

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 402

COURT

Supreme Court of British Columbia

DECIDED

5 March 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 402 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2021 BCSC 402

Date: 20210305

Docket: 27393-32(m), 27393-61, 27393-73

Registry: Vancouver

Regina

v.

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

Larry Ronald Amero

Restriction on Publication: A publication ban has been mandatorily imposed under s. 648(1) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury retires to consider its verdict.

Before: The Honourable Madam Justice Maisonville

Ruling re Application Nos. 32(m), 61, 73 - Information Sharing - Breach of s. 8 of the Charter

Counsel for the Crown:

D.A. Jardine, Q.C.

D. Darby

A. Cochrane

A. La Bar

N. Gregoire

S. Dworkin

M. Sheardown

Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil):

A. Dorin, appearing as agent

(November 4, 2020)

R.S. Fowler, Q.C.

K. Blok

A. Tolliday

Counsel for the Accused, Dean Michael Wiwchar:

S. Buck

A. Dorin

J. Desbarats

Counsel for the Accused, Larry Ronald Amero:

A. Dorin, appearing as agent

(November 4, 2020)

M. Rock

Place and Dates of Hearing:

Vancouver, B.C.

November 4-5, 2020

January 4-8, 11, 13, 18, 20, 22, 25, 29, and February 1, 3, 2021

Place and Date of Ruling:

Vancouver, B.C.

March 5, 2021

introduction

- [1] The applicants, Rabih Alkhalil, Dean Wiwchar and Larry Amero, seek to exclude pursuant to s. 24(2) of the Charter evidence seized from an apartment in Montreal (the "Montreal Residence") as well as incident to the arrest of Mr. Wiwchar and from searches of his apartment, storage locker, and a safe house in Surrey on the basis that information contained in the fruits of the searches was shared with numerous other law enforcement agencies, contrary to s. 8 of the Charter.

the applicants' arguments

The Applicant Alkhalil

- [2] The evidence on this application was, for the most part, agreed to.

Evidence on the Application

Inspector Brad Desmarais

- [3] The investigation into the homicide of Sandip Duhre became known as Project Reality. Insp. Desmarais was responsible for overseeing Project Reality from its inception until shortly before his retirement from the Vancouver Police Department ("VPD") in February 2013. His responsibility was to provide advice to investigators and obtain resources and funding for the Project.
- [4] Insp. Desmarais was also a participant in meetings arranged by the RCMP, Project Scrapyrd. The focus of the meetings was National Tactical Enforcement Priorities ("NTEP"). The purpose of Project Scrapyrd was to coordinate the sharing of information and intelligence between police agencies, but it also evolved to include coordinating functions. Insp. Desmarais said that the best way to describe it was as follows:

Information-sharing prior to Project Scrapyrd, in this area of enforcement, was somewhat ad hoc. The RCMP, I think laudably, tried to create an environment where that information could be shared in a more structured environment and the function of Scrapyrd in my view was the ability to recognize that other agencies may have an interest in connecting investigators who have conduct of those investigations together, and they would determine the best -- the best approach or what information should be sharing.

- [5] Insp. Desmarais explained that not all investigations undertaken by the VPD are "projects". An investigation will become a project where it requires more than the usual number of investigative resources or if it has a multi-jurisdictional aspect that would raise the complexity of the investigation. Information management within a project occurs outside the PRIME (Police Records Information Management Environment) system, which is the "mainstay of police file management". There would be reference to the project in PRIME, but it would be very skeletal. Insp. Desmarais described PRIME as "primarily the tool that a patrol officer or a general duty officer uses to manage files on the street, as well as low-level

files that are fairly linear". PRIME is a province-wide entity managed by PRIMECorp. While he said he was not an expert on PRIME, Insp. Desmarais said that he understood that "PRIME does have rules and policies around access who can access what levels of information".

- [6] Insp. Desmarais confirmed that PRIME gives different agencies, and different individuals within those agencies, different permissions or access to the information it contains. Not everyone with access to PRIME has access to the same information. Each individual with access to PRIME has their own access code and the system keeps a record of when somebody logs into PRIME, when they log out of PRIME and what they look at. Access to PRIME leaves a "footprint".
- [7] Insp. Desmarais explained that the murder of Mr. Duhre was believed to be tied to a larger gang conflict that transcended the Lower Mainland. He was referred to an operational plan put in evidence that indicated that an objective of Project Reality was to share appropriate investigative information with other police agencies including the RCMP, the Provincial Intelligence Hub, the Integrated Gang Task Force, the Integrated Homicide Investigation Team and the Combined Forces Special Enforcement Unit ("CFSEU"). It was believed that because of the inter-jurisdictional nature of the gang conflict, it would be of assistance to solve the homicide and protect public safety to share information with other law enforcement agencies. Insp. Desmarais anticipated, from the inception of Project Reality, that private information, including information obtained pursuant to judicial authorizations, would be shared with other law enforcement agencies to advance the investigation into the homicide of Mr. Duhre and other investigations or law enforcement objectives.
- [8] Insp. Desmarais was asked whether he approved of the sharing of information with other investigations in principle. He explained that he approved of it in principle but left it to the discretion of investigators to decide how to operationalize the sharing of information. He said he recalled an intention to create a database for the sharing of information obtained through Project Reality, but he did not recall the outcome. He approved of the plan to share information with "agencies that had a need to know". The function of providing a database for access to information from Project Reality would be to assist agencies conducting forensic examinations on behalf of Project Reality and to connect investigators to allow them to decide whether sharing information was relevant.
- [9] Insp. Desmarais testified that he anticipated that information shared from Project Reality would include information obtained from the fruits of searches and in relation to which people would have an expectation of privacy. However, the information sharing would only occur where there was an "investigative need to know". While he understood that information might be shared if another investigative body had a reason to know, he had no expectation that information would be shared. In respect of the phones seized from the Montreal Residence, Insp. Desmarais testified that before the data would be shared, it would have to be analysed to determine "whether it is appropriate to share", meaning whether it

