

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 206

COURT

Supreme Court of British Columbia

DECIDED

14 February 2020

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2020 BCSC 206 R. v. Alkhalil

THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 206

Date: 20200214

Docket: 27393-25

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

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Before: The Honourable Madam Justice Maisonville

Ruling Re: Exclusion of Evidence from Wiwchar's

BMO Safety Deposit Box

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(January 9, 10, 14, 2020)

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

January 9, 10, 13-15, 2020

Place and Date of Ruling:

Vancouver, B.C.

February 14, 2020

introduction

- [1] The Applicant, Dean Michael Wiwchar, seeks to exclude evidence obtained by the Vancouver Police Department ("VPD") from his safety deposit box at the Bank of Montréal (the "BMO") on the basis of challenges to the judicial authorizations used to obtain it.

- [2] On March 29, 2012, VPD investigators obtained a production order for the Applicant's bank account and safety deposit box records at the BMO at 401 West Georgia Street, Vancouver, BC. The production order was issued on the basis of an affidavit sworn by Det. Wu on March 28, 2012 (the "PO-ITO"). Information received under the production order was subsequently used in an affidavit in support of a general warrant to search the Applicant's safety deposit box sworn by Det. Wu on April 5, 2012 (the "GW-ITO").
- [3] The Applicant seeks to excise from the PO-ITO references to information he claims was obtained in a manner that violated his rights under s. 8 of the Charter. The two areas of challenge are (a) the use by surveillance officers of booking photographs to identify the Applicant, and (b) verbal inquiries made by Det. John Paul St. Amant of employees at the BMO with respect to the Applicant's banking information.
- [4] The evidence before the Court on this voir dire consisted of the evidence of Det. Wu, who was earlier cross-examined on her affidavit by the Applicant, the testimony of Det. St. Amant, as well as exhibits and admissions.
- [5] This ruling solely addresses whether there were breaches of the Charter which could lead to excision. The parties will address the sufficiency of the ITOs at a later time.

factual background

- [6] On January 17, 2012, the VPD commenced an investigation into the shooting death of Sandip Duhre at the Sheraton Wall Centre in Vancouver. The theory of investigators was that this was a targeted hit. By March 2, 2012, the Applicant was determined to be a person of interest based on the investigation to that point.
- [7] Police began 24-hour surveillance on the Applicant on March 24, 2012.

Surveillance at the Edgewater Casino

- [8] On March 25, 2012, surveillance officers followed the Applicant to the Edgewater Casino where they monitored the Applicant and his girlfriend, Juanita Hyslop. In a two-hour period, the Applicant was observed making bets of \$500 (won), \$1,000 (lost), \$1,000, \$5,000 (lost) and \$6,000 (lost) at the baccarat table. After making those bets, the Applicant was observed pulling out a large stack of \$100 bills (approximately 1 inch thick) and a stack of \$50 bills (approximately $\frac{3}{4}$ inch thick) from Hyslop's purse. The surveillance officer estimated that there was approximately \$30,000 in cash.
- [9] The following day, March 26, 2012, surveillance officers observed the Applicant drive to the BMO at 401 West Georgia Street, Vancouver. He exited his vehicle and retrieved a black laptop sized briefcase from the rear seat and then entered the bank. Surveillance members lost sight of the Applicant inside the bank. They checked the automatic teller machines area, all the teller wickets, and offices off the main lobby area of the bank and the Applicant was not observed. Less than ten minutes later, the Applicant was seen leaving the bank carrying the same black briefcase.

The BMO Inquiry

The Phone Call made by Det. St. Amant to Steve Goss of BMO Pacific Region Legal, Corporate and Compliance Group

[10] On March 27, 2012, Det. St. Amant telephoned Mr. Steve Goss of BMO Pacific Region, Legal, Corporate and Compliance Group. He explained to Mr. Goss that he was conducting a homicide investigation and wished to confirm banking information relating to the Applicant, who had been seen the previous evening at the BMO. Det. St. Amant advised Mr. Goss that he would be seeking a production order to obtain the records, which he testified were

documents regarding Dean Wiwchar accounts, specifically if there was any financial records, safety deposit boxes, ATM or credit cards and any personal information related to those files. And by personal information, name, date of birth, phone number, address.

