SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Adam Joseph Drake*, 2023 NSSC 364

Date: 20231006
Docket: CRH 519166
Registry: Halifax

Between:

His Majesty the King

v.

Adam Joseph Drake

Decision on Voir Dire
(Section 8 Charter Application)

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	July 21, 2023, in Halifax, Nova Scotia
Oral Decision:	October 6, 2023
Written Release to Parties:	November 10, 2023
Release for Publication:	June 17, 2025
Counsel:	Eric R. Woodburn, K.C. and Cory Roberts, for the Provincial Crown Stanley W. MacDonald, K.C. and Allan F. MacDonald, for the Applicant

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By the Court (Orally):

Introduction:

[1] On November 21, 2016, Tyler Ronald Joseph Keizer was murdered. The Applicant, Adam Joseph Drake, was charged with first-degree murder in relation to his death, in March 2019 ("the first charges"). The Crown proceeded by Direct Indictment in January 2020. The trial was set to begin on November 2, 2021. However, the Indictment was withdrawn on October 29, 2021 by the Crown, citing the absence of a realistic prospect of conviction.

[2] While initially investigating Mr. Drake as a person of interest, in the aftermath of Mr. Keizer's murder, police became interested in his gold iPhone 6 because they felt that it might hold some evidence in relation to the homicide. A Section 487 search warrant was granted by a Justice of the Peace on March 7, 2017. The warrant was for the limited purpose of conducting a search of the phone between the dates of March 8 – 31, 2017.

[3] The police conducted a warrantless seizure of the phone from Mr. Drake, on March 16, 2017, while he was using it, so he would not have an opportunity to "lock" it. This was consistent with the method of seizing the phone which was detailed in the Information to Obtain ("ITO") which had been presented to the Justice of the Peace preliminary to the warrant to search the phone being granted. At the time of the seizure, Mr. Drake was presented with the warrant which had been obtained to search the data on the device.

[4] Police quickly transported the seized iPhone to RCMP headquarters in Dartmouth, and extracted the data from it to the extent that the (then) current technology permitted. The police filed a "Report to Justice" detailing the warrantless seizure of Mr. Drake's iPhone (s. 489.1). This took place on March 28, 2017, 12 days after the seizure itself. An Order for Detention (s.490) for a period of three months with respect to the iPhone was granted. No further orders under s.490 have been obtained since then.

[5] On January 8, 2021, Corporal Todd Bromley of the RCMP recommended to Crown counsel that, although Mr. Drake's phone had been analysed in 2017, it could be reanalysed, using new technology, which might allow access to data from chat applications and other deleted data that had not been accessible in 2017. Once again, on October 27, 2021, he opined to Crown counsel that the phone should be reanalysed because additional data could be retrieved from it.

[6] The Crown explained its decision to withdraw the Indictment containing the first charges, on October 29, 2021, on the basis that the scheduled trial was imminent and any request for an adjournment thereof would have been characterized as "disclosure delay".

[7] In the meantime, the police continued to detain the iPhone, even though the three-month limitation period with respect to the only Order for Detention that was ever obtained, had expired on June 28, 2017. Although he did not make application to have it returned to him, Mr. Drake never expressed consent to the further detention.

[8] On August 12, 2022, a search warrant to search the data contained in the device was obtained. The police took this step in the expectation that further evidence might be obtained from a new extraction of the phone data. They intended to use a method that had become available due to improvements in technology since the first extraction in March 2017.

[9] This (second) extraction was conducted in September 2022. A full digital image of the device was thereby obtained. No further search of the physical device itself was necessary, once police were in possession of this image. It also provided additional information which the first extraction had not.

[10] On the basis of the evidence obtained in the second extraction, the Crown now is of the view that there exists a realistic prospect of conviction, which has resulted in Mr. Drake being charged once again with the first-degree murder of Mr. Keizer ("the second charges").

[11] The Applicant argues that the delay of 12 days in filing the request under s. 489.1 after the seizure of the iPhone and/or the continued detention of the phone after June 28, 2017 violated his rights pursuant to the *Canadian Charter of Rights and Freedoms* ("the Charter"), and in particular, s.8 thereof. He seeks to have the impugned evidence excluded pursuant to s. 24(2) of the Charter, as a consequence.

Issues:

(a) Did the filing of the Report to Justice 12 days after the seizure of the iPhone, and/or the continued detention of Mr. Drake's iPhone after June 28, 2017 constitute a breach of his s. 8 Charter rights? and

(b) If yes, should the impugned evidence be excluded pursuant to s. 24(2) thereof?

Discussion

(A) Did the filing of the Report to Justice 12 days after the seizure of the iPhone, and/or the continued detention of Mr. Drake's iPhone after June 28, 2017 constitute a breach of his s. 8 Charter rights?

i. The applicable law

[12] To place the positions of the parties in context, it is helpful to examine the pertinent sections of the *Criminal Code*. I begin with section 487, which provides:

> Information for search warrant
>
> 487 (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
>
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
>
> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
>
> (c.1) any offence-related property, may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
>
> (d) to search the building, receptacle or place for any such thing and to seize it, and
>
> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect of it to, a justice in accordance with section 489.1.
>
> [Emphasis added]

[13] Next, s. 489. 1 is referenced:

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).

[Emphasis added]

[14] Section 490 follows:

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.

Idem

(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.

Detention without application where consent

(3.1) A thing may be detained under paragraph (1)(b) for any period, whether or not an application for an order under subsection (2) or (3) is made, if the lawful owner or person who is lawfully entitled to possession of the thing seized consents in writing to its detention for that period.

When accused ordered to stand trial

(4) When an accused has been ordered to stand trial, the justice shall forward anything detained pursuant to subsections (1) to (3) to the clerk of the court to which the accused has been ordered to stand trial to be detained by the clerk of the court and disposed of as the court directs.

Where continued detention no longer required

(5) Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor, or the peace officer or other person having custody of the thing seized, determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), the prosecutor, peace officer or other person shall apply to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered its detention under subsection (3), or

(b) a justice, in any other case,

who shall, after affording the person from whom the thing was seized or the person who claims to be the lawful owner thereof or person entitled to its possession, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, make an order in respect of the property under subsection (9).

Idem

(6) Where the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required, the prosecutor, peace officer or other person shall apply to a judge or justice referred to in paragraph (5)(a) or (b) in the circumstances set out in that paragraph, for an order in respect of the property under subsection (9) or (9.1).