could further another investigation.

[10] Insp. Desmarais recalled attending a Project Scrapyard meeting in Ottawa in December 2012. Most of the Project's meetings occurred by weekly telephone conferences but this one was in person. Insp. Desmarais did not remember discs or a database. He was aware that investigators were preparing to put information onto a disc, but he was not aware of the contents of the disc. If a disc was handed out at the conference, he would expect that a log would have been maintained of who the disc was given to and why they needed the information on the disc. A distribution log was in fact kept and was in evidence but no reason why was set down.

[11] When asked whether he understood that information obtained from the phones seized from the Montreal Residence would be shared with other police agencies, Insp. Desmarais said:

[W]hat should happen is that information is derived from the devices, returned to the VPD, and then VPD make a decision on whether -- based on the network created by Scrapyard, whether it is germane to other investigations, and then release it in due course to those investigations that had a need to know. It was never -- insofar as my recollection, it was never the intent that VPD would give the cellphones to the RCMP and say, 'Do what you want with them.' That was never the intent.

[12] He agreed that it was never his intention that the information obtained from the phones would be disseminated en masse without having been reviewed by VPD investigators to make a determination as to what should be shared. While he did not expect a review of every single datapoint, "generally speaking there should be a nexus to another investigation before any information is shared". It was further clarified that when he referred to another investigation, he meant another ongoing investigation involving another police agency.

[13] Insp. Desmarais's understanding at the time of the Montreal Residence search was that information could be shared with relevant ongoing investigations but that it would be an abuse to share information obtained from the search with the police community at large, meaning police agencies that did not have a relevant ongoing investigation. It was put to him that he understood that there had to be some kind of control in place over who information was shared with, and he said, "I would go further we had a responsibility to ensure that it was shared at a -- in a professional, consistent manner that furthered another investigation and not just for curiosity's sake".

[14] Insp. Desmarais agreed that back in 2012/2013 cell phones were capable of holding vast amounts of data including emails, text messages, and photographs along with information that would generally be very private such as banking information, and personal information about an individual's thoughts and feelings.

Peggy Irwin

- [15] At the time of the Duhre homicide, Peggy Irwin was working as a civilian analyst with the homicide unit at the VPD. As an analyst, Ms. Irwin provided summaries of data including in the form of timelines, association charts and maps. She is familiar with PRIME, an electronic database that is used to log police interactions throughout British Columbia. The type of information logged on PRIME includes investigations, person details and vehicle information related to large scale investigations and regular patrol based policing. Ms. Irwin explained that there is a possibility for documents such as surveillance reports, photographs, and items obtained pursuant to judicial authorization to be attached to a file in PRIME.
- [16] Different people have different privileges when it comes to accessing PRIME, and files themselves can be given different privileges restricting access to certain information. All logins to PRIME are recorded. Anyone with access to a given file on PRIME is able to print documents from PRIME and, once printed, there is no specific mechanism for keeping track of what happens to the documents. However, when a person prints something from PRIME, their name and the time the document was printed is recorded in the header or footer. Ms. Irwin also explained that once information is added to PRIME it can be modified or updated. Information can also be removed from PRIME, but not everyone with access to PRIME has the ability to remove information from it.
- [17] The Project Reality investigative file, as with most major cases, was managed outside of PRIME on an M Drive at the VPD. Access to the investigative file was restricted to members of the VPD working in the investigation division within major crimes, within homicide and specifically Project Reality. Anyone who did not have access to the Project Reality M Drive would not even be able to see that it existed. Within the Project Reality investigative file there was also a subfolder containing an information sharing database. The database was "essentially an Excel spreadsheet that had hyperlinks to documents". Ms. Irwin did not create the database and did not know exactly what was in it. The database was created and maintained by the investigative assistant, Heather Wilson.
- [18] Ms. Irwin attended the Project Scrapyard conference in Ottawa in December of 2012 along with Heather Wilson, Det. Glynis Griffiths, Insp. Desmarais, and Supt. Porteous. Ms. Irwin was aware that the database was downloaded onto a disc prior to the conference by Ms. Wilson. She was present at the conference when Ms. Wilson distributed copies of the disc, but she did not recall who it was given to. Ms. Irwin said that Ms. Wilson "provided discs for anyone who wanted a copy". According to the distribution list, which was an exhibit on this application, ultimately only three copies of the disc were given out--one to a Sûreté du Québec member, one to an A Division RCMP member, and one to a C Division (Ottawa) member (and CFSEU received an extract of the Duhre BlackBerry).