[11] Det. St. Amant testified that he did not request that Mr. Goss provide him with banking records. He only asked that Mr. Goss confirm to him that the BMO had documents that could be obtained by a production order and the location of those documents.

[12] Det. St. Amant provided Mr. Goss with the Applicant's name, date of birth and address.

[13] Det. St. Amant asked Mr. Goss for the correct "naming conventions" of those documents. He testified that he requested that information from Mr. Goss so the affiant could use the correct names in the production order application (to ensure they would receive all the documents they were looking for), and that the affiant needed confirmation that the records existed and the location of the records in order to obtain a production order.

[14] Mr. Goss told Det. St. Amant he would call back in an hour. At 15:14 hours that same day, Mr. Goss called back and confirmed that the Applicant had accounts at the BMO and that the police "will want to obtain [a] production order for all documentation, information, deposit box. And a search warrant." Det. St. Amant testified that this implied to him that there was a safety deposit box held by the Applicant.

[15] Det. St. Amant documented his conversation with Mr. Goss in a task action report created that same day:

Ø GOSS confirmed WIWCHAR had documentation, accounts and information which could be obtained from the BMO at 401 West Georgia Street, Vancouver;

Ø GOSS could not provide details without a Production Order. He stated that based on the previous conversation related to police wanting personal information (application, accounts, phone numbers, credit cards, atm cards) and a safety deposit box of WIWCHAR that I would want to get a production order and a search warrant;

Ø GOSS advised that if I contacted the branch manager and made a request for all documents and files related to WIWCHAR that I would obtain the information I required for a search. GOSS implied there was a safety deposit box but would not confirm without authorization; and

Ø GOSS provided me with the branch manager name of Steve LEE and a contact number.

- [16] At 15:20 hours, Det. St. Amant phoned Steve Lee and arranged an appointment. He advised Mr. Lee that the police would be seeking a production order for records relating to a "confirmed client", and he provided the Applicant's name and date of birth.
- [17] At the meeting held a short time later, Mr. Lee advised Det. St. Amant that he was able to receive a production order at his location and that the records and documents relating to the Applicant were at that office. Mr. Lee also advised that there was not a lot of activity on the Applicant's accounts and that he also had an older account that was no longer active. Mr. Lee advised that he would be able to confirm that the Applicant had a safety deposit box once the production order was received.
- [18] Following Det. St. Amant's inquiry with the BMO, at 10:21 hours on March 27, 2012, the Applicant was again surveilled to the Edgewater Casino, where he lost \$7,000 during the space of one hour.
- [19] On March 28, 2012, police obtained a production order for the Applicant's BMO records. The records were produced to Det. St. Amant and showed that the Applicant opened an account (which had a negative balance) and rented a large safety deposit box on February 3, 2012.
- [20] On March 29, 2012, police applied for a general warrant for a covert search of the Applicant's safety deposit box at the BMO. That application was denied.
- [21] On April 5, 2012, Det. Wu swore the GW-ITO to obtain a general warrant for a covert search of the Applicant's safety deposit box at the BMO. Det. Wu incorporated all the information that was included in the PO-ITO along with additional information linking the Applicant to Mr. Duhre's murder and information obtained from the Applicant's BMO bank records. The application was granted.

BMO Privacy Code

- [22] The BMO Privacy Code, which is available on its website, limits the use and disclosure of client information. While not exactly the same as the policy in force at the material time, counsel advise it is very similar. The Code reads in part:

We will only use or disclose your Personal Information for the purpose(s) it was collected and as otherwise identified in this Privacy Code. Personal Information may be released to third parties including legal or regulatory authorities in cases of suspected criminal activity or contravention of law, for the detection and prevention of fraud, or when required to satisfy the legal or regulatory requirements of governments, regulatory authorities or other self-regulatory organizations, or to comply with a court order or for the protection of our assets (for example,

collection of overdue accounts).

