaty" means conversations about illegal matters.)
- [37] The Crown contends that there are also several relevant images of the accused in his Nokia phone's image folder:
- a) the accused with big stacks of cash;
 - b) the accused making a wiping nose gesture;
 - c) the accused making a gun gesture with his hand, in the Holt Renfrew store.

- [38] Similarly, there are several images of the accused holding big stacks of cash that he sent to a third party on his Nokia phone.
- [39] There are several social media posts from the accused's Instagram and Snapchat accounts. These include the following:
- a) the accused referring to guns;
 - b) the accused posting a photo to Instagram containing a large amount of cash, and allusions to explosions or shots in the posting text;
 - c) the accused posing on Instagram while making a gun gesture with a large stack of cash;
 - d) the accused displaying his middle fingers for the camera in what looks like the Deluxe Hotel, where the Nokia phone was located.
- [40] The text of some of the accused's Instagram posts also alludes to gangs, "murderplugs", and coming after people. These were also captured on his Nokia phone.
- [41] The Nokia phone also contained a Facebook Messenger conversation with Shawn Keepeness, that included the following messages:
- a) On September 24, 2019, the accused wrote to Mr. Keepeness "Got the plug mann yu might wanna come see me";
 - b) On October 18, 2019, the accused wrote to Mr. Keepeness "watchu know bout 60k hits nigga", followed by photographs of the accused posing with cash and making a gun gesture in Holt Renfrew.
- [13] I held that the Nokia phone evidence as well as the social media postings of the accused were admissible: paras. 116 - 118.
2. The Searches of the Phone Data
- [14] The ASF sets out the circumstances relating to the data searches in detail:

Execution of the Warrant Issued by Judicial Justice Toy - January 16, 2020

1. On November 23, 2019, a search warrant was executed by the New Westminster Police Department ("NWPD") at a business located at 3505 Kingsway in Vancouver, BC, operating as the Deluxe Hotel. During the execution of this search warrant, then-Detective Andrew Leaver located and seized a Nokia cellphone (the "Nokia Phone").
2. Detective Leaver filed a report to a justice in Form 5.2 (a "Form 5.2") in relation to the Nokia Phone and other items from the search of the Deluxe Hotel on November 24, 2019.
3. On January 16, 2020, a search warrant was issued by Judicial Justice Toy for the data from the Nokia Phone.

4. On January 17, 2020 at 9:42am, Detective Constable Michael Holley of the NWPD executed Judicial Justice Toy's search warrant for the Nokia Phone.
- 5.
6. Cellebrite is a company which provides digital forensics hardware, software and support services to law enforcement agencies. A Reader Report displays data extracted from a digital device or storage medium within the parameters of a prior judicial authorization in an organized, readable format for analysis and evidentiary purposes in police investigations. A Reader Report is produced using Cellebrite software, and can be generated from data extracted from a digital device or storage medium (such as a SIM Card) or from another Reader Report.
7. D/Cst. Holley could not successfully extract the data contained on the Nokia Phone and sent the Nokia Phone to specialists at Cellebrite. The data was successfully extracted on August 11, 2020 by an employee of Cellebrite, Dan Embury. Mr. Embury subsequently returned this data and the Nokia Phone to the NWPD. The data extracted was not in a form that is readable to humans.
8. On August 25, 2020 at 8:02am, D/Cst. Michael Holley produced a Reader Report from the data extracted from the Nokia Phone by Mr. Embury.

Execution of the Warrant Issued by Judicial Justice Campbell - August 31, 2020

9. On August 25, 2020 at 11:58am, D/Cst. Holley gave then-Cpl. Matt Robson of the RCMP Integrated Homicide Investigation Team ("IHIT") a USB containing the Reader Report that he produced from the data extracted by Mr. Embury, as well as a copy of the data extracted by Mr. Embury (the "Nokia Phone USB").
10. On August 31, 2020 Judicial Justice Campbell issued a search warrant for the contents of the Nokia Phone USB.
11. On August 31, 2020 at 12:15pm, Cpl. Matt Robson executed Judicial Justice Campbell's search warrant for the Nokia Phone USB.
12. On September 1, 2020 at 9:40am, Cpl. Matt Robson gave the Nokia Phone USB to then-Cst. Lana Chui. At 11:11am, Cst. Chui generated a Reader Report from D/Cst. Holley's Reader Report that was contained on the Nokia Phone USB.