Sgt. Jean-Pierre St. Amant

- [19] Sgt. St. Amant was assigned the role of primary investigator for Project Reality. He drafted the operations plan for Project Reality noted above.
- [20] During the search of the Montreal Residence, a number of electronic devices were seized including police exhibits 3LW, 8LW (also known as the Sideswipe phone), 9LW (also known as the Where is Waldo phone), 15LW (also known as the Birdman phone), and 20LW (also known as the Skullbuster phone). The devices seized from Mr. Alkhalil's room in the Montreal Residence became exhibits 3LW, 4LW, 5LW, 6LW, 7LW, 8LW, 9LW, 10LW, 11LW, and 12LW. Sgt. St. Amant received extraction reports for each of these devices in October 2012. Of note, the extraction reports were limited at that time. None contained Pretty Good Privacy ("PGP") encrypted messages.
- [21] Only the extraction report for exhibit 8LW was included on the disc. A print out of the report was in evidence on the voir dire.
- [22] Sgt. St. Amant was aware that a database had been created. While he did not access it to conduct investigative steps, he was generally aware of what was in the database such as surveillance reports and information obtained pursuant to warranted searches. He was aware that members of Project Reality attended a conference in December 2012. He did not attend because he was ill. He was aware that information from the Project Reality file would be provided to outside agencies at the conference.
- [23] Sgt. St. Amant was asked about information from BlackBerry's seized from the Montreal Residence being shared with agencies outside of the VPD. On June 6, 2013, he provided Det. Sgt. McKay of the Quebec Provincial Police ("QPP") a copy of the tech crime report and analyst report for the Skullbuster phone. He testified that he provided this information to Det. Sgt. McKay because the data included PGP messages about Mr. Amero "over a time frame of when he was shot and other criminal activities on it, and I shared it because I was aware that they have criminal charges related to drug trafficking".
- [24] On June 6, 2013, Sgt. St. Amant provided a copy of the extraction report for the Sideswipe phone, exhibit 8LW, to Kari Launen with Ottawa's Proceeds of Crime Unit to "assist with Alkhalil communications in the phone related to finance" in the context of an investigation into proceeds of crime involving the Alkhalil family and associates.
- [25] On January 20, 2014, he provided Det. Jay Howe of the Niagara Regional Police copies of the RCMP tech reports for exhibits 3LW, 8LW, 9LW and analyst product of Ms. Irwin.
- [26] In February 2014, Sgt. St. Amant also directed Ms. Irwin to provide Jill Patterson of CFSEU with a copy of the extraction report and her work product for exhibit 20LW.

- [27] On December 6, 2014, Sgt. St. Amant provided Jas Gill, a member of CFSEU working on Project E-Nitrogen, the investigation into the Kelowna shooting of Jonathan Bacon and Mr. Amero, with a copy of the extraction report and analyst work product for exhibit 20LW. Sgt. St. Amant testified that he disclosed this information to Gill "because this phone basically covered the timeline of when Larry Amero was shot in Kelowna, so it was evidentiary".
- [28] On December 24, 2015, Sgt. St. Amant gave Det. Lisa Wu, then of CFSEU, the RCMP tech crime analyst reports for exhibits 9LW and 15LW. He testified that he disclosed this information because it covered some information related to an explosives theft from 2011.
- [29] On January 14, 2016, Sgt. St. Amant also provided the RCMP extraction report for exhibit 9LW to CFSEU Det. Charlene Vilkas who was also associated to the E-Nitrogen investigation.
- [30] On April 23, 2013, Sgt. St. Amant gave IHIT Staff Sgt. Graham de la Gorgendiere a copy of the extraction report and analyst work product related to exhibit 20LW because it contained information related to the hunting of Sukh Dhak and he was the supervisor in charge of that investigation.
- [31] On January 14, 2016, Sgt. St. Amant disclosed the extraction reports and analyst work product related to exhibits 9LW and 15LW to IHIT investigators Terry Faulkner and Sharon Badyal who were investigating the murder of Sukh Dhak.
- [32] Sgt. St. Amant also provided Sgt. Terry Browne of the Toronto Police Service ("TPS") copies of the extraction reports for exhibits 3LW, 8LW, 9LW and 20LW because two of the phones overlapped with the time period relevant to their investigation of the Raposo homicide.
- [33] Beyond sharing data extracted from the devices, Sgt. St. Amant testified that there were additional instances when information obtained during the course of the Montreal search was shared with other police organizations. He did not know whether there was a master record of all evidence that was shared from the Project Reality file.
- [34] When Sgt. St. Amant asked Ms. Irwin to forward information to Ms. Patterson in February 2014, he asked her to add a Protected B disclaimer advising that the information was not to be further disseminated without prior permission from the VPD:

This report has been provided by the Vancouver Police Investigation Division Homicide Unit.

This report may contain sensitive or confidential information pertaining to ongoing active homicide investigations. This report and its contents, in whole or in part, shall not be further disseminated, distributed or copied without consultation with, and the permission of, lead investigators or team commanders for PROJECT REALITY.