The Photographs

- [23] The Strike Force members who conducted surveillance of the Applicant were provided with a Strike Force Master Target Profile Sheet (the "Target Sheet") by investigators to rely upon for visual identification of the Applicant.
- [24] The photographs of the Applicant on the Target Sheet had been taken on January 14, 2011 and March 8, 2011, when he was taken into VPD custody on warrants for breach of parole pursuant to s. 135 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 [CCRA]. The Applicant had been on parole for convictions relating to a number of indictable offences. The photographs of the Applicant taken on those occasions were put into the VPD's Computer Aided Booking System ("CABS") and were retrieved to put together the Target Sheet.
- [25] The particulars of the January 14, 2011 occasion are that a warrant of apprehension and suspension of statutory release was issued in respect of the Applicant pursuant to the CCRA on that date. The Applicant had been released from Kent Institution on statutory release under the CCRA which continued to be in force from October 7, 2010 to June 22, 2011. A Parole Board member issued the warrant based on reasonable and probable grounds to believe that the Applicant should be apprehended with the suspension of the statutory release.
- [26] When the Applicant was taken into custody, he was photographed by Cst. D'Andrea.
- [27] Det. St. Amant was cross-examined about this issue, and testified that the Applicant had not been "charged" with breach of federal parole "at this time". When asked why photographs of the Applicant had been taken upon his arrest, Det. St. Amant explained that photographs were taken pursuant to the warrant of apprehension to ensure they had the "right person in custody and to create a record of that".
- [28] Strike Force surveillance members used the photographs on the Target Sheet to identify the Applicant during surveillance from March 24 to 28, 2012.
- [29] The Target Sheet was also subsequently forwarded to the United States Drug Enforcement Administration and Mexican authorities with a request for surveillance support after the Applicant and others were observed boarding a flight to Mexico in April 2012.
- [30] In 2007, the VPD implemented a policy for the destruction of photographs and fingerprints after "non-conviction" disposition of charges. That policy (with minor changes) has been posted on the publicly-accessible webpage entitled "How do I get my identification documents destroyed" on the VPD website since that time. Det. St. Amant identified this policy during his cross-examination.

The issues and positions of the parties

- [31] This application raises two issues. The first is whether the photographs of the Applicant attached to the Target Sheet were the results of an unlawful search, such that their use by the Strike Force officers infringed the Applicant's rights under s. 8 of the Charter. The second is whether Det. St. Amant's inquiries of employees of the BMO constituted a search for the purposes of s. 8.
- [32] With respect to the photographs, the Applicant submits that individuals have a privacy interest in their facial image, and that the compelled taking of a photograph of a person under arrest is an intrusion into that interest that engages s. 8. He further says that the statutory authority to photograph a person under arrest is governed by the Identification of Criminals Act, R.S.C. 1985, c. I-1 [ICA], s. 2 of which permits photographs to be taken of a person who is "in lawful custody charged with or convicted of an indictable offence". The Applicant argues that neither component applied to him at the time the photographs were taken--breach of parole not being an offence and an absence of any temporal connection between his convictions and the taking of the photographs--and that there was, accordingly, no statutory justification for photographing him. In the absence of a common law basis for the photographs, the Applicant contends that his rights under s. 8 of the Charter were infringed.
- [33] The Crown responds that the Applicant did not have a reasonable expectation of privacy in his appearance when he was arrested and booked, and that photographs taken in those circumstances do not constitute a search as contemplated by s. 8 of the Charter. In the event the Court finds that the Applicant had a reasonable expectation of privacy, the Crown maintains that the taking of photographs was authorized by both s. 2 of the ICA and the common law. Consequently, the subsequent use of the photographs in the Target Sheet did not infringe s. 8.
- [34] As for Det. St. Amant's inquiries of the BMO, the Applicant argues that he had a reasonable expectation of privacy in the personal information held in his banking records at the BMO, and that the officer's questioning of the BMO employees constituted a search for the purposes of s. 8 of the Charter.
- [35] The Crown answers that Det. St. Amant's request for confirmation of accounts did not amount to a search. It says that police are permitted to ask questions to determine whether records exist before seeking a production order to obtain them. In any event, Det. St. Amant did not receive any personal information from the BMO employees, only confirmation that the Applicant had accounts at the bank, information about which could be obtained with a production order.

law

- [36] Section 8 of the Charter provides:

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

- [37] The function of s. 8 of the Charter is to protect individuals from unjustified state intrusions upon their privacy: *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 160. The s. 8 analysis determines "whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goal, notably those of law enforcement": *R. v. Tessling*, 2004 SCC 67 at para. 17, citing *Hunter* at 159-160.
- [38] Section 8 of the Charter protects the biographical core of one's personal information: *R. v. Plant*, [1993] 3 S.C.R. 281 at para. 20.
- [39] The starting point for any analysis with respect to s. 8 of the Charter is whether there exists a reasonable expectation of privacy, which is determined by a consideration of the totality of the circumstances: *R. v. Spencer*, 2014 SCC 43 at para. 16; *Tessling* at para. 32. There are four lines of inquiry which guide the application of the totality of circumstances test and they are set out in *R. v. Cole*, 2012 SCC 53 at para. 40; *R. v. Marakah*, 2017 SCC 59 at para. 11; *Spencer* at para. 18; and *Tessling* at para. 32. The four lines of inquiry are:
- 1) What was the subject matter of the alleged search?
 - 2) Did the claimant have a direct interest in the subject matter?
 - 3) Did the claimant have a subjective expectation of privacy in the subject matter?
 - 4) If so, was the claimant's subjective expectation of privacy objectively reasonable?
- [40] If the court find that there is a reasonable expectation of privacy, then it proceeds to the second stage to determine whether the search was conducted reasonably. This requires the Crown to prove, on a balance of probabilities, that the search was authorized by law, the authorizing law was reasonable, and that the authority to conduct the search was exercised in a reasonable manner.
- [41] The legislation pursuant to which the Applicant was taken into custody at the time his photographs were taken is s. 135 of the CCRA, which provides:

Suspension of parole or statutory release

135 (1) A member of the Board or a person, designated by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of parole or statutory release or when the member or person is satisfied that it is necessary and reasonable to suspend the parole or statutory release in order to prevent a breach of any condition thereof or to protect society, may, by warrant,

- (a) suspend the parole or statutory release;
- (b) authorize the apprehension of the offender; and

- (c) authorize the recommitment of the offender to custody until the suspension is cancelled, the parole or statutory release is terminated or revoked or the sentence of the offender has expired according to law.

[Emphasis added.]

[42] At the material time, s. 2(1) of the ICA provided:

Fingerprints and photographs

2 (1) The following persons may be fingerprinted or photographed or subjected to such other measurements, processes and operations having the object of identifying persons as are approved by order of the Governor in Council:

- (a) any person who is in lawful custody charged with or convicted of
 - (i) an indictable offence, other than an offence that is designated as a contravention under the Contraventions Act in respect of which the Attorney General, within the meaning of that Act, has made an election under section 50 of that Act, or
 - (ii) an offence under the Security of Information Act;
- (b) any person who has been apprehended under the Extradition Act;
- (c) any person alleged to have committed an indictable offence, other than an offence that is designated as a contravention under the Contraventions Act in respect of which the Attorney General, within the meaning of that Act, has made an election under section 50 of that Act, who is required under subsection 501(3) or 509(5) of the Criminal Code to appear for the purposes of this Act by an appearance notice, promise to appear, recognizance or summons; or
- (d) any person who is in lawful custody pursuant to section 83.3 of the Criminal Code.

Use of force

- (2) Such force may be used as is necessary to the effectual carrying out and application of the measurements, processes and operations described under subsection (1).

Publication

- (3) The results of the measurements, processes and operations to which a person has been subjected pursuant to subsection (1) may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law.

[Emphasis added.]

is the taking of a photograph upon arrest a search?

- [43] Whether s. 8 of the Charter is engaged in the present circumstances depends on whether the taking of the booking photographs of the Applicant constituted a search. The answer turns on whether, in the totality of the circumstances, the Applicant had a reasonable expectation of privacy. If he did, then the taking of the photographs was a search within the meaning of s. 8. Conversely, if he had no reasonable expectation of privacy, there was no search.
- [44] Several decisions have considered whether taking a booking photograph constitutes a search, though not through the lens of the totality of circumstances test. In *R. v. Bishop*, 2013 BCSC 522, the two accused were lawfully arrested and transported to the detachment where they were photographed and fingerprinted. The Crown conceded a breach of the ICA, which requires a charge be laid before these events occur, but argued that the photograph and fingerprints were lawfully obtained pursuant to the common law.
- [45] Madam Justice Bruce reviewed the authorities on the issue, including two decisions of the Supreme Court of Canada: *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387; and *R. v. Feeney*, [1997] 2 S.C.R. 13. In *Beare*, the Court considered whether s. 2 of the ICA, specifically, its applicability to persons who had not been convicted of an offence, infringed s. 7 of the Charter. In concluding that it did not, LaForest J. wrote (at para. 59):