No 5.2s for Data Filed

13. D/Cst. Holley did not file a Form 5.2 when he generated the Reader Report for the data extracted from the Nokia Phone provided by Mr. Embury. Cst. Chui did not file a Form 5.2 when she generated the Reader Report from D/Cst. Holley's Reader Report.

[15] Both warrants authorizing the searches of the phone's data stated that the authorized peace officers were required to report on the things seized. As no reports were prepared, these stipulations were not complied with.

[16] I have not included references in the ASF to the NWPDP search of the phone's SIM card, as distinct from its searches of the data from the phone itself. The SIM card data was not provided to IHIT by the NWPDP, and does not form part of the Crown's case. There is no evidence before me as to what evidence might have been on the SIM card. I can infer that the NWPDP did not consider any SIM card evidence to be of value to IHIT. Therefore this application relates specifically to the phone data. It is agreed, however, that the NWPDP also did not file a Form 5.2 report for the contents of the phone's SIM card.

[17] In summary:

- a) The search of the hotel room, and the NWPDP and IHIT searches of the phone's contents were judicially authorized;
- b) The NWPDP filed a Form 5.2 for the seizure of the phone;
- c) The NWPDP and IHIT did not file Form 5.2 returns for the phone's data;
- d) The NWPDP and IHIT did not comply with the terms of the warrants requiring them to report on the things seized.

[18] The Crown summarizes the evidence in issue as follows:

The Reader Report generated by [then Constable, now Corporal] Chui is the source of the evidence intended to be relied on at trial by the Crown. The evidence the Crown intends to rely on from the Nokia Phone is outlined in the [DCE reasons] at paras 34-41. The Crown also intends to rely on text messages and call records between the Nokia Phone and a phone number linked to Trion Castello to show an association between the two men following the offence.

[19] The ASF also addresses the policing experience of the various officers involved, and their understanding of the law and their obligations.

[20] The Crown acknowledges that all police officers involved were experienced officers, with a minimum of approximately seven years of service.

[21] The ASF indicates that at the material times (that is, in 2020), the officers all believed that a further Form 5.2 report to a justice was not required for data seized from a digital device (e.g. a cell phone) already in the lawful possession of police. They believed that the Form 5.2 return provided to a justice for the device itself was sufficient to comply with the police obligations under s. 489.1. They state that as a result of this Court's decision in *Teixeira* No. 1, they all now understand that another Form 5.2 report to a justice is required when data is extracted from a seized digital device.

- [22] The written reasons in Teixeira No. 1 were released March 1, 2022. The decision was delivered orally a few days before that.
- [23] Sergeant Matt Robson is a member of the NWPd. He was seconded to IHIT until August, 2020. In 2020 he held the rank of Corporal. He was the lead investigator with IHIT for the Coric homicide. Like the other officers, his understanding as to the police obligation to prepare the Form 5.2 reports changed when he became aware of Teixeira No. 1. He adds that this Court's decision in R. v. Gill, 2021 BCSC 377 also informed his revised understanding. That decision was released March 2, 2021.
- [24] Like the other officers, Detective Constable Holley did not believe a further Form 5.2 report was required for data obtained from a digital device when a report was prepared for the device itself, until the decision in Teixeira No. 1. However, unlike the other officers, he believed that a Form 5.2 report would be required if the police seized data without having seized the physical device that stored the data. (I infer this is probably because, in these circumstances, there would be no seizure of the device, and no Form 5.2 report submitted for the device.)
- [25] Chapter 21.3 of the RCMP Operational Manual, provided:
- 1.9.3 Data that is seized as a result of investigation must be reported to a justice as soon as practicable, in accordance with CC, section 489.1.
- NOTE: A "seizure" includes making a copy of a document.
- [26] D/Cst. Holley, a member of the NWPd, was not aware of this provision of the RCMP manual. The NWPd manual relating to seizure of property contains no similar provision.
- [27] RCMP Constable Chui was not aware of any RCMP policy provision relating to filing Form 5.2 reports for data extracted from a seized electronic device.
- [28] IHIT's practice is now to file a Form 5.2 report whenever it receives a report relating to extracted data from a digital device.