The information contained in this report has been selected in part from the data obtained from Vancouver File 2012-8885, Exhibit 20.

The identifications or conclusions contained within this report are speculative and based on comparison with known police information at the time of preparation. This information has NOT been tested or confirmed.

Please notify the Vancouver Police Homicide Unit if you have received this report in error and delete any electronic copies or appropriately dispose of any hard copies.

PROTECTED B

THIS DOCUMENT IS SUBJECT TO THIRD PARTY RULE

[Emphasis in original.]

- [35] Sgt. St. Amant testified that this disclaimer was not provided with all the information that he disclosed to other police agencies. In response to the request from Ms. Patterson for information in February 2014, Sgt. St. Amant wrote to Insp. Laurence Rankin, then the team commander for Project Reality, and told him that the database was "always free to use and was created by Heather for other intelligence agencies to review".
- [36] On October 15, 2012, Sgt. St. Amant attended a meeting with Insp. Desmarais and Sgt. Griffiths. They discussed a request for information they had received from Quebec. One of the things Sgt. St. Amant noted in relation to this meeting was "not a fishing trip for other investigators, and expected to utilize database for specific requests in the future". He said this note was about the database that was being developed and which was "to be utilized for searchability for other investigations into our file". He agreed that his understanding and expectation about the database was that requests for information from it would be specific and targeted. It was not his expectation that law enforcement agencies would be given free access to the database but, "ultimately it turned into certain investigations which were identified through NTEP and at Inspector Desmarais' level, they would have access". His opinion at the time was that the database should be kept for their investigation "and not open to everyone".
- [37] Sgt. St. Amant received an initial tech crime analysis report for exhibit 9LW in October 2012. At that time, the PGP messages on the phone were encrypted and the RCMP did not have the technology to decrypt them. In December 2014, Sgt. St. Amant resubmitted the device and the RCMP was subsequently able to access and decrypt all of the data on the phone. The copies of the extraction report for 9LW that Sgt. St. Amant provided to Det. Lisa Wu in December 2015, IHIT in January 2016, CFSEU in January 2016 and TPS in October 2015, were of the latter report with all the decrypted PGP messages.

- [38] Sgt. St. Amant understood that once he forwarded information to other police agencies, he no longer had control over what those agencies did with the information. He was aware that in 2015 the TPS forwarded data from Mr. Alkhalil's phone to the Sûreté du Québec. He acknowledged that it was possible that other law enforcement agencies could have forwarded the information he provided them to other agencies whether or not he was aware of that happening.
- [39] Sgt. St. Amant received an email from Crown counsel in 2013 which advised him to make sure that they had warrants for the PGP devices and linking the Supreme Court of Canada's decision in *R. v. Vu*, 2013 SCC 60. There was no evidence that he had ever looked at this email and he said receipt of this email did not impact the sharing of information and that he continued to share information equally before and after the email. Sgt. St. Amant said that one circumstance in which it would be inappropriate to share the fruits of a search would be where the information was unlawfully obtained.

Sgt. Nicolas Bernier

- [40] In 2012, Sgt. Bernier was a corporal working as a digital forensic investigator with the RCMP's technical analysis team ("TAT"). In that role, one of his duties was to conduct forensic analysis of seized computers and mobile devices.
- [41] BlackBerrys are a make of smartphone, meaning they are capable, in addition to making phone calls, of sending and receiving emails and text messages, sending and receiving messages through BlackBerry Messenger (BBM), accessing the internet and taking, sending, receiving, and storing photographs and videos. Smartphones also have calendar applications and the ability to write notes. One of the principal selling features of a BlackBerry device was its enhanced security features including strong encryption. For that reason, BlackBerry devices were used by government officials and the RCMP. BlackBerrys are password protected so that they cannot be accessed without the password. They also have what is called on-device encryption, or content protection, which means that all records on the device, including messages and contacts, are encrypted. If a person were able to get past the password protection on the device, the content protection would kick in to protect the data which would be encrypted or, in simple terms, not readily readable.
- [42] BlackBerry also sold what they called BlackBerry Enterprise Server (BES). It was a way of managing BlackBerry devices by, for example, enforcing information technology policies which tighten the security on the devices. BES was software that was widely available to anyone who wanted to purchase and set it up and manage a group of BlackBerrys. The purpose of all these security functions was to ensure privacy and to keep documents secret. BlackBerry users who increased the storage capacity of their devices by adding a micro-SD card could also utilize memory card encryption which would encrypt the files on the SD card in the same way that content protection would encrypt files on the device.

- [43] PGP was a publicly accessible software developed and owned by a company called Symantec. PGP software could be downloaded to a server and served as an enhancement to the security features of a BES. The primary purpose of PGP software was to encrypt messages sent between two BlackBerrys. The RCMP employs a similar concept on their emails and it is used commercially by law firms, pharmaceutical companies, or anyone with intellectual property to protect.
- [44] Sgt. Bernier testified that generally, when he completes a report after extracting data from a BlackBerry, the report will contain all of the raw data that was extracted--an extraction report. When the RCMP initially received exhibit 9LW they were unable to access it because it was encrypted. The phone was later resubmitted and in July of 2015 Sgt. Bernier completed an extraction report that included over 17,000 PGP messages. Exhibit 8LW was analysed in October of 2012, and in November of 2012 Sgt. Bernier completed an extraction report that included 326 emails. Any further data on the phone, such as photographs, would have been obtained at the local level by the VPD using a program called Cellebrite.