It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice has been made out, must expect a significant loss of personal privacy. He must expect that incidental to his being taken in custody he will be subject to observation, to physical measurement and the like. Fingerprinting is of that nature. While some may find it distasteful, it is insubstantial, of very short duration, and leaves no lasting impression. There is no penetration into the body and no substance is removed from it.

- [46] Justice LaForest went on to address in a more summary way s. 8 of the Charter. He wrote that assuming fingerprinting could be looked upon as a search, it was clear that it would not be unreasonable in the circumstances for the same reasons it did not violate the principles of fundamental justice under s. 7.
- [47] Subsequently, in *Feeney*, the Supreme Court held that taking fingerprints incident to an unlawful arrest infringed s. 8 (at para. 175):

After he was taken to the Williams Lake detachment, the appellant was fingerprinted. The fingerprints matched prints found on the deceased's refrigerator and on an empty beer can in the deceased's truck. *R. v. Beare*, [1988] 2 S.C.R. 387 (S.C.C.), held that fingerprinting as an incident to a lawful arrest did not violate the Charter. In the present case, however, the arrest was unlawful and involved a variety of Charter breaches. Compelling the accused to provide fingerprints in the present context was, in my view, a violation of s. 8 of the Charter, involving as it did a search and seizure related to the appellant's body, about which, at least in the absence of an lawful arrest, there is clearly a high expectation of privacy. I should add that procedures that are taken incidental to and following an unlawful arrest, which impinge on the reasonable expectation of privacy of the arrestee, will generally constitute a breach of s. 8.

[48] After referring to these (and other authorities) in Bishop, Bruce J. concluded (at para. 133):

whether or not the common law right to fingerprint an accused upon arrest continues to exist in spite of the enactment of the Identification of Criminals Act, I am unable to accept that a violation of the Act must be deemed to be a breach of the accused's rights under s. 8 of the Charter. The authorities cited above support a conclusion that photographing an accused in the course of a police investigation is not a search. I agree. I am also satisfied that if a photograph of an accused during the booking-in process can be regarded as a search, it is not unreasonable provided the arrest is lawful. A photograph at this time is necessary to identify the accused, particularly if he is detained in custody. It is not a serious invasion of privacy in the circumstances.

[49] Justice Bruce held that whether the fingerprints and photographs of the two accused were taken in violation of the ICA or pursuant to a common law authority, there was no violation of their rights under s. 8 of the Charter.

[50] In *R. v. Arthur*, 2013 BCSC 770, the accused was arrested and transported to the police detachment where he was fingerprinted and photographed before charges were laid. The Bishop decision was applied and the conclusion was that since those events did not constitute a search, there was no breach of the accused's s. 8 rights.

[51] The accused in *R. v. Strickland*, 2017 BCPC 1, was charged with impersonating a police officer and dangerous driving. During the investigation, police used a mugshot of the accused in a photo line-up. The photograph had been taken on an earlier occasion when the accused was arrested, but ultimately not charged, with harassment. The accused argued that the taking and use of the photograph infringed his rights under s. 8 of the Charter. The Crown maintained that he had no expectation of privacy in a photograph of his face and that the taking of his photograph during the earlier booking process did not trigger the application of s. 8 because it did not constitute a search.

[52] Judge Mrozinski first considered whether the accused had an expectation of privacy in the photograph, which had been taken pursuant to the common law. After an extensive review of the authorities, including Beare and Bishop (and the authorities cited therein), she concluded as follows on this issue:

For all of these reasons, I find that there is a privacy interest in a photograph of one's face taken by police without consent, whether for investigative purposes or following arrest. The taking of such a photograph triggers s. 8 in that it must be determined whether the person's reasonable expectation of privacy as against state intrusion is violated in the circumstances.

