

CANADA / JUDGMENT

R. v. Pham

2023 BCSC 1491

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1491 R. v. Pham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Pham,

2023 BCSC 1491

Date: 20230706

Docket: 86452-2

Registry: Nanaimo

Rex

v.

Kien Trung Pham

Corrected Judgment: The text of the judgment was corrected at paragraph 1 on October 6, 2023.

Further Corrected Judgment: The text of the judgment was corrected at paragraphs 42 and 46 on May 17, 2024.

Before: The Honourable Mr. Justice Baird

Oral Reasons for Judgment on Voir Dire #4

Counsel for the Crown:

T. McFadgen

Counsel for the Accused:

J. Dosanjh

Place and Dates of hearing:

Nanaimo, B.C.

June 15-16 & 19, 2023

Place and Date of Judgment:

Nanaimo, B.C.

July 6, 2023

- [1] THE COURT: The accused, Kien Trung Pham, is charged with trafficking in narcotics, principally methamphetamine, and other criminal offences. The subject of this ruling is whether evidence of data stored in cellphones seized on Mr. Pham's arrest should be excluded under s. 24(2) of the Charter of Rights and Freedoms, the Crown having conceded that it was obtained in a manner that infringed or denied Mr. Pham's right, guaranteed by s. 8 of the Charter, to be secure against unreasonable search or seizure. On June 19, 2023, I dismissed Mr. Pham's application to exclude the evidence with these reasons to follow.

BACKGROUND

- [2] On May 7, 2019, two packages were seized at the Vancouver International Airport by the Canada Border Services Agency ("CBSA") containing over three kilograms of methamphetamine and 394 grams of MDMA. Mr. Pham's fingerprint was lifted from a container inside one of these packages, which had been sent from Loomis Express located at 4431 Boban Drive in Nanaimo, BC ("Loomis"). They were destined for New Zealand.
- [3] The shipper was identified as Essential Nutrition Wholesale, which subsequent police investigation suggested was a fictitious company. It turned out that similar packages had been shipped through the same Loomis branch in the months prior to May 2019, also destined for New Zealand, usually by a male later identified as William McGuire, who paid for the shipments with cash. The amount paid for dispatch was always in excess of the declared value of the goods shipped.
- [4] William McGuire dropped off packages at Loomis on May 15 and May 17, 2019. They were labelled with Essential Nutrition Wholesale as shipper and were also destined for addresses in New Zealand. The packages were seized by police and searched under warrant. They contained multiple kilograms of methamphetamine. After the May 15, 2019 package delivery, William McGuire was observed by Loomis staff getting into the passenger side of a waiting silver two-door Mercedes coupe bearing licence plate CV1 80S (the "Mercedes"). Mr. Pham was the registered owner of this vehicle. Two Loomis employees provided information to police that the driver of the vehicle was an Asian male.
- [5] At approximately 3:30 p.m. on May 17, 2019, William McGuire arrived at Loomis in a Ford F150 pickup truck similar to one owned by Mr. Pham. The pickup remained on Boban Drive while William McGuire entered the office to ship the package. Subsequently seized security camera footage from a nearby business revealed that there was a second person waiting for

Mr. McGuire in the Ford F150. Several days of surveillance were conducted thereafter during which RCMP officers saw Mr. Pham driving both the Mercedes and a silver Ford F150 registered to him bearing licence plate LP 2391 (the "F150").