Heather Wilson

- [45] Ms. Wilson is an investigational assistant with the VPD and was in that role in 2012. In 2012, Project Reality was one of the projects for which she provided assistance. One of her tasks in relation to Project Reality was the creation of a searchable database created from the Project Reality file. When Ms. Wilson uploaded documents to the database, she applied headers and footers to each page of each document. The headers included an identification number, and the footers said, "This database is protected by third party rule. Please contact VPD Homicide Project Reality prior to using this material".
- [46] In December 2012, Ms. Wilson attended the Project Scrapyard meeting/police conference in Ottawa and gave a presentation based around a database she created from the Project Reality file. She brought to court a copy of that database with modifications (Exhibit #6). The database she presented at the conference did not have the request log or the Excel version of the spreadsheet found in Exhibit 6.
- [47] At the Ottawa conference, Ms. Wilson presented on how to navigate and search the database. She did not review the contents of the database, just how to use it. Ms. Wilson brought six to ten copies of the database with her on discs and provided them to four officers at the meeting who requested one. She was asked to prepare the discs in advance and anticipated that people in attendance at the conference might want copies. Ms. Wilson testified, "after I did the presentation, the -- these people just came up and said, 'Yes, we would like to have a copy.' I wrote their name down, where they -- where they worked, and then gave them a copy of the disc". Ms. Wilson did not recall any process for asking for identification or eligibility to receive the discs. The discs themselves looked the same as the top image on Exhibit #7 with writing around the perimeter of the disc that said, "This confidential CD is the property of the Vancouver Police Department. This CD is intended solely for law enforcement purposes and any unauthorized viewing, copying, disclosure,

distribution or dissemination of the information contained on this CD is strictly prohibited by law and may result in criminal prosecution". Beyond asking for the person's name and which organization they were with, Ms. Wilson did not ask them anything before providing a copy of the database. She did not ask what investigations the discs were being requested for.

- [48] There was no evidence regarding the purpose for which Ms. Wilson burned the discs and provided them to certain attendees at the conference in Ottawa. The applicants did not call A/Sgt. Glynis Griffiths, who was the Team Commander. She had worked with Ms. Wilson in creating the disc and was responsible for its oversight. Ms. Wilson was an administrative assistant and had no independent authority to disclose the disc at the conference.
- [49] Ms. Wilson testified that it is possible to place restrictions on a disc that would limit the ability to copy what was on the disc, but that was not done prior to dissemination of the database. There was also nothing embedded in the Adobe version that would prevent copying although Adobe does have that capability.
- [50] One of the items in evidence is titled "Database Request Log" and is a log that Ms. Wilson created concerning the distribution of the database. The columns in the log are for the names of the person to whom the database was distributed, the organization they work with, and the date the database was provided. Exhibit #6 contains a folder marked "Items". In the exhibit, the folder is empty, however, at the time the disc was distributed that folder contained the documents that constituted the data set out in the database. In Exhibit #6, the item numbers on the spreadsheet are hyperlinked. In a functioning version of the database, clicking the item number would direct you to the item in the "Items" folder.
- [51] As of the date of the conference in Ottawa in December 2012, the database was populated with documents up to #1194 on the spreadsheet. All the items after #1194 were added to the database after December 12, 2012.
- [52] In addition to the four copies of the database that Ms. Wilson provided to attendees of the Ottawa conference, she sent a copy of the database to Robert Ratych of Peel Homicide on an unknown date, a copy to Jill Patterson of the VPD on June 27, 2013, a copy to Jill Patterson to forward to Project Scrapyard on June 27, 2013, and a copy to RCMP Project E-Nitrogen on October 6, 2014, which concerned the investigation of the Kelowna shooting of Jonathan Bacon and Amero.
- [53] The Excel version of the spreadsheet on Exhibit #6 was the version Ms. Wilson used to create the database, but once the data entry was completed, Ms. Wilson converted the spreadsheet to PDF because Adobe Reader could be downloaded for free so anyone could open it and Adobe has better search capability than Excel.