III. Legal Principles

- [29] Section 489.1 and s. 490 set out a scheme for judicial oversight of things seized by police and detained for purposes of an investigation or criminal proceeding. S. 489.1 is triggered when a "thing" is seized. S. 490 provides, in general, for continued detention, return or disposal of the things seized.
- [30] As Bennett, J.A. explained in R. v. Craig, 2016 BCCA 154:
- [146] The Criminal Code sets out a comprehensive search and seizure regime in ss. 487 to 490.01. Included in that regime is a requirement for a report in Form 5.2 to be filed with a justice after the execution of a search warrant detailing, amongst other things, the items seized .

[159] Section 489.1 addresses the return of items not required for proceedings, and the process if items are required for proceedings. If the items are required for further proceedings, the officer shall, as soon as practicable, bring the thing seized before a justice or file a report to the justice that the officer seized the thing and is detaining it or causing it to be detained to be dealt with in accordance with s. 490(1) (s. 489.1(1)). In this way, s. 489.1 has been described as the "gateway" which fruits of a search must pass through in order to come under the judicial supervision mandated by s. 490: *R. v. Garcia-Machado*, 2015 ONCA 569 at para. 15. The report to the justice shall be in the form set out as Form 5.2 (in the Criminal Code), and shall include the statements referred to in s. 487.1(9) (s. 489.1(3)).

[161] Section 490 sets out a comprehensive scheme of judicial supervision for items seized by a warrant or in a warrantless search. Under s. 490(1), a justice shall order the goods returned to the lawful owner unless the justice is satisfied that the detention of the things seized is required for investigative purposes, a preliminary inquiry, trial or other proceeding. Nothing shall be detained for longer than three months unless, on application, the justice is satisfied that an extension of the detention period is justified or proceedings have been instituted where the things seized may be required (s. 490(2)). A justice may only grant extensions up to one year (s. 490(3)). If the goods are required after that and no proceedings have been instituted, an application for further detention must be made in a superior court. The provisions also address the return of things seized to their lawful owner after the periods of detention expire.

[31] Section 489.1 is as follows:

Restitution of thing or report

489.1 (1) Subject to this or any other Act of Parliament, if a peace officer has seized anything under a warrant issued under this Act, 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) return the thing seized, on being issued a receipt for it, to the person lawfully entitled to its possession and report to a justice having jurisdiction in respect of the matter and, in the case of a warrant, jurisdiction in the province in which the warrant was issued, if the peace officer is satisfied that
 - (i) there is no dispute as to who is lawfully entitled to possession of the thing seized, and
 - (ii) the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
- (b) bring the thing seized before a justice referred to in paragraph (a), or report to the justice that the thing has been seized and is being detained, to be dealt with in accordance with subsection 490(1), if the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii).

Person other than peace officer

- (2) Subject to this or any other Act of Parliament, if a person other than a peace officer has seized anything under a warrant issued under this Act, 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 and so that the thing seized may be dealt with in accordance with subsection 490(1),
- (a) bring the thing before a justice having jurisdiction in respect of the matter and, in the case of a warrant, jurisdiction in the province in which the warrant was issued; or
- (b) report to the justice referred to in paragraph (a) that the thing has been seized and is being detained.

Form

- (3) A report to a justice under this section shall be in Form 5.2, varied to suit the case.
- [32] In *R. v. Vu*, 2013 SCC 60, the Supreme Court of Canada first concluded that a digital device is unique from other receptacles, such that a separate warrant to search a digital device is necessary, even if the device itself was lawfully seized pursuant to a warrant.
- [33] In *R. v. Craig*, 2016 BCCA 154, Bennett J.A., for the court, held that the failure of police to prepare a Form 5.2 report for a thing seized is a breach of section 8 of the Charter, where an accused had a residual privacy interest in that item.
- [34] In *Craig*, unlike the present case, no cell phone was seized, and no Form 5.2 report was prepared for the evidence in question. The accused was convicted of sexual touching of a person under the age of 16, sexual assault, and internet luring, in relation to the complainant, a 13 year old girl. He had communicated with the complainant via Nexopia, a social media website used primarily by teenagers. The police obtained a search warrant for data stored on Nexopia's computer servers, to be executed at Nexopia's corporate headquarters, in Alberta. In response to the warrant, Nexopia provided the police with messages from the accused's account. Although the precise form in which the information was conveyed to the police is not quite clear on the judgment of the court, it appears that the relevant messages were provided in some form of digital format, therefore, computer data was seized, consistent with the terms of the warrant. The decision of the court refers to the seizure of "items": e.g. para. 184. The warrant as modified by an Alberta police officer referred to compact discs and digital video discs, but no such items were intended to be seized and were not in fact seized: para. 187.
- [35] As noted, no Form 5.2 return was prepared for the data obtained. The responsible police officer testified that her failure to do so was a "complete oversight".