- [6] Surveillance officers saw the Mercedes parked at 6136 Kiara Place in Nanaimo on May 21, 22 and 23, 2019, and the F150 parked there on May 17, 21, 22 and 23, 2019. Police believed that this is where Mr. Pham lived with his mother and his brother, Le Tran. Mr. Pham was seen coming and going from this residence.
- [7] Surveillance on May 23, 2019 started at 9:35 a.m., at which time both the Mercedes and the F150 were parked in the driveway of 6136 Kiara Place. At 10:00 a.m. Mr. Pham departed the residence driving the F150. He attended Loomis where he picked up a number of packages identified as "cleaning supplies". At 11:42 a.m. he was followed by the surveillance detail to an address on Twelfth Street in Nanaimo where he picked up William McGuire.
- [8] Mr. Pham and Mr. McGuire drove together in the F150 to an apartment building at 1805 Summerhill Place, arriving at 12:03 p.m. Mr. Pham entered the building and re-emerged several minutes later carrying a white box with blue lettering on it. He got back in the F150 and drove off. The surveillance officer, Cst. Ilioi, who was following Mr. Pham northbound on Bowen Road, saw Mr. Pham's brother, Le Tran, in the Mercedes, driving in the opposite direction, generally towards Summerhill Place.
- [9] Less than 10 minutes later, William McGuire entered Loomis to ship a white box with blue lettering on it. It was destined for New Zealand. After he was done he walked away from the Loomis office carrying a receipt. Surveillance officers watched all of this. Mr. Pham was waiting in the F150 parked in a nearby dead-end street or driveway. Mr. McGuire got into the passenger side and Mr. Pham set the vehicle in motion. A team of police officers swooped in to cut it off. Both men were arrested for drug trafficking.
- [10] The F150 was searched incidental to arrest. The items seized from it included four mobile phones, two found on the front driver's seat, and two in the front centre console between the driver and passenger seats. Cst. Fowler was responsible for seizing and documenting these devices. He assigned exhibit identifiers to each of them. The ones from the front seat became police exhibits E-3 and E-4; the ones from the centre console, Exhibits I-9 and I-10.
- [11] In accordance with the requirements of s. 489.1 of the Criminal Code, Cst. McCowan submitted a report to a justice in Form 5.2 listing the four cellphones and indicating that the police wished to detain these items for investigation. The Form 5.2 was filed with the Nanaimo Court registry on June 1, 2019. The receiving justice authorised the detention of the four phones for the 90-day period mandated by s. 490(2) of the Criminal Code. Counsel have agreed that the expiry date for this authorisation was August 22, 2019.
- [12] The following additional facts have been admitted on this voir dire:

- a) On May 24, 2019, 203-1805 Summerhill Place was searched. On May 31, 2019, Cst. McCowan filed a Form 5.2 pertaining to exhibits seized during this search. The 90-day expiry of the Form 5.2 for these exhibits was on August 23, 2019.
- b) On May 24, 2019, 6136 Kiara Place was searched. On May 31, 2019, Cst. McCowan filed a Form 5.2 pertaining to the exhibits seized during this search. The 90-day expiry of the Form 5.2 for these exhibits was on August 23, 2019.
- c) On May 24, 2019, the Mercedes was searched. On June 1, 2019, Cst. Fowler filed a Form 5.2 pertaining to the exhibits seized from this search. The 90-day expiry of the Form 5.2 for these exhibits was on August 22, 2019.
- d) On October 18, 2019, Cst. Fudge applied for and was granted a search warrant authorising the search of police Exhibits E-3, E-4, I-9 and I-10. The warrant authorised police to enter these devices, to search them for relevant evidence, "and to report thereon as soon as practicable but within a period not exceeding seven days after the execution of the warrant to the clerk of the court for the Nanaimo Court registry".
- e) In the sworn Information to Obtain this warrant ("ITO"), Cst. Fudge did not state that the 90-day authorisation period under s. 490(2) of the Criminal Code for detention of Exhibits E-3, E-4, I-9 and I-10 had expired.
- f) Further, within the ITO, Cst. Fudge specified a time limit for searching Exhibits E-3, E-4, I-9 and I-10 in the following terms, which the issuing justice endorsed in the warrant itself:
 - 68. Should the Search Warrant be granted, I request that the authorization time for the execution be between the dates of October 18th, 2019 and November 15th, 2019, between the hours of 0700 hrs and 2059 hrs and that the search will be conducted at the Nanaimo RCMP Detachment.
- a. This time frame will provide adequate time to locate a qualified Member within the Nanaimo Detachment who is trained and equipped with the technological expertise to properly enter and search the devices. Should further examination be required, the devices will be forwarded to the RCMP Forensic Technological Unit.
- g) Cst. Devoe conducted a Cellebrite extraction of data from Exhibit E-3 on November 10, 2019; from Exhibit E-4 on November 17, 2019; from Exhibit I-9 on November 24, 2019; and from Exhibit I-10 on November 24, 2019. No report to a justice in Form 5.2 was filed in relation to the seizure of data from any of these exhibits.
- h) On March 5, 2020, the RCMP obtained an order under s. 490(2)(a) for an extension of authorisation to detain the four cellphones and other exhibits. This order expired on May 6, 2020. No extension application was made before or after that date. The police continued to detain the phones without judicial authorisation to do so.