[53] However, Mrozinski P.C.J. promptly went on to find that the compelling state interest in identifying and documenting an accused following arrest outweighed that individual's personal privacy, including in photographic images of their face. Thus, while the taking of the accused's photograph upon arrest was a search, the search was not unreasonable.

- [54] The photograph at issue *R. v. Flintroy*, 2018 BCSC 1692, was not a booking photograph but a photograph the accused had submitted with a passport application to Citizenship and Immigration Canada ("CIC"). The VPD obtained the photograph and used it in a surveillance target sheet, as well as to confirm the accused's identity with confidential informers. Mr. Justice Williams concluded that the accused had a reasonable expectation of privacy in the photograph, having regard to the totality of the circumstances. He found that the subject matter of the search was of a personal nature, and that the accused quite obviously had an interest in it. He further found that the accused had a subjective expectation of privacy in the photograph that was objectively reasonable. The photograph had been submitted to CIC for the purpose of obtaining a passport, and was attached to an application form that included a provision indicating the information would only be used in a limited way. It was therefore reasonable for the accused to expect that his photograph would not be used against him in a criminal investigation.
- [55] Aside from the foregoing authorities, most of the decisions in this area address either fingerprinting or fingerprinting and photographing as part of the same booking process. The Applicant argues that the principles derived from these cases can be applied by analogy to booking photographs, though the Crown does not agree. Some of the cases before me include *R. v. Connors* (1998), 155 D.L.R. (4th) 391 (B.C.C.A.), *R. v. Pelucco*, 2013 BCSC 588, *R. v. Nguyen*, 2013 BCSC 950, and *R. v. A.S.S.*, 2013 BCPC 373.
- [56] *Connors* did not specifically consider whether the taking of fingerprints was a search and appeared to proceed on the basis that it was; the primary issue in the case was whether the taking of fingerprints was authorized by law. The courts in the other decisions found the taking of fingerprints to be a search that engaged s. 8 of the Charter. The lawfulness of the arrest was the determining factor in *Pelucco* and *Nguyen* with regards to whether a breach of s. 8 was found. In *A.S.S.*, the fingerprints in question were from the accused's sealed youth criminal record when he was arrested for a summary conviction offence. The Court found that as neither the ICA nor the common law allowed an accused to be fingerprinted for a summary conviction offence, the accused had been subject to an unlawful search.
- [57] With the exception of *Flintroy*, none of the foregoing decisions analyzed whether the taking of photographs or fingerprints was a search within the meaning of s. 8 through the lens of the totality of circumstances test as the authorities now require. Moreover, the facts of *Flintroy* are quite different from those at bar so that decision is of limited assistance. It is therefore necessary to consider whether the Applicant had a reasonable expectation of privacy such that the taking of the photographs constituted a search.
- [58] The subject matter in question was photographic images of the Applicant's face and tattoo. They implicate his personal privacy, though not necessarily to a core biographical level. The photographs capture the Applicant's physical appearance and disclose that he was arrested. Moreover, the Applicant clearly had a direct interest in the photographs. As for whether he had a subjective expectation of privacy in the photographs, there is no evidence from the Applicant on the issue. Subjective expectation is not a "high hurdle" and can often be

inferred from the circumstances. Given that the Applicant was in police custody at the time the photographs were taken, any such expectation would likely have been quite modest. Nevertheless, I am prepared to accept that the Applicant had a subjective expectation of privacy in his photographs, though a very attenuated one.