- [36] After reviewing what she described as "inconsistent judicial consideration", Bennett J.A. held that failure to strictly comply with the statutory provisions of the Criminal Code pertaining to preparing Form 5.2 reports to a justice will result in a s. 8 Charter breach where the accused had an ongoing residual privacy interest and rendered the continuing detention unreasonable (para. 182).
- [37] The implication of Craig is that data seized by the police pursuant to a warrant comes within the phrase "seized anything" in s. 489.1, thus triggering an obligation to prepare a report to a justice, in Form 5.2.
- [38] In Craig, there were other breaches of s. 8, in relation to the manner of execution of the search warrant. However, Bennett J.A. viewed these other matters as minor.
- [39] On the s. 24(2) analysis, Bennett J.A. rejected the appellant's contention that the evidence should have been excluded. She stated that the failure to file the Form 5.2 was "troubling", but not "egregious or intentional": at paras. 189 and 196. I interpret this to mean that this breach was on the lower end of the seriousness scale. She held that the obtaining of judicial authorization in the form of the warrant to seize the items indicated that the interests of the accused were not seriously undermined, and the failure to file a Form 5.2 did not affect his rights at all.
- [40] The facts in Teixeira No. 1 were similar to those in the present case. The defence applied under s. 7 of the Charter (abuse of process) to exclude evidence in the form of data extracted from electronic devices seized from a residence. Form 5.2 reports were filed for the seized devices. Subsequently, search warrants were granted to search five of the devices seized. The searches generated data extraction reports relating to the data on the devices. No Form 5.2 reports were prepared for the extraction reports. The police officers testified that they did not believe Form 5.2 reports were required in the circumstances.
- [41] The Crown argued that no Form 5.2 report was required for the extraction reports, in the circumstances.
- [42] Justice Duncan held, based upon Craig, that the data was a "thing" for purposes of s. 489.1, despite the fact that the data remained on the device itself, which remained in police custody, and ought to have been the subject of a Form 5.2 report.
- [43] Justice Duncan found that there was an abuse of process, based upon several factors, including the failure to file the Form 5.2 report, and the fact that the devices themselves were being detained beyond the authorized period of detention. As noted, this factor is not present in the case before me.
- [44] Subsequently, in R. v. Teixeira, 2022 BCSC 887, [Teixeira No. 2], Duncan J. declined to exclude the evidence.

- [45] In *R. v. Teixeira* 2022 BCSC 1251, [Teixeira No. 3], Duncan J. observed (para. 72), that police failure to file a Form 5.2 or otherwise report to the issuing justice that they had searched the device and created an extraction report was *prima facie* a breach of s. 8, based upon Craig.
- [46] As noted, Teixeira No. 1 was issued March 22, 2022, and is the decision that the officers in the present case say made them aware that a further Form 5.2 report was required for data extracted from a seized cell phone which was itself the subject of a Form 5.2 report. I can infer that sometime after the release of Teixeira No. 1, the officers involved in this case received legal guidance on the point, but there is no evidence before me about that.
- [47] In *R. v. Bottomley*, 2022 BCSC 2192, released December 14, 2022, Justice Devlin applied Teixeira No. 1 and Teixeira No. 2, in concluding that the police breached s. 8 in failing to prepare and file Form 5.2 reports for data obtained from authorized searches of electronic devices, which were themselves obtained in authorized searches. Justice Devlin rejected the Crown's contention that warranted extraction of data from an electronic device was not a "seizure" within the meaning of the Code, and that the court in Teixeira had failed to address this point. As in Teixeira, none of the investigators involved in the seizure of electronic devices considered that the extraction of data from the devices was a seizure leading the obligation to prepare a Form 5.2 report to a justice. After considering a number of case authorities apparently not before the court in Teixeira, Devlin J. held that she was bound to follow Teixeira, which, in any event, she agreed with.
- [48] Following Teixeira and Bottomley, it is now clear that the law as applied in B.C. requires that the police prepare a further Form 5.2 report to a justice in relation to data extracted from an electronic device, even though the device itself is already the subject of a Form 5.2 report. The extraction of data is considered a further "seizure" and the data is a "thing" for purposes of s. 489.1.
- [49] In other provinces, the law may not be so clear.
- [50] In *R. v. Simmons*, 2024 ABKB 397, Justice Renke declined to follow Bottomley. Justice Renke stated:
- [235] First, Craig is correctly decided, given what was actually seized in that case and the state of our legislation. If the only "thing" seized pursuant to a search warrant is information or data, then the only "thing" that can be reported under s 489.1 is the seizure of that data. The circumstance is the electronic equivalent of reporting the seizure of a collection of documents that had been filed with a third party.
- [236] Craig, though, was not dealing with the extraction of data from a seized electronic device.