- i) The charges were sworn and these proceedings against Mr. Pham were instituted on September 4, 2020.

DATA EXTRACTION EVIDENCE

- [13] On the present voir dire, I was provided with the data extracted from each of the four cellphones in question, which the Crown claims comprise circumstantial evidence directly relevant to proof of the various offences set out in the indictment, or to negative an inference plainly suggested in the cross-examination of various witnesses that Mr. Pham may not have been involved in their commission. The Crown concedes that the prosecution will not be defeated by the exclusion of this evidence, but says that its case will be materially weakened if this remedy is granted, resulting in an impairment of the truth-seeking purpose of the trial.
- [14] With respect to Exhibit E-3, found on the front seat of the F150, I was shown an "Extraction Report" indicating that the phone number for the device is 1 (250) 797-5674. Amongst the extracted data are digital photographs, including one of a handwritten note from "Kenny", which the evidence plainly suggests is how Mr. Pham identifies himself to English speakers. In it, "Kenny" appears to be taking responsibility for damaging someone else's automobile and offering to pay for it, asking the other person to call him at (250) 797-5674 for that purpose.
- [15] There are also photographs of documents addressed to, or in the name of, Kien Trung Pham. These include notices from collection agencies, traffic and parking tickets for both the F150 and the Mercedes, including red light infraction notices with attached photos of the F150, commercial invoices in the name of Essential Nutrition Wholesale, a B.C. Lottery Corporation notice of prohibition from entering casinos, travel itineraries, cheques, banking records and Canada Revenue Agency taxation documents.
- [16] There are also a number of "selfies" of Mr. Pham, pictures of the Mercedes; of supplement containers such as Leucine, Creatine and Taurine, similar if not identical to the containers found in the packages seized by the CBSA and the RCMP; a single receipt in the amount of \$439.89 for 40 containers of Leucine; screenshots of Google map images of Auckland, New Zealand; and large amounts of money in New Zealand, Canadian and European currency, mostly in larger denominations. There is one picture of dozens of Canada Post Xpresspost packages lying on the front passenger seat and footwell of a motor vehicle, another that appears to be a computer screenshot showing the user name "bcpremo" with a password, and yet another of an online chequing account record in which, under the heading "Your E-mail", the address listed is "phamkien33@gmail.com".