Application for order of return

(7) A person from whom anything has been seized may, after the expiration of the periods of detention provided for or ordered under subsections (1) to (3) and on three clear days notice to the Attorney General, apply summarily to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or

(b) a justice, in any other case,

for an order under paragraph (9)(c) that the thing seized be returned to the applicant.

Exception

(8) A judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or a justice, in any other case, may allow an application to be made under subsection (7) prior to the expiration of the periods referred to therein where he is satisfied that hardship will result unless the application is so allowed.

Disposal of things seized

(9) Subject to this or any other Act of Parliament, if

(a) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or

(b) a justice, in any other case, is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall

> (c) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person, or
>
> (d) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession, and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person, and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.
>
> Exception
>
> (9.1) Notwithstanding subsection (9), a judge or justice referred to in paragraph (9)(a) or (b) may, if the periods of detention provided for or ordered under subsections (1) to (3) in respect of a thing seized have expired but proceedings have not been instituted in which the thing may be required, order that the thing continue to be detained for such period as the judge or justice considers necessary if the judge or justice is satisfied
>
> (a) that the continued detention of the thing might reasonably be required for a purpose mentioned in subsection (1) or (4); and
>
> (b) that it is in the interests of justice to do so.
>
> . . .
>
> [Emphasis added]

[15] Finally, s. 8 of the Charter provides that:

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

ii. Mr. Drake's standing and competing arguments on the merits

[16] The test which I am to apply in determining whether Mr. Drake had a reasonable expectation of privacy (and therefore standing under s. 8 of the Charter to bring his challenge) is uncontroversial. It is set out in *R. v. Edwards*, [1996] 1 SCR 128 and *R. v. Patrick*, 2009 SCC 17. It involves an analysis of the subject matter of the evidence obtained, whether Mr. Drake had an interest in the contents of his phone, whether he had a subjective expectation of privacy with respect to that informational content, and whether that expectation was objectively reasonable.

[17] I accept that the subject matter of the search was the content of Mr. Drake's smart phone, and that he clearly had a direct interest in the intimate and personal

information contained therein. Obviously he, like almost everyone with a smart phone, would have a subjective expectation of privacy with respect to same.

[18] Was that expectation reasonable? As the court noted in *R. v. Craig*, 2016 BCCA 154:

> [72] The Court, after referencing *Dyment*, discussed the factors to be considered when determining if there is a reasonable expectation of privacy in information. One factor is whether the information is of a "personal and confidential nature". The Court held that s. 8 protects "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include intimate details of the lifestyle and personal choices of the individual" (at 293).
>
> [Emphasis in original]

[19] Counsel for the Applicant references *R. v. Morelli*, 2010 SCC 8 to the following effect:

> [2] It is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer.
>
> [3] First, police officers enter your home, take possession of your computer, and carry it off for examination in a place unknown and inaccessible to you. There, without supervision or constraint, they scour the entire contents of your hard drive: your emails sent and received; accompanying attachments; your personal notes and correspondence; your meetings and appointments; your medical and financial records; and all other saved documents that you have downloaded, copied, scanned, or created. The police scrutinize as well the electronic roadmap of your cybernetic peregrinations, where you have been and what you appear to have seen on the Internet — generally by design, but sometimes by accident.

[20] Search of an accused's smart phone, the argument continues, will generally be even more invasive, given the ubiquity of such devices, and the fact that, in many cases, they accompany an individual every waking minute of their lives.

[21] I conclude that Mr. Drake's subjective expectation of privacy in relation to the core biographical data contained therein was objectively reasonable. That expectation remained extant even though he no longer retained control of the item. This conclusion is reinforced by *R. v. Marakah*, 2017 SCC 59, wherein it is noted that "... control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest ... Control is one element to be considered in the totality of the circumstances…" (para. 38).

[22] The Crown's failure to contest Mr. Drake's standing to bring this Application was an appropriate concession in these circumstances.

[23] The Crown does, however, advert to the intimacy of the concept of a "reasonable expectation of privacy" and a s. 8 Charter analysis. It contrasts the Applicant's reasonable expectation of privacy with respect to the information contained in the iPhone (which it concedes) with his expectation of privacy in the device itself, which it characterizes merely as a "box" which houses the data. This latter expectation is said to be "...extremely limited or nonexistent" *(Respondent Pre-hearing Brief, para. 18).*

[24] Consistent with the Applicant's reasonable expectation of privacy with respect to the information stored in the iPhone, the Crown argues the police (properly) obtained another warrant to search the device prior to the second extraction.

[25] The Respondent further emphasizes the fact that Mr. Drake was fully aware that his phone continued to be held by the police following the seizure from his hands at the Canada Games Centre on March 16, 2017. He had previously sought exclusion of evidence from his iPhone in pretrial hearings in this court in relation to the first charges, before they were withdrawn in October 2021. Justice Boudreau in an (as yet) unpublished decision, ruled that the seizure of the iPhone from the Applicant's hands was lawful under s. 489(2) and that there had been no breach of Mr. Drake's Charter protected rights associated with that seizure. Finally, the Crown reiterates that Mr. Drake had not applied to have it returned to him at any time before the second extraction took place. (*Respondent Pre-hearing Brief, July 14, 2023, para. 12*)

[26] The Applicant's argument essentially boils down to the contention that his phone was seized, the regime contemplated by the *Criminal Code* was not followed, continued detention of his phone beyond June 28, 2017 was illegal, and it therefore follows that the second search of his phone was "unreasonable" within the meaning of Section 8 of the Charter.

[27] In support of this argument, counsel for Mr. Drake offers the following context:

> 18. These are the realities that necessarily inform the analysis in the current case. There has never been a more powerful tool for law enforcement than the search of an accused's smartphone. No item in the course of human history contains more

> information about a person's biographical core. This trend will continue as we spend more time on our electronic devices and the technology behind them continues to improve. Our smartphones will get "smarter", and we will spend more, not less, time using them as the years go on.
>
> 19. The defence submits that as the scope and intimacy of the information available to police through the search of an accused's smartphone increases, so too must the procedural protections afforded to that information. As will be shown below, there can be no doubt that the Code section 490 regime must be reassessed in light of the pervasive technological advancements of the last several years and the implications that ongoing police seizures have with respect to the privacy rights of an accused.
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> *(Applicant's Pre-Hearing Brief, June 27, 2023)*

iii. Analysis

[28] In the well-known case of *Canada (Director of Investigation and Research)* v. *Southam*, [1984] 2 SCR 145, ("*Hunter*") the Court adopted American lines of authority to conclude that the Charter (s. 8) "protects people, not places" (*Hunter*, p. 159). Dickson, J. (as he was then) made the further point that s. 8 protected a "reasonable expectation" of privacy, which, in turn, requires an assessment as to whether that right, in the circumstances of an individual case, ought to yield to government intrusion upon it. This intrusion is most often encountered within the context of law enforcement (pp. 159-160).