- [241] Sections 489.1 and 490 do not regulate the information developed from the physical item. In this respect, the treatment of electronic objects does not differ from the treatment of other physical evidence. The physical item is to be reported on and regulated. The results of the investigation, whether that concerns DNA profiling, chemical analysis, or recovered text messages, are not to be reported on under these provisions.
- [51] Justice Renke preferred the analysis of Justice Akhtar in *R. v. Robinson*, 2021 ONSC 2446. Justice Renke also cited another Ontario case, *R. v. Johnson-Phillips*, 2023 ONSC 1977 para 128, where the court applied *Robinson*.
- [52] I have been directed to no appellate authority directly on point. In *R. v. Neill*, 2023 ONCA 765, the court concluded that that the issue did not need to be decided, and should be left to be considered in a case where the issue might affect the outcome: endnote [3].

IV. Analysis

- [53] Section 24 of the Charter provides:

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

- (2) Where, in proceedings under subsection (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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- [54] As explained by the Supreme Court of Canada in *R. v. Tim*, 2022 SCC 12:

- [74] Section 24(2) of the Charter is triggered where evidence is "obtained in a manner" that violates an accused's Charter rights. A s. 24(2) inquiry examines the impact of admitting evidence obtained in breach of the Charter on public confidence in the justice system over the long term, based on three lines of inquiry: (1) the seriousness of the Charter-infringing state conduct; (2) the impact of the breach on the accused's Charter-protected interests; and (3) society's interest in the adjudication of the case on the merits. A court's task is to balance the assessments under these three lines of inquiry "to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute"

[75] Section 24(2) does not create an automatic exclusionary rule when evidence is obtained in breach of a Charter right. The accused bears the onus of establishing that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

[Citations omitted.]

[55] A threshold question is whether the evidence in question was "obtained in a manner" that infringed or denied the rights of the accused guaranteed by the Charter.

[56] In this case, the failure to prepare Form 5.2. reports for the data extraction reports did not cause the evidence to become known or available to the police. In that sense the evidence was not "obtained in a manner" that breached the accused's rights.

[57] However, the courts have taken a purposive and generous approach to this threshold question: *R. v. Tim*, 2022 SCC 12, para. 78. The court summarized the applicable principles as follows:

[78] This Court has provided guidance as to when evidence is "obtained in a manner" that breached an accused's Charter rights so as to trigger s. 24(2):

1. The courts take "a purposive and generous approach" to whether evidence was "obtained in a manner" that breached an accused's Charter rights;
2. The "entire chain of events" involving the Charter breach and the impugned evidence should be examined;
3. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct";
4. The connection between the Charter breach and the impugned evidence can be "temporal, contextual, causal or a combination of the three";
5. A remote or tenuous connection between the Charter breach and the impugned evidence will not suffice to trigger s. 24(2). Such situations should be dealt with on a case by case basis. There is "no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote".

[Citations omitted.]

[58] The Crown does not dispute that s. 24(2) is engaged in relation to the cell phone data. If necessary it would contest that issue with respect to the SIM card data, which as I have said, was never provided to IHIT and is not part of the Crown's case. The defence application focusses on the cell phone data. It is unnecessary for me to decide whether the SIM card data ought to be excluded.