Mr. Alkhalil's Submissions

- [54] Mr. Alkhalil notes that much of the information shared by the police in this case was information obtained pursuant to judicial authorization. Appellate authority recognizes that individuals retain a residual privacy interest in items lawfully seized by police and that Charter protection continues during state detention: *R. v. Garcia-Machado*, 2015 ONCA 569 at para. 45 and *R. v. Craig*, 2016 BCCA 154 at para. 180.
- [55] Mr. Alkhalil acknowledges that once evidence has been lawfully seized and searched, police are, in certain circumstances, entitled to share the fruits of their search with other law enforcement agencies. However, he says, the ability to share such information is not limitless. In *United States of America v. Wakeling*, 2014 SCC 72, the Supreme Court contemplated that safeguards be imposed on information sharing on a case-by-case basis, as a citizen's residual privacy interest remains shielded from unreasonable intrusion by the state even where a valid warrant authorized its capture in the first instance.
- [56] Mr. Alkhalil submits that the way in which information in relation to which he had a reasonable expectation of privacy was shared by the VPD with other police agencies in this case violated his privacy rights as protected by s. 8 of the Charter. He says that much of this information was illegally obtained, and includes the extraction reports for all phones seized from the Montreal Residence, the line sheets for the dial number recorder for his cell phone, the Avis car rental agreement, and his RBC Visa records. Most of these items were included in the database handed out at the December 2012 Scrappyard conference (two of the extraction reports were added to the database subsequently). As well, Sgt. St. Amant also shared several of the extraction reports outside of the database.
- [57] Although the police had obtained production orders for the Avis car rental agreement and the Visa records, this Court concluded in an earlier ruling (indexed at 2019 BCSC 1801) that the ITO for the production orders contained information that had been obtained in violation of Mr. Alkhalil's rights under s. 8 of the Charter. The Crown conceded that, as a result, the two production orders, as well as the dial number recorder, could not have issued. The Crown has also conceded that the searches of the phones seized from the Montreal Residence were unlawful since the search warrant for the residence did not expressly authorize a search of the devices.
- [58] Mr. Alkhalil argues that *Wakeling* is clear that information sharing is permissible where the information shared was lawfully obtained. Where, as here, illegally obtained information is shared, that not only exacerbates the seriousness of the initial unlawful seizure but itself constitutes an independent violation of the Charter. He says that the frequency of the sharing of the unlawfully obtained information and the circumstances under which it occurred will inform the s. 24(2) analysis.

- [59] Mr. Alkhalil additionally submits that the way in which the VPD shared the database - handing out discs at a conference to "anyone who wanted a copy" without meaningful limitation on subsequent use or dissemination and without assessment of the relevance of the information to the receiving agency - impacted the reasonableness of the manner of search and resulted in a further violation of s. 8 of the Charter.
- [60] Mr. Alkhalil argues that the database, containing personal information going to his "biological core", was shared with a complete disregard for his residual privacy interests and without any of the protections afforded by PRIME. The only protection was the disclaimer on the disc. The disc was not formatted to prevent copying. While the person to whom each disc was disclosed was identified in Ms. Wilson's log, there was no means of determining who later accessed the information or with whom it may have subsequently been shared. Moreover, there is no evidence as to why the people who received the disc wanted it; how it was used; where it is now; or whether it has been copied or downloaded onto a server for more widespread use.
- [61] Mr. Alkhalil says that in *Wakeling* at para. 95, the Supreme Court recognized that even where information is lawfully obtained, s. 8 of the Charter protects against unreasonable use of the information. Here, the VPD failed in their "responsibility to manage access to the data obtained by them in a manner respectful of the accused's residual privacy interests" (*R. v. Ferguson*, 2018 BCSC 819 at para. 205) by disclosing extensive highly personal information about Mr. Alkhalil and his co-accused, without consideration of relevance, without restriction and without protections. This use of the information infringed his rights under s. 8 of the Charter.

Mr. Wiwchar's Submissions

- [62] Mr. Wiwchar adopts the submissions of Mr. Alkhalil. He adds that the Project Scrapyard disc contained highly personal information about him including a psychological report, medical documents, banking records, correspondence protected by solicitor-client privilege and personal photographs. This information was obtained as a result of searches of a number of locations including the Surrey storage locker, the Surrey safe house, his residence and storage locker on Jervis Street, and his BMO safety deposit box. Mr. Wiwchar contends that these searches were rendered unreasonable as a result of the subsequent indiscriminate sharing by the VPD, thus infringing his rights under s. 8 of the Charter.
- [63] In his notice of application Mr. Wiwchar raised issues about the TPS sharing information obtained from searches of BlackBerry's seized incident to his arrest in Toronto for the Raposo homicide and about the QPP sharing information with the TPS about Project Loquace, a drug trafficking investigation. However, these were not pursued further in oral or written argument

Mr. Amero's Submissions

- [64] Mr. Amero also adopts the submissions of Mr. Alkhalil as they relate to the sharing of the Project Scrapyard disc. He makes additional submissions regarding photographs of Hells Angels clothing and paraphernalia taken during the VPD's search of the Montreal Residence. He says that the photographs were taken not for the purposes of the investigation set out to the judicial officer authorizing the search, but rather, for intelligence, a purpose not mandated by the search warrant or its process.
- [65] Mr. Amero's submissions are based on the evidence of Sgt. Det. Erick Monfette from an earlier application, reviewed below.

Sgt. Det. Erick Monfette

- [66] Sgt. Det. Erick Monfette was an intelligence officer with the Service de Police de la Ville de Montreal ("SPVM") with a specialization in motorcycle gangs. He was assigned to participate in the search of the Montreal Residence on August 8, 2012. His task was to assist the VPD officers in the search in terms of nomenclature or items in relation to outlaw motorcycle gangs including jewelry, clothing, and other articles associated with the Hells Angels.
- [67] Although Sgt. Det. Monfette was at the search during its initial stages, he also returned later in the day to assist investigators on site and to ensure that the forensic identification technician, Mr. Carson, from the SPVM, "had taken photos that were of interest to us in terms of anything related to motorcycle gangs, paraphernalia, accessories and so on". He was there to ensure certain "quality control". When asked in cross-examination about that term, Sgt. Det. Monfette explained that was a term he used "to make sure that the items are 'identifiable', that the jewelry, the articles of clothing are properly depicted". He was then asked the following questions:

Q And later the use of the databases would be to ?