- [17] In addition to this, there are internet pictures of packaging tape, Krazy Glue, and foam liner cap seals of the sort used for security and protection in the packaging of vitamins and supplements. There are also two brief videos of someone heat-sealing such cap seals onto the sort of supplement containers that are featured elsewhere in the photographs extracted. The Crown will argue, by reference to other evidence, that some of these photos were taken inside 203-1805 Summerhill Place.
- [18] The evidence of data extracted from Exhibit E-4, also found on the driver's seat of the F150, include outgoing text messages to a variety of individuals saying "Kenny new number". One incoming message asks, "Please give me your wickr name", followed in less than a minute with the response "bcsupremo". Another asks "Can you send me an email address", followed by the response, within three minutes, of "phamkien33@gmail.com". Another reads "Hey bro just wanted to say thx again for ur generosity and remind you about email", followed three minutes later by the response "phamkien33@gmail.com". In one outgoing message, the user of Exhibit E-4 asks "What's the other number you have"; just over 30 seconds later the recipient asks "Who is this"; the response within six seconds is "Kenny". There are also a number of incoming messages which the Crown will argue are referrable to drug transactions in which the sender places, and the user of Exhibit E-4 responds to, orders for "pants" (heroin/fentanyl), "side", "window", or "glass" (methamphetamine), and "shirts" or "soft" (powdered cocaine).
- [19] Digital photographs were also extracted from Exhibit E-4 including "selfies" of Mr. Pham; pictures of supplement containers similar to those extracted from E-3 and seized by the CBSA and RCMP; the waybills for both packages seized by the CBSA; the waybill for the package dropped off at Loomis by William McGuire on May 15, 2019; screenshots of text messages with the names, addresses and phone numbers of contacts in New Zealand, including the person to whom one of the packages seized by the CBSA was addressed; a large heat-sealed package with a substance that looks like a narcotic substance; and a screenshot of an online Sale Detail document from "BC PREMO" to an address in Quebec for a shipment of "1gm Crystal Meth Pristine Icy Shards".
- [20] The extracted data from Exhibit I-9 includes text messages referring to "pants", "glass" and "soft", an incoming message asking "Who is this", with the response "Kenny", and an exchange in which one of the outgoing messages refers to "1805 Summerhill". There are also exchanges with a person identified as "Cat T" or "Terrance", including about "pants", and one of them is an outgoing message saying "Pham Kien 0793 3962-190".
- [21] Photos extracted from exhibit I-9 include one of Mr. Pham and a young Asian female; a screenshot related to the sale of "1gr High Quality High Heat Crack Cocaine" paid by bitcoin to be delivered to an address in Ontario; a screenshot of a text message with an outgoing message referring to "bcpremo"; a screenshot of a message from "bcpremium" confirming a package to be sent to an address in New Zealand; a screenshot of a waybill in the name of Essential Nutrients Wholesale for a 20-pound shipment to an address in New Zealand with a handwritten note indicating that it was paid in cash; a screenshot of an online order from a

vendor listed as "bcpremo (90)" for two "1 gr Potent High Heat Crack Cocaine" paid by bitcoin to be delivered by Xpresspost Canada Post; and a screenshot which appears to relate to the shipment of "1 gr Potent High Heat Crack Cocaine" to be shipped to an address in Alberta with an encrypted message sent through the e-mail address "DumDumpremo@lovebcpremo.com".

- [22] The data extracted from Exhibit I-10 includes entries in an electronic calendar listing the "Attendee" as phamkien33@gmail.com. There are also digital photos of cheques payable to Kien Pham, bank drafts purchased by Kien Pham, a handgun which the Crown will argue is identical to one found in the search of 203-1805 Summerhill Place, pictures of the Mercedes, the Mercedes licence plate "CV1 80S", "selfies" of Mr. Pham, his B.C. driver's licence, invoices for Essential Nutrition Wholesale, contact information from someone in New Zealand, screenshots of online orders for narcotics from a vendor listed as "bcpremo", and cash in Canadian and European currency.

DISCUSSION

- [23] Mr. Pham's complaint here, and the basis on which he seeks exclusion of the evidence extracted from the cellphones, is that the RCMP's failure to properly report to a justice about the items seized and to seek the timely extension of lawful authority to detain them, along with Cst. Devoe's failure to execute the search warrant on three of the devices within the timeframe permitted by the issuing justice, or to report to the justice that she had extracted data and wanted to keep it, cumulatively rise to the level of police misconduct that would result in damage to the long-term reputation of the judicial system if endorsed by admission of the evidence at trial.
- [24] The Crown concedes that these failures amount to an infringement of Mr. Pham's s. 8 Charter right to be free from unreasonable or unlawful search or seizure, but says that they were unintentional procedural errors that do not rate as serious misconduct or much impact Mr. Pham's reasonable expectation of privacy in the contents of the cellphones in all of the circumstances. The Crown argues that there is an urgent and strong public interest in pursuing the case to a conclusion based upon all of the logically relevant evidence produced during the police investigation of Mr. Pham.
- [25] Section 24(2) of the Charter provides that where evidence was obtained in a manner that infringed or denied any rights guaranteed therein, it 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.
- [26] The exclusion of evidence is never automatic. The decision whether to do so requires a balancing of factors in three lines of inquiry mandated by *R. v. Grant*, 2009 SCC 32 at para. 71, namely: 1) the seriousness of the Charter-infringing conduct; 2) the impact on the accused's Charter-protected interests; and 3) society's interest in the adjudication of the case on its merits. The underlying assumption is that there will be a negative impact on public

confidence in the justice system if unlawfully gathered or detained evidence is admitted in criminal proceedings, but that circumstances will arise in which the exclusion of evidence will have a similar negative effect.