1. The Seriousness of the Charter-Infringing State Conduct

- [59] In *R. v. Beaver*, 2022 SCC 54, the Court summarized the first line of inquiry as follows:
120. The first line of inquiry under s. 24(2) considers whether the Charter-infringing state conduct is so serious that the court needs to dissociate itself from it. This inquiry requires the court to situate the Charter-infringing conduct on a scale of culpability. At one end of the scale is conduct that constitutes a wilful or reckless disregard of Charter rights, a systemic pattern of Charter-infringing conduct, or a major departure from Charter standards. At the other end of the scale are less serious Charter breaches, including breaches that are inadvertent, technical, or minor or those that reflect an understandable mistake.
- [60] The applicant argues that there were multiple breaches of his s. 8 rights in this case, in that both Detective Constable Holley and Constable Chui generated Reader Reports from the data extracted from the Nokia phone by Mr. Embury, the employee of Cellebrite, and neither prepared the required Form 5.2 report. As noted in the ASF, D/Cst. Holley produced a Reader Report from that data extracted by Mr. Embury. Constable Chui produced a Reader Report from the Reader Report produced by D/Cst. Holley.
- [61] These are merely two instances of the same failure, relating to the same data, and for the same reasons, namely, that the officers involved did not believe that Form 5.2 reports were required in the circumstances. Both searches were conducted pursuant to warrants. In the circumstances, characterizing the failures as "multiple breaches" of the applicant's rights does not add anything to the analysis of the seriousness of the breach. There is in this case no "pattern of abuse" as referenced in *Grant*, para. 75.
- [62] As noted, both warrants included language requiring that the things seized be reported upon. Thus, in failing to do so, the police ignored these terms.
- [63] As noted, the only evidence before me on this *voir dire* is via the ASF. The ASF makes no mention of this further failure, thus I have no evidence from the police officers regarding this aspect of the matter.
- [64] These failures increase the seriousness of breach, but only somewhat. The failure of the police was in failing to prepare the reports, due to their misunderstanding of the law. I infer that the same misunderstanding led them to ignore this term of the warrants. I also infer that the reporting term is a standard one found in all warrants. Thus, the misunderstanding of the police could suggest to them that this standard wording was inapplicable.
- [65] As noted, there was also no Form 5.2 report prepared in relation to the SIM card data, but that evidence is not material to the present application.
- [66] I view the breaches as being at the less serious end of the scale.
- [67] I accept that the officers involved did not know that Form 5.2 reports were required in the circumstances. The concept of reporting on data as a thing seized separate from the device from which it is obtained is counter-intuitive and does not fit well with the wording of the statute.

- [68] I do not conclude that they ought to have known that reports were required, prior to the release of Teixeira No. 1. This only became clear after the release of Teixeira No. 1, the written version of which was released March 4, 2022. I note that the submissions in that case were heard over many days beginning in November, 2021. It cannot be said that the law in this Province was clear before the court's decision was released. In fact, it may be said that in B.C., there continued to be some doubt about the matter until this court's decision in Bottomley was released on December 14, 2022. The law in the rest of Canada remains mixed.
- [69] Teixeira was a logical extension of Craig, and of Vu.
- [70] In Craig, there was no seizure of an electronic device, and no Form 5.2 report, of any kind.
- [71] As noted, the Court of Appeal in Craig described Nexopia as a "social media website". The accused and the complainant communicated via messaging, described as a "private communication similar to email". The communications took place in 2009. It is apparent that the communications took place well before the current ubiquity of cell phones. The police did not seize an electronic device such as a cell phone or a computer belonging to the accused. Instead, they obtained a search warrant for the data stored on the Nexopia computers, and no Form 5.2 was prepared in relation to the seizure.
- [72] As Duncan J. noted in Teixeira No. 2, the requirement to prepare Form 5.2 reports for data extracted from an electronic device already in police custody pursuant to a warranted search, and where the police had prepared a Form 5.2 return for the device itself had been presented, had not been the subject of any other reported decision in B.C. prior to her decision in Teixeira No. 1, and was the subject of conflicting decisions in the Ontario courts.
- [73] It is notable that Craig was decided on April 11, 2016, more than five years before the beginning of the hearing of the application in Teixeira No. 1, on November 15, 2021. The issue was apparently the subject of extensive argument in both Teixeira No. 1 and Bottomley.
- [74] There remains no appellate authority directly on point.
- [75] In *R. v. Fabas*, (unreported, December 6, 2022, BC Provincial Court, #70152, Chilliwack Registry), Judge A. Ormiston, as she then was, stated that the law was unsettled prior to Teixeira No. 1, which reduced the seriousness of the breach: para. 14. She went on to observe:

The lack of clarity in the caselaw is compounded or perhaps created by the fact that the sections of the Code themselves are not clearly drafted and cry out for a redrafting that makes clear police obligations when it comes to electronic evidence.

- [76] The applicant argues that RCMP Constable Chui ought to have been aware of the obligation to prepare a Form 5.2 report due to the provision in the RCMP Operations Manual, which I referred to earlier. Constable Chui was not aware of the policy. For convenience, I repeat the provision in question. Chapter 21.3 of the RCMP Operational Manual stated:

1.9.3 Data that is seized as a result of investigation must be reported to a justice as soon as practicable, in accordance with CC, section 489.1.

NOTE: A "seizure" includes making a copy of a document.

- [77] The first part of this is consistent with Craig. It is also consistent with the understanding of Detective Constable Holley, mentioned previously, that a Form 5.2 report would be required if the police were seizing data, without having seized the physical device itself.
- [78] The scope of the added note is unclear. It is not apparent that "making a copy of a document" extends the guidance to data extraction from an electronic device. What is clear is that the Operational Manual does not say anything specific about reporting requirements for warranted searches of seized electronic devices. While it may be said that, as the officer responsible for seizing and managing exhibits and preparing Form 5.2 reports, Constable Chui ought to have been familiar with this part of the manual, given its unspecific content, her lack of awareness of the policy does not add anything to my overall assessment of the seriousness of the breach. As Duncan J. noted in Teixeira No. 2, (which related to the remedy for the breach) the policy does not have the force of law: para. 26.

[79] The NWPD policy guidance says nothing about seizures of data, as such:

Form 5.2 Report to a Justice - General Guidelines

19. Pursuant to Section 489.1 of the Criminal Code, anything that has been "seized" must be reported to a Justice.
23. A Form 5.2A Report must be completed whenever a member "seizes" anything, including drugs, for an investigative or legal process. This includes items "seized" under Federal or Provincial statutory authority, including by way of search warrant or production order, or under common law powers.
- [80] The failure to prepare the reports in this case did not reflect carelessness, neglect of duty, or indifference to the Charter rights of the applicant. Upon the police agencies becoming aware of the decision in Teixeira No. 1, they amended their procedures in order to comply with the decision.
- [81] The searches of the phone were conducted pursuant to warrants. As Rosenberg J.A. observed in R. v. Rocha, 2012 ONCA 707, at para. 28: "Applying for and obtaining a search warrant from an independent judicial officer is the antithesis of wilful disregard of Charter rights."
- [82] In summary, I view failure to prepare the Form 5.2 reports as inadvertent. I do not conclude that the police conduct was negligent, as in my view the law prior to Teixeira No. 1 did not clearly indicate that there was such a requirement. While the police are expected to know what the law is, they are not expected to engage in judicial reflection on conflicting precedents: R. v. Grant, 2009 SCC 32, at para. 133.

[83] I conclude that the breaches were on the low end of the seriousness scale. Accordingly this factor does not favour exclusion.

2. The Impact of the Breach on the Accused's Charter-Protected Interests

[84] In *R. v. Grant*, 2009 SCC 32, the court stated:

[76] This inquiry focusses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. [] The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

[78] Similarly, an unreasonable search contrary to s. 8 of the Charter may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

[85] The principles were succinctly summarized in *Tim*, as follows:

[90] The second line of inquiry under s. 24(2) considers the impact of the breach on the accused's Charter-protected interests. It asks whether the breach "actually undermined the interests protected by the right infringed" (*Grant*, at para. 76; *Le*, at para. 151). This involves identifying the interests protected by the relevant Charter rights and evaluating how seriously the breaches affected those interests (see *Grant*, at para. 77). As with the first *Grant* line of inquiry, the court must situate the impact on the accused's Charter-protected interests on a spectrum, ranging from impacts that are fleeting, technical, transient, or trivial, to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed. The greater the impact on Charter-protected interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. This is because "admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute" (*Grant*, at para. 76; see also *Le*, at para. 151; *Harrison*, at para. 28).