[29] Earlier, he had pointed out:

> [the function of the Charter] is to provide a continuing framework for the legitimate exercise of governmental power ... for the unremitting protection of individual rights and liberties... It must … be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear those considerations in mind... *(p. 155)*

[30] In *Craig*, a decision to which both parties have referred, the British Columbia Court of Appeal canvassed the authorities after *Hunter* to the following effect:

> [55] I turn next to the decision in *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, and the important principles stated therein. The issue was whether taking a vial of blood from an unconscious patient and providing it to the police was a violation of s. 8 of the *Charter*. Mr. Dyment was convicted of drinking and driving. In concluding that the search was unreasonable, La Forest J. affirmed the conclusion of Dickson J. in *Hunter*, "that the purpose of s. 8 'is … to protect

individuals from unjustified state intrusions upon their privacy' … and that it should be interpreted broadly to achieve that end, uninhibited by the historical accoutrements that gave it birth" (at 427). He reiterated the interpretive principles of s. 8 analysis, at 426:

> From the earliest stage of *Charter* interpretation, this Court has made it clear that the rights it guarantees must be interpreted generously, and not in a narrow or legalistic fashion; see *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344. … [The *Charter*] is a purposive document and must be so construed. [*Hunter*] dealt specifically with s. 8. It underlined that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of the privacy of the individual; see especially pp. 159-60. And that right, like other *Charter* rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Its spirit must not be constrained by narrow legalistic classifications based on notions of property and the like which served to protect this fundamental human value in earlier times.

[56] Justice La Forest emphasized the importance of having robust privacy protections in modern times, at 427-428:

> The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, *Privacy and Freedom* (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.
>
> [Emphasis added]

[57] In *Dyment*, La Forest J. identified three categories of privacy that have continued to provide a context for analysis. These are territorial aspects, personal aspects, and informational. In terms of privacy in relation to information, (the issue engaged in this appeal), he said this at para. 22:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force [*Privacy and Computers*, the Report of the Task Force by the Department of Justice 1972] put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to

> reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*, S.C. 1980-81-82-83, c. 111.
>
> [Emphasis in original]

[31] Broadly speaking, ss. 489.1 and 490 are linked. The prescribed procedure requires that the person or persons effecting the seizure of an item must either bring same, or provide a report describing it, to a justice "as soon as practicable". (s. 489.1(1)) Further discussion of the interplay between these provisions is provided in *R. v. Garcia-Machado*, 2015 ONCA 569:

> [14] Section 489.1(1) applies to both warrantless common law seizures and seizures pursuant to a warrant: *R. v. Backhouse*, 2005 CanLII 4937 (ON CA), [2005] O.J. No. 754, 194 C.C.C. (3d) 1 (C.A.), at paras. 113, 115.
>
> [15] Importantly, s. 489.1(1) is the gateway to s. 490. As Rosenberg J.A. explained in *Backhouse*, at para. 112:
>
> > Section 490 provides that where things have been brought before a justice or a report made to a justice in respect of anything seized under s. 489.1, there is an obligation on the justice to supervise its detention. The section also sets out an elaborate scheme to facilitate the return of items seized to their lawful owners.
>
> [16] If a peace officer fails to file a report under s. 489.1(1), the property seized is not subject to judicial supervision during the investigation under s. 490. The real importance of s. 489.1(1) is its link to s. 490.
>
> [17] In *R. v. Raponi*, [2004] 3 S.C.R. 35, [2004] S.C.J. No. 48, 2004 SCC 50, at para. 28, McLachlin C.J.C. described s. 490 as "purporting to provide a complete scheme for dealing with property seized in connection with crime". Section 490 is lengthy. To provide context for my analysis below, I outline some of its principal provisions, although in very broad terms. The interpretation of these provisions is not at issue on this appeal.
>
> [18] Under s. 490(1), the justice to whom a report is made under s. 489.1(1)(b) is required to order the return of the property to the lawful owner or a person lawfully entitled to possession of [page742] the item unless the justice is satisfied that detention of the item is required "for the purposes of any investigation or a preliminary inquiry, trial or other proceeding". In that case, the justice may order the item detained for up to three months.

> [19] Under s. 490(2) and (3), if the justice is satisfied that, "having regard to the nature of the investigation", the detention of the item for a further period is warranted, the justice may extend the detention for successive periods, but not for more than a year in total. Importantly, notice of each application to the justice for further detention must be given to the person from whom the thing detained was seized.
>
> [20] Section 490(3) requires an order from a judge of a superior court1 to detain the item for more than a year, unless proceedings have been instituted in which the thing detained may be required.
>
> [21] Section 490(4) provides that if the accused is ordered to stand trial, the justice is required to forward anything detained to the clerk of the court.
>
> [22] Section 490(7) and (8) permit the person from whom the item has been seized to apply for the return of the item seized after the expiry of the detention period or, in the case of hardship, before the expiry of the detention period.
>
> [23] Section 490(10) permits a person (other than the person from whom the item was seized) who claims to be the lawful owner or a person lawfully entitled to possession of the thing seized to apply for an order to return the thing.
>
> [24] Section 490(13) permits the Attorney General, the prosecutor, the peace officer, or other person having custody of a document to make and retain a copy of the document before bringing it before a justice or returning it to a person.
>
> [Emphasis added]

[32] Later, the same Court, in *R. v. Canary*, 2018 ONCA 304, observed:

> [45] Section 489.1(1) applies to seizures made both with and without prior judicial authorization: *Backhouse,* at para. 111. The provision fulfills an important purpose, providing the gateway to s. 490 of the *Criminal Code*: *R. v. Garcia-Machado,* 2015 ONCA 569, 126 O.R. (3d) 737, at paras. 15, 55; *Backhouse,* at para. 112. Section 489.1 should not be conceptualized as a meaningless exercise in paperwork. Filing the initial report under s. 489.1(1) is the act that places the property within the purview of judicial oversight. It provides for a measure of police accountability when dealing with property seized pursuant to an exercise of police powers. This provides an important measure of protection to the party who is lawfully entitled to the property, but also provides a measure of protection to the police who become the custodians responsible for the property seized. Allowing for this type of oversight is particularly important in the wake of warrantless seizures, ones where no prior authorization has been given, meaning the seizures are beyond the knowledge of the judicial system.
>
> [Emphasis added]

[33] The Crown's position is that a delay of 12 days to file a Return to Justice ("RTJ") as contemplated by s. 489.1(1) satisfies the "as soon as practicable" criterion

specified in that section. Even if it does not, the argument continues, the data itself (the first extraction) occurred on the very day of the seizure. If a breach occurred (delay in filing the report) it occurred after that first extraction had already taken place.

[34] To paraphrase the Applicant's position, whether there has been compliance with the "as soon as practicable" requirement is a fact specific exercise. He contrasts cases such as *R. v. Kift*, 2014 ONCJ 454, where police had to document and classify over 250 items, with these circumstances, where there was only one item seized on March 16, 2017: the iPhone at issue in these proceedings.

[35] In *Garcia-Machado*, Court considered this question:

> [44] The question on this appeal is whether the Constable's failure to comply with the requirements in s. 489.1(1) to make a report to a justice as soon as practicable also rendered the continued detention of a seized item unreasonable and therefore contrary to s. 8 of the *Charter*.
>
> [45] I conclude that the answer to that question is yes. As I have explained, it is clear that an individual retains a residual, post-taking reasonable expectation of privacy in items lawfully seized and that *Charter* protection continues while the state detains items it has taken. Sections 489.1(1) and 490 govern the continued detention by the state of the items seized and, I conclude, the requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting privacy interests. The constable's post-taking violation of s. 489.1(1) by failing to report to a justice for more than three months after seizure of the blood and hospital records compromised judicial oversight of state-detained property in which the appellant had a residual privacy interest. It therefore rendered the continued detention unreasonable and breached s. 8. The fact that a person may have a diminished reasonable expectation of privacy after a lawful, initial police seizure and that in a particular case there may have been virtually no impact on that expectation will be important factors in the analysis under s. 24(2) of the *Charter*. However, they will not render continued detention after a clear violation of the requirement in s. 489.1(1) to report to a justice as soon as practicable reasonable.
>
> [46] It is established law that in order to be reasonable, a seizure must be authorized by law: *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, [1987] S.C.J. No. 15, at p. 278 S.C.R.; *R. v. Caslake*, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, [1998] S.C.J. No. 3, at para. 10. If seized property is detained without complying with s. 489.1(1), then its continued detention is not authorized by law: Backhouse, at para. 115. [page747]
>
> [47] Although one could conceive of provisions governing retention that would not relate to the protection of privacy, ss. 489.1(1) and 490 were enacted to

"regulate state activity that interferes with privacy interests", as Rosenberg J.A. explained in Backhouse, at para. 110:

> Although s. 489.1 was an early enactment after proclamation of the Charter it reflects Charter values and principles. It favours judicial supervision. It is part of a scheme that includes s. 490 and that is *designed to regulate state activity that interferes with privacy interests*.
>
> (Emphasis added)

[48] As I explain below, the requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting an individual's residual, post-taking reasonable expectation of privacy. I therefore conclude that the constable's clear failure to comply with that obligation breached s. 8.

[36] In *R v. Rafuse*, NSPC 63, the Court dealt with a situation in which the initial report was filed 444 days after the seizure. In so doing, the Court concluded that:

> [29] The Courts have repeatedly emphasized the need for compliance with ss. 489.1 and 490 of the Code. As noted, these are not suggested guidelines for the police, but mandatory provisions. There is absolutely no doubt that the delay of 444 days in filing the Report to Justice was a s. 8 breach of Mr. Rafuse's *Charter* rights.
>
> [Emphasis in original]

[37] In *R. v. Murray #1*, 2018 ONSC 3053, the Court dealt with a delay of 18 days in filing the initial report under s.489.1 as follows:

> [46] Section 489.1(1) of the *Criminal Code* requires the police to prepare a report to the justice who issued the warrant (or some other justice in the same territorial division) as to what was seized under the warrant or pursuant to s. 489 of the *Criminal Code*, what items seized are being held, or have been returned to their lawful owners; and what items are being detained in police custody. The *Code* requires that this report be filed "as soon as is practicable." A failure to make a required report in a timely manner makes the continued detention of the seized property unlawful and may breach s. 8 *Charter* rights.[16]
>
> [47] The search in this case started on the night of April 3, 2015 and continued into April 4, 2015. The report to the issuing justice was made on April 22, 2015, a delay of 18 days. The officer acknowledged that there was a "bit of a delay" in submitting the report. He explained that he was busy, both on this case and also in preparing a triple murder/suicide for a coroner's inquest. He had not brought his notebooks for other cases he was working on to court with him and was therefore unable to provide specifics of other cases he was working on during those two weeks in 2015.

[48] Counsel for the defence submits that a delay of this length is a breach of the officer's duty to report, particularly as there were only 33 items seized and the delay is not adequately explained.

[49] The term "as soon as is practicable" is a flexible one and its interpretation depends on the surrounding circumstances. Clearly the police have a duty to make the report, and compliance is important to ensure judicial oversight for the protection, not only of the accused, but other members of the public. I agree that the volume of the seizure is a relevant factor in determining the precise parameters of "as soon as practicable." The seizure of thousands of items will clearly take longer to itemize in a report than the seizure of 33 items. The nature of the items seized would also be relevant. Here, however, the nature of the items is a neutral factor. They were not of a nature that took a considerable time to examine and list, so as to warrant a longer period of time for filing. On the other hand, they were not perishable, nor were they items whose ownership would likely be challenged by persons other than the accused, which would warrant a shorter period of time for filing. Finally, some allowances must be made for the usual exigencies. If an officer is busy with other more pressing matters and there is nothing about the nature of the seizure that mandates an early filing of the report, then there can be more flexibility.