- [27] The inquiry is objective. It asks whether a reasonable person, informed of all of the relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute. It requires an assessment of the overall impact that the admission, in criminal proceedings, of unconstitutionally obtained or detained evidence would have on society's confidence in the justice system over the long-term. The onus is on the accused to establish that the impugned evidence should be excluded.
- [28] If part of Mr. Pham's complaint is that Cst. McCowan, in filing the initial Form 5.2 request for authorisation to detain things seized on June 1, 2019, failed to specify that he wished to keep, not only the cellphones themselves, but the data stored within them, I am not much persuaded by it. I agree with the observation made by the Court of Appeal in *R. v. Craig*, 2016 BCCA 154 that such a breach is trivial and undermined Mr. Pham's protected interests very little.
- [29] Cst. McCowan's failure to follow the requirements of the Criminal Code respecting detention of seized property is certainly nothing to brag about. He should have known better. RCMP officers are required to comply with the law in every particular. The Projects Unit which obtained the evidence in question, and to which Cst. McCowan belonged at the time, undertakes many narcotics investigations, including, of course, obtaining and executing search warrants and seizing property if lawfully authorised to do so. Along with the power to seize property comes the responsibility to account for it to a judicial officer and to get authorisation to keep it for legitimate investigational purposes.
- [30] In my view, Cst. McCowan complied adequately if not perfectly with s. 490 of the Criminal Code when he filed his Form 5.2 report on June 1, 2019. I am satisfied that his failure to get an extension of the 90-day period set out in s. 490(2) was merely an oversight. There was nothing wilful or intentional about it. When he realised his error he promptly filed an application for further authorisation to detain the devices and served it on Mr. Pham with an accompanying affidavit explaining his grounds for doing so. Mr. Pham attended the hearing of this application with his lawyer on March 5, 2020 and did not oppose it.
- [31] The extension order expired on May 5, 2020 and was not renewed before the Crown preferred the charges for which Mr. Pham is now on trial. Once again, I am satisfied that this was a form of inadvertence or negligence and was not a wilful subversion of the law. I was surprised to learn that, when all of this happened, the Projects Unit had no reminder system in place to trigger timely applications for continued detention of things seized, but I was told that the oversights in the present case have led to the introduction of such a system. I also have some sympathy for Cst. McCowan's additional explanation for failing to bring a renewal application on or before May 5, 2020: the COVID-19 pandemic had set in, and the

normal pursuit of his duties was disrupted by a departmental order that he should work from home. I would also note that the charges at bar were sworn only four months later, bringing to an end the necessity of seeking permission to further detain evidence.

- [32] I would emphasise, as well, that at no time before the charges in the present indictment were sworn on September 4, 2020 did Mr. Pham bring an application under s. 490(6) seeking return of the cellphones or any of the other property seized. In my experience, in all of the circumstances of the case as they have so far been revealed to me, if Cst. McCowan had sought extensions in a timely way he would certainly have got them. On the one occasion where he did so, Mr. Pham raised no objection. Especially given his own reluctance to apply for return of the cellphones, I have no reason to think that he would have opposed any subsequent extension application if Cst. McCowan had made one.
- [33] While I was not particularly impressed by Cst. Devoe's execution of the warrants relating to the search of exhibits E-4, I-9 and I-10 beyond the dates permitted on its face, and she must take greater care in the future, once again I am satisfied by her evidence that she did not do this with any subversive intention or wilful disregard of lawful requirements. She told me that she was operating under the mistaken belief that another police officer had "executed" the warrant within the timeframe specified, and that she was merely continuing with the search of the devices that had started in time. The Crown concedes that this was a misunderstanding of the terms of the warrant, and that the extraction of data from the devices in question was warrantless.
- [34] Once again, however, if Cst. Devoe had realised her mistake, she could simply have applied for another warrant based on the same information used in getting the first one, and in my view, it would swiftly have been granted. Cst. Devoe now realises, as well, that she should have filed a Form 5.2 application for authorisation to detain the data extracted from the cellphones, but I accept that this did not occur to her at the time because she thought the cellphones had been adequately reported by Cst. McCowan. That she was wrong about this is now clear, but Cst. Devoe struck me as a highly intelligent and serious police officer, and I am confident that she will make no such procedural errors in the future.
- [35] This is all a preamble to the Grant inquiry into whether the evidence from the cellphone should be excluded. On the first line of the Grant inquiry, and considering the conceded Charter breaches cumulatively, I would rate them in the lower end of the culpability scale. I would not call them trivial, but neither would I rate them as serious. I cannot say that I feel any particular inclination to distance myself and this court from the comparatively minor technical errors made by honest police officers whom I am satisfied will never make them again, and I doubt that any reasonable and well-informed objective observer would conclude that the inclusion of the evidence in question would negatively affect public confidence in the justice system. This line of the Grant inquiry does not support the exclusion of evidence.