A As an intelligence officer, the photographs can be used for intelligence purposes. Yes, for purposes of understanding a situation at a particular time why certain jackets or vests are - - are being used at a certain - - in Montreal at the time.

Q And to demonstrate the involvement of a certain individual, in a certain group, Hells Angels?

A Yes, possibly,

Q Using expert opinions regarding affiliation of individuals?

A Yes, that is also a possibility

Q Training purposes of other intelligence officers?

A Yes, that is also a possibility

Q And to be used in search warrants if necessary?

A Yes, , also that's possible.

The Crown's Response

- [68] While the Crown accepts Mr. Alkhalil's review of the evidence, it highlights a number of assertions he made in his oral submissions with which it takes issue. The first was the proposition that the police did not review the information on the database before sharing it. The Crown responds that Sgt. St. Amant testified that he prepared a task report outlining his review of all the extraction reports for devices seized from the Montreal residence that were available in October 2012. None of those extraction reports at that time contained PGP messages. Moreover, Ms. Irwin also gave evidence that she reviewed the extraction reports for the devices and if she came across messages of importance, she would contact Sgt. St. Amant and/or A/Sgt. Griffiths and advise them of the content.
- [69] With respect to the defence assertion that the disc was given to whoever asked for it and without any meaningful restrictions or limitations as to subsequent use or dissemination, the Crown points to Sgt. St. Amant's evidence that the December 2012 meeting was limited to "interested parties [meaning the law enforcement agencies] who had the same target groups in the national tactical enforcement priority target group". Accordingly, it says, it is not the case that the disc was randomly distributed.
- [70] The defence contends that Sgt. St. Amant was aware that he required a warrant to search the phones following the Supreme Court's decision in Vu but that police continued to share information unlawfully obtained from the phones. The Crown responds that a fair reading of the officer's evidence indicates only that he recently located an email sent by a member of the Crown office in 2013 advising police to ensure they had warrants to search phones, with a link to Vu. There is no evidence that Sgt. St. Amant reviewed the email in 2013, what the email said or that the officer believed it applied to the devices seized from the Montreal residence.
- [71] With respect to the defence assertion that the disc was given to whoever asked for it and without any meaningful restrictions or limitations as to subsequent use or dissemination, the Crown points to Sgt. St. Amant's evidence that the December 2012 meeting was limited to "interested parties [meaning the law enforcement agencies] who had the same target groups in the national tactical enforcement priority target group". Accordingly, it says, it is not the case that the disc was randomly distributed.
- [72] Finally, the Crown notes that Ex. 6 is a list of the materials on the disc. There were no PGP messages related to the devices found in the room attributed to Mr. Alkhalil. The extraction report for Exhibit 8LW prepared by Sgt. Bernier in November 2012 contained 326 emails from the device found in the room occupied by Alkhalil and is #1194 on the disc and the extraction report was placed in evidence.

- [73] The Crown further submits that information sharing involving the RCMP is regulated by the Privacy Act, R.S.C. 1985, c. P-21, and by the Privacy Act, R.S.B.C. 1996, c. 373 and the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 in the case of the VPD. It says that this statutory regime does not impose any requirement that sharing among law enforcement agencies be limited to personal information determined on reasonable grounds to have investigative relevance to other investigations, which is the standard the applicants ask the Court to apply.
- [74] With respect to Mr. Amero's application concerning the photographs taken during the search of the Montreal Residence, the Crown accepts that it is a reasonable inference that the SPVM retained a copy of the photographs taken by Mr. Carson, both of the search of the premises and those specifically taken at the direction of Sgt. Det. Monfette. It further accepts that it can be inferred that the SPVM kept the retained photographs in their file management systems, and likely used them in the manner described by the officer. The Crown submits that to the extent that Mr. Carson was an agent for the VPD through the provision of his assistance, this can be understood as an instance of information sharing between the VPD and the SPVM. However, it says, Mr. Amero has not provided any basis for finding that such sharing infringed s. 8 of the Charter, especially since he has not provided any authority for the proposition that judicial authorization was required for the photographs.

Discussion

- [75] It is uncontroversial as between the parties that once evidence has been lawfully seized, the police are generally entitled to share the fruits of their search with other law enforcement agencies. Mr. Alkhalil himself acknowledges that "such sharing can and should take place for the efficient investigation and detection of crime and protection of the public" so long as it is done in a manner that respects an accused's residual privacy interests.
- [76] In *Wakeling*, a majority of the Supreme Court accepted that law enforcement agencies are entitled, at common law, to share the lawfully obtained fruits of a judicial authorization in the absence of a further review by a judge without infringing s. 8 of the Charter. McLachlin C.J.C., writing for herself but concurring in the result, stated (at paras. 92-93):

The warrant allows the police to obtain the information and to use it for purposes of law enforcement. The individual whose communications are lawfully intercepted under a valid warrant cannot complain that this unreasonably breaches his privacy. To put it metaphorically, a valid warrant sanitizes the state intrusion on privacy, as long as the execution of the warrant is reasonable and the information is used for purposes of law enforcement.