[50] There is a reason that this section does not require a specific period of time for a report to be made. There are simply too many variables to impose a rigid time requirement. In this case, the report was relatively straightforward. It would have taken some period of time for the forensic team to review the items seized and for the investigative team to determine whether those items were relevant to the offence. I would not have expected that to take more than a week, given the small number of items seized. On the other hand, there was nothing particularly time-sensitive about the nature of the items seized or the ownership rights of anybody connected to them. Officers busy with other high-priority matters cannot be expected to drop everything to file a report. The delay here was only a matter of 18 days – less than three weeks.

[51] I was not referred to any case dealing with a delay of this limited magnitude. In R. v. Garcia-Machado, the Ontario Court of Appeal dealt with the seizure of a blood sample pursuant to a warrant and the failure of the police to make a report to the issuing justice for more than three months. The trial judge found this to be a breach of s. 8 of the Charter and excluded the results of the analysis of the blood sample from the evidence at trial, resulting in the accused being acquitted of impaired driving. The Ontario Court of Appeal ordered a new trial. The Court agreed with the trial judge that the more than three-month delay was a breach of the reporting requirement (without any analysis of when it would have been required to be filed) and also that it breached s. 8 of the Charter. However, the Court of Appeal held that the evidence should still have been admissible by operation of s. 24(2) of the Charter, based on the following factors:

> (1) the initial search had been pursuant to a warrant, such that there had already been some balancing of the accused's privacy interest;
>
> (2) the accused had only a minimal residual privacy interest in the blood sample, once it had been seized;
>
> (3) the property was only used for the precise purpose for which it had been obtained;
>
> (4) if the report had been made as soon as practicable, the justice would undoubtedly have ordered detention of the evidence;
>
> (5) the nature of the items seized was such that the accused was not deprived of his enjoyment of it; and,
>
> (6) this was a case of delayed compliance, not complete non-compliance.
>
> [52] In all the circumstances of this case, and in particular the absence of any impact from the delay on the accused or anyone else and the officer's time commitments to other pressing work, I do not find the delay of 18 days to be a breach of s. 489.1.
>
> [53] If I have erred on this point, the breach was a mere technical one. There was no bad faith on the part of the officer or officers involved and no impact on the rights of the accused, or anyone else. When the report was filed on April 22, 2015, the justice ordered the detention of all items seized until the completion of all proceedings. Corey Murray has been in custody this entire time and has not been deprived of any of his property by virtue of any delay in reporting. Accordingly, even if there was a breach of the reporting requirement and a breach of s. 8 of the *Charter*, I would admit the evidence seized under s. 24(2) of the *Charter*. On this point, in addition to the factors in my overall s. 24(2) analysis below, I rely on the Court of Appeal's decision in Garcia-Machado, which involved a far longer delay, with the reason for the delay being systemic ignorance of the time requirement. Both of those factors make the breach in that case more serious than the case before me, while many of the other factors cited in support of the admission of the evidence apply equally to this case.

[38] Although I accept that compliance with s. 489.1 requires filing of the RTJ (in Form 5.2) "as soon as practicable", this phrase is not to be conflated with "as soon as possible." It might have been possible for the police to have acted with more alacrity. However, I cannot conclude that the filing of the report, 12 days after the seizure of the iPhone, where the first extraction was carried out within 24 hours of the seizure, and in all of the other circumstances of this case, constituted an infringement of Mr. Drake's s. 8 Charter rights. If I have erred in arriving at this conclusion, I would not have excluded the evidence under s. 24(2), for reasons which I will explain further on.

[39] As to the alleged s. 490 breach, the Crown argues that detention orders were clearly not required for the physical iPhone device seized from the Applicant between March 2019 (when the first charges were laid) and October 2021 (when they were withdrawn). Counsel continues "[detention orders] are also not required now that proceedings have been instituted again in October 2022." Finally, in an apparent reference to s. 490(2)(b), it is argued that "... the police are only required to obtain detention orders until such time as proceedings are instituted in which the thing detained may be required" *(Crown Prehearing Brief, paras. 34 – 36)*.

[40] With respect, I am unable to agree. I observe that the words "search" and "seizure" have been interpreted to be disjunctive. One needs only to refer further to the *Craig* decision once again:

> [154] Thus, as noted earlier, the Court concluded that the *Charter* protected people, not places, moving the focus from property rights to privacy rights. It also concluded that a warrantless search was *prima facie* unreasonable (at 161).
>
> [155] Section 8 of the *Charter* protects against unreasonable search or seizure. These words are used disjunctively: *Dyment* at 431. Thus, it is possible for a search to be reasonable, but a seizure to be unreasonable.
>
> [156] In *R. v. Colarusso*, 1994 CanLII 134 (SCC), [1994] 1 S.C.R. 20 at para. 91, the Court said the following in relation to the continuing nature of a seizure:
>
> > [I]t must be understood that the protection against unreasonable seizure is not addressed to the mere fact of taking. Indeed, in many cases, this is the lesser evil. Protection aimed solely at the physical act of taking would undoubtedly protect things, but would play a limited role in protecting the privacy of the individual which is what s. 8 is aimed at, and that provision, *Hunter* tells us, must be liberally and purposively interpreted to accomplish that end. The matter seized thus remains under the protective mantle of s. 8 so long as the seizure continues.
>
> [Emphasis added]

[41] With that in mind, and given the importance of the rights protected by the regime, I conclude that the continued detention of Mr. Drake's iPhone beyond June 28, 2017 was impermissible. What had initially been a lawful (albeit warrantless) seizure of the item became unlawful after that date. The Crown was in receipt of a valid warrant to search the phone which it had seized (legally, as per Justice Boudreau's decision) on March 16, 2017.

[42] As a result of initial compliance with the ss. 489.1 – 490 regime, the Crown possessed a valid authority to continue to possess the phone, but only until June 28,

2017. Any further detention required compliance with s. 490(3) and, importantly, would have required that notice be given to Mr. Drake. In addition, when the Crown obtained a warrant to conduct the second extraction in 2022, there is no evidence that the Justice of the Peace who issued it had been made aware of the fact that the requirements of s. 490 had been violated.