- [36] Defence counsel relied amongst other cases on *R. v. Bottomley*, 2023 BCSC 603, in which this court strongly condemned the conduct of a team of Vancouver-area major crime investigators and their manner of giving evidence. The court identified a spate of Charter-infringing conduct described, amongst other things, as alarmingly negligent, blatant, wilful and arrogant. It included a breach of the accused's right to access legal advice, which the court found to be "particularly egregious". This was compounded by misleading police testimony on the subject. In the present case, while Csts. McCowan and Devoe should have known better than to make the mistakes for which they have candidly taken responsibility, I am quite unable to apply the excoriating and vituperative language used in *Bottomley* to their comparatively minor omissions. Also, Mr. Pham's application for an exclusionary remedy has no basis in a serious denial of his right to counsel.
- [37] I would also distinguish *R. v. Gill*, 2021 BCSC 377. In that case it was admitted that members of a specialised murder investigation team called IHIT had actually been directed by their superiors to defy the law and to ignore their legal obligation to report to the issuing justice about property seized. A ranking officer on that team was advised in 2007 by a Justice of the Peace that his investigators were failing across the board to file extension applications once the s. 490(2) 90-day limitations were exceeded. The same officer received unambiguous advice from senior prosecutors that the s. 490 procedures were mandatory, and that all of the unit's active files had to be brought into compliance. He was warned that failure to do so could result in the exclusion of evidence. This sound legal advice was ignored, with the result that property belonging to the accused, including cellphones, was held by the police without judicial authorisation for more than six-and-a-half years.
- [38] Not surprisingly the court in *Gill* found this to be a deliberate, flagrant and provocative disregard for Charter-protected rights. It was aggravated by the high-handedness of the refusal not only to comply with the law, as every peace officer is sworn to do, but also to heed the advice of senior lawyers who gave clear guidance about what the law required and the consequences of non-compliance. To make matters worse, the officer who received this advice later circulated a memo to every member of the team, explicitly advising them not to seek further detention orders on investigative files that had been out of compliance with s. 490 for significant periods of time, precisely so that judicial attention would not be drawn to them.
- [39] It does not surprise me in the least that this astonishing and long-lasting wilful and conscious subversion of the law, with the accused being deprived of intimate personal information on his cellphones for almost seven years, was considered to be a serious infringement of his rights leading to the exclusion of evidence. By comparison, as I have already said, the misdeeds of Csts. McCowan and Devoe are of a far lesser variety and were not intentional. Cst. McCowan would have got extensions had he asked for them. Cst. Devoe would have been granted a new warrant if she had realised that she needed it. The all-in delay between Mr. Pham's arrest and the institution of these proceedings was only 15 months. Mr. Pham did not apply for the return of his phones during this interval though he

was aware the police had seized and kept them. When an extension was sought he did not oppose it. Only items of data that are arguably relevant to the charges before the court were extracted from the cellphones. The rest was left behind. The scope of the seizure was reasonable, in other words, another distinguishing feature from Gill where the police intentionally seized cellphones not listed in the warrant.