- [59] As regards whether that subjective expectation was objectively reasonable, I find that it was. The fact that the photographs were taken when the Applicant was in police custody on a warrant of apprehension for breach of parole is an important contextual factor but it is not determinative. While authorities such as Beare acknowledge a "significant loss of personal privacy" upon arrest or for a person against whom a case for issuing a summons or warrant has been made out, I do not take them as suggesting there is no expectation of privacy. In my view, when a person on parole, who is required to comply with conditions and is subject to completing sentence, is taken into custody for violating those conditions, he retains an expectation of privacy in regards photographing, albeit a very attenuated one.
- [60] Accordingly, I conclude that the Applicant had a reasonable expectation of privacy and that photographing him was therefore a search that engaged s. 8. I therefore turn now to consider whether the search was reasonable.
- [61] Section 2 of the ICA states that any person who is in lawful custody charged with or convicted of an indictable offence may be fingerprinted and photographed.
- [62] The Applicant submits that neither aspect applied to him at the time his photographs were taken. Breach of parole is not an offence under either the CCRA or the Criminal Code. Moreover, the Applicant maintains, he was not in lawful custody convicted of an indictable offence at the time either. In this regard, he argues that it is critical to assess why he was in custody when the photographs were taken. He was not in custody because he had been convicted of an indictable offence in the past but because he had allegedly breached his parole. The Applicant acknowledges that he was originally on parole because of his conviction for an indictable offence but argues that there must be a temporal limit to the conviction otherwise police would be authorized to take photographs of an individual in perpetuity, long after the sentence for the conviction had ended.
- [63] It is a basic principle of statutory interpretation that words in a statute must be given their plain and ordinary meaning, harmoniously with the scheme and object of the legislation: *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42. As is evident from the title of the ICA, its purpose is to identify criminals, which are those persons identified in s. 2(1). Nothing in the purpose or language of the Act suggests that the only time that a photograph can be taken of an individual who has been convicted of an indictable offence is on conviction. I do not find that to be the case. Section 2 is clear.
- [64] I am also mindful of Det. St. Amant's evidence in this regard that the purpose of taking such a photograph is to ensure that the police have the right person in custody.

- [65] Section 2(3) of the ICA permitted the police to use the photographs taken pursuant to s. 2(1) for the purposes of the Target Sheet. As well, I am mindful of VPD Policy 1.6.20(i) that governs the taking and use of photographs. Paragraph 9 authorized the use and dissemination of the Applicant's booking photographs on the Target Sheet.
- [66] Accordingly, I find that there was no breach of the Applicant's rights under s. 8 of the Charter when surveillance officers used the photographs on the Target Sheet to identify him.
- Did Det. St. Amant's Inquiries of BMO Representatives Constitute a Search?
- [67] This issue concerns the inquiries Det. St. Amant made of Messrs. Goss and Lee.
- [68] The Applicant submits that the inquiry made of Mr. Goss, even though he provided no information to Det. St. Amant and advised him that he needed to obtain a production order, constituted a search. The Applicant says that it was of no moment that Mr. Goss did not respond with any information, as it was the attempt to elicit the information that made the inquiry a search. The inquiry Det. St. Amant made of Mr. Lee is similarly alleged to be a search.
- [69] The Applicant relies upon *R. v. Lillico* (1994), 92 C.C.C. (3d) 90 (Ont. Ct. J. (Gen. Div.)), aff'd [1999] O.J. No. 95 (C.A.). The issue before the court concerned whether bank disclosure of information on a customer's account without judicial authorization was in violation of s. 8 of the Charter. Mr. Lillico was being investigated for fraud in relation to a cheque. The police contacted the bank in order to determine if the cheque had been deposited to Mr. Lillico's account and whether there were subsequent disbursements. The bank confirmed the deposit and that there had been significant activity on the account following the deposit. Specific details were neither requested nor provided. The information provided by the bank was then included in an information to obtain to apply for a search warrant.
- [70] The court found that, while a financial institution has a general duty to protect the confidentiality of banking records, a balance must be struck between the customer's right to confidentiality and the public's rights to effective law enforcement (at para. 13):

I conclude that financial institutions have a general duty to protect the confidentiality of banking records. On the other hand, a balance must be struck between the customer's right to confidentiality and the public's right to effective law enforcement. In my opinion, disclosure of only the most general information by confirming only that a particular cheque was deposited into the customer's account, and that there was subsequent activity in the account, does not threaten the "biographical core of personal information" which is inherent in the meaning of the phrase "private and confidential". Therefore, it does not constitute an infringement of the privacy of the individual so as to attract the protection of s. 8 of the Charter.

The Ontario Court of Appeal endorsed the decision.