[43] I cannot accept the proposition that the subsequent institution of proceedings "in which the thing detained may be required" (which is to say, charges are laid) may serve to retrospectively cure what had, in effect, by that time become an illegal seizure of the object in question. The Crown was not legally possessed of the iPhone after June 28, 2017, when the 3 months contemplated by s. 490(1) had expired. To state the contrary would be to suggest that the regime contemplated by ss. 489.1 – 490 may be completely ignored when an item is seized, and all that is necessary is that charges be subsequently laid against the owner, under circumstances in which the item detained may be required. Such an interpretation would marginalize the requirements of these sections to the point where the entire exercise became "a meaningless exercise in paperwork" (per *Canary*, para. 45).

[44] Because the police were not lawfully possessed of his iPhone, the second search and extraction violated Mr. Drake's s. 8 Charter protected right to be free from unreasonable search and seizure. The more pertinent question (now) is what is to be done in relation to the results of that extraction.

(B) Should the evidence obtained in the second extraction in 2022 be excluded under s. 24(2) of the Charter?

[45] Section 24(2) of the Charter provides as follows:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights and 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.

[46] As to whether the admission of the impugned evidence in these proceedings "...would bring the administration of justice into disrepute", it is customary to refer, at the outset, to *R. v. Grant*, 2009 SCC 32. In that case, the Supreme Court of Canada provided (what was then) a new framework for an analysis to be conducted under s. 24(2).

[47] This revised framework for analysis under s. 24(2) was intended to be more flexible than the prior approach utilized in cases such as *R v. Collins, [1987] 1 SCR 265*, and *R v. Stillman, [19997] 1 SCR 607*. It is described in para. 67-71 of *Grant,* and there are a number of general propositions that are very pertinent to a consideration of the issues in the present case. They may be summarized as such:

1. The purpose of s. 24(2) is to maintain the good repute of the administration of justice which embraces the notion of maintaining the rule of law and upholding *Charter* rights in the system as a whole;
2. The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining public confidence in and for the effectiveness of the justice system. The inquiry is objective;
3. The focus of s. 24(2) is both long-term and prospective. Section 24(2) seeks to ensure that the impugned evidence does not do further damage to the repute of the justice system;
4. The focus of s. 24(2) is societal. It is not aimed at punishing the police or providing compensation to the accused, but rather at systematic concerns. Its focus is on the broad impact of admission of the evidence on the long-term repute of the justice system;
5. The three avenues of inquiry are each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward looking, and societal perspective;
6. The court must assess and balance the effect of admitting the impugned evidence on society's confidence in the justice system having regard to (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 the adjudication of the case on its merits;
7. The court must balance the assessments under each of these three lines of inquiry to determine whether, on the totality of the circumstances, the admission would bring the administration of justice into disrepute; and
8. While the categories of consideration set out in *Collins*, are no longer applied, the factors relevant to the s. 24(2) determination enunciated in *Collins*, and subsequent cases are captured in the new framework of analysis.

[48] As observed previously, the majority in *Grant, supra*, identified three criteria (avenues of inquiry) to assist courts in the delicate balancing exercise mandated by s. 24(2). These include a consideration of:

a. the seriousness of the *Charter*-infringing state conduct;
b. the impact of the breach on the *Charter*-protected interests of the accused; and
c. society's interest in the adjudication of the case on its merits.

[49] Subsequently, the Supreme Court in *R v. Harrison*, [2009] SCC 34, elaborated, at para. 36:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interest of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[50] I will now proceed to apply the *Grant* criteria to the circumstances of this case.

a) The seriousness of the Charter infringing conduct

[51] At this stage, the Court must consider the nature of the police conduct that led to the *Charter* violation and the subsequent discovery of evidence. The Court must ask itself whether the police engaged in misconduct from which the Court should disassociate itself? This will be a case where the departure from *Charter* standards was major in degree or where the police knew (or should have known) that their conduct was not *Charter*-compliant. (See *Harrison*, at para. 22).

[52] The majority in *Grant*, also expressed the view that, while extenuating circumstances or good faith could attenuate the seriousness of the misconduct or reduce the need for the court to dissociate itself, ignorance of *Charter* standards must not be rewarded or encouraged, and negligence or wilful blindness cannot be equated with good faith.

[53] In *R v. Kitaitchik* (2002) 166 C.C.C. (3d) 14 (Ont. C.A.), Doherty J.A., suggested an approach to characterize police conduct for purposes of considering

this factor under 24(2), which was approved and endorsed by the Supreme Court of Canada in *Harrison*. Justice Doherty stated:

> Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights… . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct.

[54] The accused has argued, as we have seen, that, by filing their report under s. 489.1, 12 days after the seizure of the iPhone, the police did not do so "as soon as practicable". As I explained earlier, I do not agree that this constituted a breach. There is no evidence the 12 days that it took the police to file the RTS failed to comply with that criterion.

[55] If I have erred in that analysis, I would have concluded that, with respect to this particular breach, there is no evidence that the oversight was anything other than a technical one. It would have constituted late compliance which is much different from non-compliance. Moreover, the impact upon Mr. Drake (being deprived of the use of his phone and the personal data upon it for 12 days, as opposed to a lesser interval) was not egregious, even if it was inconvenient. Were the Court considering this breach and nothing more, I would have concluded that society's interest in this matter being heard on the merits should result in the admission of the impugned evidence.

[56] I now consider the s. 490 breach. Having concluded that the iPhone has been illegally detained for a period in excess of six years, I must evaluate the seriousness of this conduct.

[57] I begin to do so by observing that, although it is the conduct of the police in relation to the accused's iPhone which is an issue, their conduct in relation to the other items that were seized during the course of this investigation sheds relevant light upon the manner in which their actions in relation to the iPhone may be viewed.

[58] In the Affidavit of Alan F. MacDonald dated June 26, 2023, and in particular, Exhibits 6 – 10 therein, we learn that, in addition to Mr. Drake's iPhone, other items seized during the course of the investigation included electronics (including other mobile phones) seized from Mr. Drake's residence at 24 Trout Run in Halifax, items seized from the halfway house in which Mr. Keizer was staying when was killed, and cell phones belonging to two other individuals. All of these items were treated

somewhat in the same fashion as the accused's iPhone, which is to say that no further detention orders were obtained after the expiry of the initial one.

[59] But the matter does not end there. It appears that a form was filled out by someone in the police department in support of an anticipated application (under s. 490) before a Justice for further detention of one of the cell phones, owned by one of the other individuals (*MacDonald Affidavit, tab 9, pp. 4-5*). This was dated March 17, 2017. Another such form was filled out on March 22, 2017 with respect to some other items that had been earlier seized (*tab 8, pp. 9-10*).