- [40] I turn now to the second line of the Grant inquiry: the impact of the admitted breaches on Mr. Pham's Charter-protected interests. Here, I must consider all of the circumstances and consider the nature and extent of Mr. Pham's reasonable expectation of privacy within all of those circumstances. I am not about to downplay the expectation of privacy with respect to data stored on personal cellphones, but as with all other rights, it is subject to limits. I start with the proposition that the cellphones were lawfully seized as an incident to an arrest which I have already determined was based on solid grounds. A warrant was obtained to extract the relevant data from the devices, even if its execution partially exceeded the time during which the data could be seized by the warrant's own terms, something about which, for the reasons already given, I am not impressed but also not much alarmed.
- [41] These are the general circumstances in which Mr. Pham's expectation of privacy in the data stored on his cellphones must be evaluated. He had been arrested on the basis of credible evidence that he was involved in trafficking large quantities of illegal narcotics. His passenger had just dropped off a package containing over a kilogram of methamphetamine destined for New Zealand. Two of the cellphones were seized on the seat of the F150 that he was occupying when arrested, and the others were found in the console directly beside him. All of the devices were lawfully seized. Given the well-established nexus between cellphone use and drug trafficking, it was entirely foreseeable that the phones would be examined based on the probability that offence-related data would be extracted from them.
- [42] The RCMP obtained a warrant to do just that. They conducted a reasonable search taking care not to extract irrelevant or sensitive personal information. The investigation had the flaws already discussed, which I am not attempting to sweep under the rug, but in the main it was routine, sound and above-board. Mistakes were made, there is no doubt about it, but there is nothing to suggest that the police were consciously or intentionally attempting to circumvent the judicial authorisation process. The acknowledged breaches, though not trivial, were inadvertent and procedural in nature, not intentional or substantive. In evaluating their impact from the perspective of the accused I must be realistic and practical, taking stock of all of the facts. On the totality of the evidence so far adduced, I find that the important basic facts are that the items in question were lawfully seized pursuant to a valid arrest, that an initial Form 5.2 report listing the cellphones if not their data was filed and renewed, and that judicial authorisation to search the devices was sought and granted.
- [43] In my experience, as I have said, given the nature and complexity of the investigation, Cst. McCowan would likely have been granted any s. 490 extension orders required to cover all of the 15-month interval between the seizure of the phones to when the charges were laid, and Cst. Devoe would have got a new warrant with more time to search the phones if she had

applied for it. Her failure to report the seizure of data to the issuing justice was an innocent mistake not a wilful subversion of the law. Mr. Pham was represented by counsel. He did not seek return of the phones. He must have been aware that a warrant would likely be sought and issued to search their contents. In all of these circumstances, I conclude that Mr. Pham's reasonable expectation of privacy in his cellphone data was at least much reduced, and with it the impact of the acknowledged infringement on his Charter-protected rights. This line of the Grant inquiry does not much weigh in favour of exclusion.

- [44] When it comes to the third line of the Grant inquiry, namely society's interest in the adjudication of the case on its merits, the question, succinctly stated, is whether the long-term reputation of the justice system will be better served by the inclusion or exclusion of evidence. The charges against Mr. Pham are serious. Public concern about the prevalence of drug trafficking is widespread and substantial. The evidence sought to be excluded is probative and reliable. It is a key component of the Crown's case.
- [45] Here, the Crown's case would not fail if the evidence were excluded, but it is logically probative real evidence that Mr. McFadgen argues is central to the proof of important elements of each of the offences in the indictment and the truth-seeking function of the trial would be materially undermined if the evidence were excluded.
- [46] As the Ontario Court of Appeal held in *R. v. McGuffie*, 2016 ONCA 365, at para. 63, if both of the first two Grant inquiries provide weaker support for exclusion, then the third inquiry will almost certainly confirm the admissibility of the evidence. Given my conclusion that the Charter-infringing police conduct in this case was at the lower end of the culpability range from trivial to serious, and that it was committed in circumstances where the impact on Mr. Pham's Charter-protected privacy expectations was attenuated, this third factor decisively tips the balance in favour of inclusion of the evidence.
- [47] In my view a reasonable person, informed of all of the relevant circumstances and the values underlying the Charter, would conclude that it would be the exclusion of the evidence rather than its admission that would bring the administration of justice into disrepute in this case. The application to exclude evidence pursuant to s. 24(2) of the Charter is denied.

"Baird J."

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