- [86] Privacy interests in the contents of personal computers are very high, and warrant strong protection: *R. v. Reeves*, 2018 SCC 56, at paras. 34-35.
- [87] Searches of modern cell phones raise even greater privacy concerns, as they typically contain vast amounts of private information, the nature of which goes well beyond even what is typically stored on a personal computer. A modern cell phone is in fact a powerful personal computer, whose capabilities are greatly enhanced by the fact that users typically carry the device on their person, and interact with it frequently. This is combined with the capacity of the device to store many kinds of private personal information, such as location data, various forms of communication, (voice, text, email), photographs (including time and location), social media activity, searches conducted, internet and website activities, usage logs, and other forms of private information, of which the user may not even be aware. This is also enhanced by often heavily used social media apps.
- [88] However, the very acute informational privacy interests of the applicant in the contents of his cell phone were substantially unaffected by the failure to prepare a Form 5.2 report, in the circumstance of this case. As the court concluded in *Craig*, (paras. 192-193) the applicant's informational privacy interests were not seriously undermined by the breaches of his s. 8 interests, since the searches of his phone were judicially authorized. There is no actual evidence in this case that suggests the applicant's privacy rights were detrimentally affected in any way by the failure to prepare the Form 5.2 reports.
- [89] I conclude that this factor does not favour exclusion.
3. Society's Interest in the Adjudication of the Case on the Merits
- [90] The third line of inquiry considers factors such as the reliability of the impugned evidence and its importance to the Crown's case. It asks "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion". Reliable evidence critical to the Crown's case will generally pull toward inclusion: *Tim*, at para. 96.
- [91] Here, there are no real concerns about reliability of the evidence.
- [92] The Crown will have no difficulty establishing that the phone belonged to the accused, given the circumstances of its seizure and the contents of the phone. In part the data is real evidence, that is, evidence that the jurors can observe or perceive for themselves (such as photographs) in order to form first hand impressions.
- [93] The importance of the evidence to the Crown's case is somewhat difficult to assess. I previously ruled that the digital evidence (which includes the cell phone evidence) was highly probative: *DCE reasons*, at paras. 34-41, and 120-121. There is some overlap between the cell phone evidence and the other digital evidence. As the Crown contends, the cell phone evidence is important in relation to planning, motive and identity, and in some respects, party admissions. Given the "intertwined and interdependent nature of the evidence" (*DCE reasons*, para. 60), the consequences of excluding a material part of the

Crown's case are unknowable.

[94] As noted, the Crown intends to rely on text messages and call records between the Nokia phone and a phone number linked to Trion Castello, in order to support an association between the two men as it relates to the offence. The association between Castello and the accused in this respect is a very important part of the Crown's case. However, as the applicant notes, there is other evidence linking the applicant to Castello. But this does not mean that the cell phone evidence is unimportant. The quantity or combined weight of the evidence may prove significant in the eyes of the jury.

[95] The applicant is charged with first degree murder, the most serious charge in the Code.

[96] As in most cases, this factor favours admission of the evidence.

4. Balancing the Factors

[97] The final step in the analysis is described as follows in *Tim* (citations omitted):

[98] The final step in the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term reputation of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision. Each factor must be assessed and weighed in the balance, focussing on the long-term integrity of, and public confidence in, the administration of justice. The balancing is prospective: it aims to ensure that evidence obtained through a Charter breach "does not do further damage to the reputation of the justice system". The balancing is also societal: the goal is not to punish the police, but rather to address systemic concerns by analyzing "the broad impact of admission of the evidence on the long-term reputation of the justice system".

[98] As all three lines of inquiry favour admission, the balancing in this case is not difficult. Any breach of the Charter is significant, and its consequences should not be trivialized. However, in the circumstances of this case, I conclude that the long-term integrity of the administration of justice and public confidence in the administration of justice strongly favour admission of the evidence.

V. Conclusion

[99] The application is dismissed.

"Verhoeven J."

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