[60] The police apparently proceeded with neither application. There is no evidence that the forms, which were filled out, were ever signed or presented to a Justice. There has been nothing offered to explain this omission, or why they did not even bother filling out the form in the case of the iPhone.

[61] Then, there is Exhibit 2. It consists of an excerpt from some police investigative notes. It is dated December 7, 2022, approximately two and a half months after the second extraction, and is said to have been authored by Sgt. Langille. It is reproduced below:

> Became aware that detention order not completed re Keizer homicide items post withdrawal in 2021. Will need to make application for same
>
> . . .
>
> Pat Oneil to address order for further detention re Keizer homicide. Advises RTJ and DO originally done by D/Cst. Mansvelt
>
> Speak to Steve Wall attempting to address axiom data re Drake phone. Need to engage TSU to assist at DFU. Attempted to call Mike Strickland. No answer

[62] Despite this, there is no evidence that (to this day) any further attempts to comply with s. 490 and bring the issue of the continued detention of the iPhone (to say nothing of the other referenced items that were seized at other times during the course of the investigation) before a Justice. Moreover, none of the individuals referenced in the note has explained why this was not done.

[63] In *R v. Gill*, 2021 BCSC 377, the court dealt with a situation where the police had a written policy of noncompliance with the statutory regime set out in sections 489.1 – 490. It is referenced in the quote below as "IH IT". The court said this:

> 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.

[64] The court also dispensed with the argument that the police could cure the breach by seeking a detention order after some 6 years of over holding:

> [116] 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.
>
> ...
>
> [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.
>
> [Emphasis added]

[65] I agree with the Crown's argument that the Supreme Court in *Grant* emphasized that the "concern of the inquiry is not to punish the police or to deter Charter breaches, although deterrence of Charter breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes" (para 73).

[66] However, the Court, in *Grant*, almost immediately expanded upon this in the following manner:

> ... admission of evidence obtained through inadvertent or minor violations of the charter may minimally undermine public confidence in the rule of law... [at] the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute" (para 74).

[67] The court echoed this sentiment in *Harrison*, adding that "where the breach was of a merely technical nature or the result of an understandable mistake, disassociation [of itself by the court from the conduct in question] is much less of a concern" (para 22).

[68] The Crown has argued, in part, that the section 8 breach here was a merely technical one, and that there is no indication of bad faith or wilful disregard of the Charter. Moreover, as they argue, good faith is demonstrated by the fact the police obtain search warrants prior to both the first and second extractions. They stress that, unlike *Gill*, there is no evidence before the court here of a deliberate policy of noncompliance with the ss. 489.1- 490 regime. Finally, the Crown points out that in the circumstances, had the requisite applications for extensions (s. 490) been brought, they would have inevitably been granted by the court.

[69] Taking these contentions one at a time, and with respect, I am unable to agree that it is proper to characterize the section 8 breach involved here as merely "technical" in nature. I observe that there has been no explanation provided to the court for the failure of the police to follow the proper processes. It is equally difficult to argue police "mistake" given their having taken the time to fill out proper section 490 forms with respect to some of the property seized on other occasions throughout

the course of this investigation, and then never following through on them. They did not even bother to fill out the form in relation to the iPhone.

[70] In addition, there is Exhibit 2. The note was made after the second extraction. It detailed that certain individuals would be tasked with responsibilities to address the noncompliance under s. 490. Nothing has been done to this day, at least nothing of which the Court has been made aware.

[71] All of these circumstances appear to speak for themselves. The people investigating the Keizer homicide were aware of the Criminal Code provisions encompassed in sections 489.1 – 490, and for some reason ignored them. They did this in full knowledge of the extremely serious nature of the charges in relation to which Mr. Drake initially, was being investigated, and under which he was charged (twice).

[72] Was this because any such proceedings seeking an Order sanctioning a detention beyond three months would have required that notice be provided to Mr. Drake? The Crown has mentioned that Mr. Drake himself never made an application to get the item back. Was nothing done after June 28, 2017, because it was better to ignore the requirements of s. 490 and let sleeping dogs lie? We do not know, and I will not speculate.

[73] What I am left with is the fact that the iPhone was detained illegally after June 28, 2017, a period cumulatively in excess of 6 years prior to the second extraction having taken place. In the absence of any explanation from the police for their conduct, the most benign interpretation of their conduct it would appear to be that they had relegated this statutory regime to "a meaningless exercise in paperwork" in these circumstances. There are other available interpretations as well.

[74] As to the "inevitability" argument, the Crown has submitted that any application for a detention order throughout the period when the phone was unlawfully in police possession, would have been successful. This was because of the potential for technological advancements to allow a more efficient search and obtain additional dates. After all, this is what happened.

[75] However, to make this argument is to overlook, in particular, the one year that followed the withdrawal of the first charges and the warrant for the second extraction. Although Constable Bromley, as we have seen, had advised Crown counsel, as early as late 2021, of the possibility that improved technology might yield more evidence on the second extraction, it is unclear how the Crown/police

viewed their prospects of obtaining additional, usable evidence at the time, unless they actually made an application for further detention and explained how the prospect of better technology improved the outlook.

[76] I conclude that this conduct, overall, amounted to a serious infringement of Mr. Drake's s. 8 Charter protected rights. It favours exclusion of the evidence.

(b) Impact of the breach on the applicant's reasonable expectation of privacy

[77] I earlier commented upon the applicant's submissions as to the context, or milieu, in which the breach took place (*para. 27*). One must juxtapose this with an individual's high expectation of privacy in devices such as cell phones, and in particular, the informational content thereof. Particular stress was laid upon this latter point in *Gill*:

> [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 CanLII 70 (SCC), [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.

[78] The Crown, to paraphrase its submissions, argues that the effect of the subsequent search warrants obtained prior to the first and second extractions, is to nullify the applicant's informational privacy interest in the contents of the phone.

[79] Again, with respect, I must disagree. The submission omits some important factors. First, it overlooks that the first charges were withdrawn, ostensibly because without the information obtained in the second extraction, there existed no realistic prospect of conviction.