- [71] The BC Court of Appeal followed Lilloo in *R. v. Quinn*, 2006 BCCA 255. The police, in the course of investigating cheque fraud, had, prior to contacting the bank, referred to information on the backs of the cheques which disclosed the name of the bank where they were negotiated and the number of the account into which they were deposited. An investigator then contacted the bank to determine the identity of the bank account holder and was provided with tombstone information, being the name and the fact the bank was in possession of the records. It was that information that was used to obtain a search warrant.
- [72] Mr. Justice Thackray, writing for the Court, noted that while financial records held by a financial institution contained intimate details about the account holder, there must be a balance between the right to privacy and the public's right to effective law enforcement. The nature of the information and the seriousness of the crime being investigated are relevant factors to consider in determining whether the balance is struck. Justice Thackray went on to say the following (at para. 91):

Any analysis therefore must pay attention to the basic principle and then consider the various factors that might take the case out of the right to privacy. What this amounts to, as in so many cases, is looking at the facts. There is no doubt but that there was a serious crime under investigation. In order to proceed with the investigation all that Corporal Shields sought from Mr. Saunders was a confirmation of the name of the account holder. This was a fundamental factor required to get the investigation underway. However, of more importance, it was a necessary basic commodity for inclusion in the Information to Obtain.

[Emphasis in original.]

- [73] Justice Thackray noted that the linking of the accused's name to the account did not reveal a biographical core of information. He ultimately concluded that no search had occurred in the circumstances.
- [74] The Applicant also cites an earlier voir dire ruling in these proceedings (indexed at 2019 BCSC 1801), where this Court noted (at para. 96):
- [96] In the appropriate case, the accused may have a reasonable expectation of privacy in only some of the information disclosed. For instance, I find, as in Lilloo and Quinn, if police called a bank to confirm certain information but then asked further questions to elicit additional information, these further questions would be a breach of one's reasonable expectation of privacy. What the police were after as set out in the agreed statement of facts was rental information, presumably who rented the vehicle. They did not have any of the information disclosed by Avis before they called the company. It would not have been confirmation of Mr. Wiwchar renting the vehicle as he was not the renter.
- [75] However, the present situation is not the same as that on the earlier voir dire in which there was no information known respecting the transaction between Avis Car Rental and the applicant there, Mr. Alkhalil. Here, the Applicant was surveilled to the BMO and placed in the general area of the safety deposit boxes.

- [76] Importantly, Det. St. Amant was only told at the time of the phone call with Mr. Goss that he would need a production order and that he would want to request for a search warrant. No further information was provided to him by the BMO.
- [77] I find that Det. St. Amant did not request the Applicant's personal information from the BMO employees. Rather, in his conversation with Mr. Goss, he sought confirmation that the BMO had the documents he would be seeking through a production order, and the appropriate way to refer to those documents in the application. Det. St. Amant was not provided with any personal information by Mr. Goss, who confirmed only that the Applicant had "documentation, accounts and information" at the BMO and that a production order and search warrant would be required before details would be disclosed. Det. St. Amant similarly advised Mr. Lee that he would be seeking a production order for records related to the Applicant. Mr. Lee informed him that he would be able to receive a production order at his location, where records relating to the Application were located. No personal information with respect to the Applicant was provided by either of the BMO representatives.
- [78] In the circumstances, I find that the Applicant did not have a reasonable expectation of privacy in the limited information the BMO employees provided to Det. St. Amant. They simply confirmed to him that the Applicant had records at their institution that could be obtained through a production order and indicated nothing would be provided to the police without a production order and a search warrant.
- [79] In respect of the photographs of the Applicant on the Target Sheet, they were taken on two occasions when he was under lawful arrest. The photographs were taken lawfully and comply with the ICA. They served additionally to ensure that the right person was arrested.
- [80] Nothing in the ICA precludes the taking of a photograph following a lawful arrest. Nor does anything in the ICA restrict photographing to only once after a conviction.
- [81] In these circumstances, the Applicant's challenge under s. 8 of the Charter to the use of his photographs and the police inquiries of the BMO is dismissed.

conclusion

- [82] I find, in all of the circumstances, that the Applicant has not established on a balance of probabilities that his rights under s. 8 of the Charter were breached by the police use of booking photographs to identify him or by Det. St. Amant's inquiries of the BMO employees.

"Maisonville J."

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Prepared on 25 October 2026 · Esheria