[80] Second, I observe once again that there is no evidence before the court that the justice who issued the 2022 search warrant was ever informed that the police

were in unlawful possession of the phone. Even if one were somehow able to argue that the 2017 warrant could have shielded the results of a second search under the original indictment from being excluded under section 24(2), surely it is a great stretch to argue that that protection could have been extended throughout the period of 2021 – 2022, during the first charges had been withdrawn and no new charges had been laid.

[81] The Crown has argued that the case of *R v. Nurse*, 2019 ONCA 260 is "very factually similar" to this case (Crown brief at para 59). It is certainly true that *Nurse* did involve a second search with improved technology. With that said, the subsequent search in that case took place within a single investigation. It did not occur within the context of a police failure to comply with statutory provisions governing their detention of the phone, and a subsequent withdrawal and relaying of the charges. I note, in particular, the court's observation in *Nurse* that "It may not always be the case that a reanalysis or reinspection of lawfully obtained evidence will not constitute a "new search". (para 141).

[82] As pointed out by applicant's counsel in his reply brief, *Nurse* did not involve extraction of new data, but, rather it dealt with a second examination of data that had already been previously (and legally) extracted. The police were in lawful possession of the device when the second analysis was done. The central issue in *Nurse* was the re-examination of previously extracted data without obtaining a new warrant. The issue of police detention of the device under the Criminal Code regime did not arise.

[83] *R v. Tsekouras*, 2017 ONCA 290 dealt with a 2011 initially warrantless search of a phone and subsequent breaches of ss 489.1-490. These latter arose from an error and through inadvertence. Simply put, the police had filed reports that did not reach the justice. When dealing with the second branch of the *Grant* analysis, the appellate court considered the trial judge's reasoning:

> [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]

[84] That court went on to observe:

> [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.

[85] Likewise, in the case at bar, it would be very inaccurate to describe the state of the law, presently, as "unsettled", or “uncertain”.

[86] The Crown referred to *R v Fareed*, 2023 ONSC 1581. As it contends, this also concerned a similar failure to comply with ss. 489.1-490. Moreover, the court noted, during the course of its section 24 (2) analysis, that "if the police had filed the necessary report, the justice of the peace would inevitably have approved retaining the property until the conclusion of these proceedings" (para 74).

[87] Context, though, is critical. In *Fareed* (once again) we find no intervening events such as the withdrawal of charges. Further, the thing seized in that case was an illegal handgun, so it is difficult to make a case that the accused ever had a reasonable expectation of privacy in that item to begin with. This provides a crucial insight into the court's conclusion (in that case) that the section 8 breach had little to no impact on the rights of the accused, and that the evidence was admissible.

[88] None of the authorities to which this court has been referred rises to the level of the constellation of factors in this case. First, the police retained unlawful possession after June 28, 2017. Even if the subsequent laying of the first charges could have somehow cured what had become an illegal seizure after that date (and, as discussed previously, it could not), they retained the phone for approximately one year after the first charges were withdrawn. During that time, they obtained a second search warrant, ostensibly on the basis of an advance in extraction technology, apparently without disclosing to the Justice that they were in unlawful possession of the phone. The process culminated (as a result of the second search) in the Crown's ability to acquire information which, in its view, now provides them with a realistic prospect of conviction. The seriousness of the impact of the breach upon Mr. Drake has been significant. It also favours exclusion.

(c) Interest in society having the matter judged on its merits

[89] In many instances, and certainly in relation to serious charges such as these, this factor tends to weigh in favor of non-exclusion. Indeed, I agree with the Crown that this is not a matter where the breach of section 8 impacts the reliability of the evidence obtained. I also agree that the 2022 search (the second one) was not warrantless.

[90] An interesting discussion with respect to the interaction between the three *Grant* criteria, and in particular, the impact of the third one upon the other two, occurred in *R v McGuffie*, 2016 ONCA 365, where the court observed:

> 63. In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence... If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tipped the balance in favor of admissibility... Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence...

[91] The court coupled this with another observation:

> 73. The seriousness of the charges to which the challenged evidence is relevant, does not speak for or against exclusion of the evidence, but rather can "cut both ways": *Grant*, at para. 84. On the one hand, if the evidence at stake is reliable and important to the Crown's case, the seriousness of the charge can be said to enhance society's interests in an adjudication on the merits. On the other hand, society's concerns that police misconduct not appear to be condoned by the courts, and that individual rights be taken seriously, come to the forefront when the consequences to those whose rights have been infringed are particularly serious…

[92] I have concluded that the first and second factors involved in a *Grant* analysis provide strong grounds for exclusion of the evidence. As to the third criterion, while there is a societal interest in seeing extremely serious charges adjudicated upon their merits, the strength of that interest is somewhat attenuated in this case given that society also has an interest in seeing that police misconduct not appear to be condoned by the courts, or that individual rights appear not to have been taken seriously.

Conclusion – Balancing the factors

[93] As I balance the three factors in *Grant* in the totality of the circumstances (*Grant* 85-88), I conclude that the evidence must be excluded. I do so with reluctance. Obviously, I am aware of the fact that this decision means that the evidence obtained by the second extraction is now unavailable to be utilized against

Mr. Drake. I am also mindful of the fact that without this evidence, on October 29, 2021, the Crown withdrew the Indictment containing the first charges against Mr. Drake, on the basis that there was no realistic prospect of conviction.

[94] Nevertheless, as I consider all of the facts, I have concluded that the police demonstrated (at best) a reckless, if not a deliberate disregard for Mr. Drake's Charter pretrial rights. The Court must disassociate itself from such conduct.

[95] In the circumstances, if the public interest in seeing the offence prosecuted was to outweigh the other *Grant* factors, in these circumstances, it is difficult to imagine a situation where a failure to comply with ss 489.1- 490 would ever require the exclusion of the evidence.

[96] The police officers were clearly aware of the regime, they knew that sections 489.1 and 490 were mandatory, at least they appeared to because they filled out the forms in relation to some of the evidence that had been obtained in other seizures in relation to this investigation. The absence of so much as an explanation for this conduct makes it extremely difficult for the Court to any good faith or inadvertent complexion upon it. It simply has not been explained.

[97] The only conclusion that I can draw is that the police deliberately ignored the provisions of s. 490. As I balance all of the Grant factors in the totality of the circumstances of this case, I must exclude the evidence obtained by virtue of the second search it its entirety.

Gabriel, J.