It has never been suggested that this principle is confined to the use of information in Canada. The reality is that crime does not stop at national borders, and police routinely share information that they have lawfully obtained under warrant with their counterparts in other countries. Provided information is shared for purposes of law enforcement, the individual cannot complain that the sharing violates his s. 8 right to privacy.

[Emphasis added.]

[77] Although the majority's analysis focussed on the wiretap regime specifically, it indicated at para. 29 that it did "not quarrel with the Chief Justice that, in general, the police may look to the common law for authority to use the fruits of a lawful search for legitimate law enforcement purposes, including disclosures to foreign law enforcement agencies."

[78] In *R. v. Ferguson*, 2018 BCSC 594, Justice DeWitt-Van Oosten, as she then was, offered the following summary of *Wakeling* (at paras. 194-195):

As I read the majority ruling in *Wakeling*, investigative agencies are entitled to share evidence they lawfully seize in the absence of further authorization, without contravening s. 8 of the Charter. However, there may be cases in which the unique circumstances surrounding the decision to share, the sharing methodology employed by those with conduct of the search, or other features of the evidentiary matrix raise concerns about the sharing and its impact on the overall reasonableness of the search.

In these scenarios, the result is that the search may not have been "reasonably executed". Without a reasonable execution of the search, the *Wakeling* principle cannot save (or validate) access to the fruits of the search for the purpose of an unrelated investigation.

[79] Of import in any reference to *Ferguson* is the highly unusual circumstance that the authorizing justice of the peace in that case issued written reasons with the search warrant modifying the warrant and placing limits on the search. That is not the case here. In *Ferguson*, DeWitt-Van Oosten J. noted specifically that whether information sharing can occur lawfully is informed by various factors:

[158] However, whether sharing can take place and, more importantly, the manner in which it may lawfully occur, is necessarily informed by the existence of statutory limitations on third-party access to the fruits of the search, and/or the terms of any warrant that authorized the search. The accused says that going beyond what is lawfully allowed to be shared, or facilitating access to the fruits of a search by another investigative agency without putting appropriate safeguards in place to respect and protect residual privacy interests on the part of the accused, may constitute a breach of s. 8 by ultimately rendering the search unreasonable.

[80] It is apparent from these authorities that the proposition that police agencies are entitled to share information for law enforcement purposes is predicated on the information having been lawfully obtained. Sgt. St. Amant acknowledged as much in cross-examination when asked to identify circumstances in which it was not appropriate to share the fruits of a search. He responded, "if it's unlawfully obtained".

[81] In *Wakeling*, McLachlin C.J.C. reasoned (at para. 94):

This Court has found that s. 8 is violated in cases where the information was seized in a context outside law enforcement and then passed along for the purpose of law enforcement: [citations omitted]. In those cases, the "sanitizing" effect of the warrant (or similar authorization process) was absent; the individual's privacy interest had not been balanced against the state's interest in law enforcement through judicial pre-authorization. Where, as here, that process has taken place, disclosure for law enforcement purposes does not violate s. 8.

[82] While the information shared in the present case was obtained pursuant to judicial authorization, subsequent developments in the law and rulings by this Court have led the Crown to concede that a substantial amount of it was unconstitutionally obtained. As a result, the "sanitizing" effect of the judicial authorizations of which McLachlin C.J.C. spoke has essentially been negated.

[83] I accept the submissions of the applicants that the sharing (or disclosure) of this unlawfully obtained information, in which they retained an expectation of privacy, constitutes a violation of s. 8 of the Charter distinct from its gathering, the consequences of which fall to be determined under s. 24(2). This information consists of the extraction reports for the devices seized from the Montreal residence, as well as any evidence obtained pursuant to the production orders for the Avis Car rental agreement and Mr. Alkhalil's RBC Visa records, and the dial number recorder for his cell phone.

[84] On the other hand, information on the disc that derived from searches of Mr. Wiwchar's Jervis Street apartment and storage locker, the Surrey safe house and his BMO safety deposit box was not unlawfully obtained, as those searches have all been found to have been lawful. Accordingly, its sharing did not infringe s. 8 of the Charter.

[85] The applicants also challenge the manner in which the VPD shared their information. They submit that the VPD disclosed large amounts of extremely personal information about them to other police agencies without assessing the relevance of the information to the receiving agency and without sufficient safeguards to protect against unreasonable invasions into the applicants' residual privacy interests. I understand these submissions to relate primarily to the sharing of the disc containing the database at the Project Scrapyard meeting in December 2012.

[86] I do not agree that the sharing of the disc was as indiscriminate as the applicants maintain. To start, the December conference at which the disc was shared was a Project Scrapyard meeting. As Sgt. St. Amant testified:

The database was planned initially for our searchability of the file, and then there was to be a - a meeting at some point here, which ultimately ended up being in December, between agencies investigating the same target groups. And the database was to be utilized for searchability for other investigations into our file. And my point of "not a fishing trip" is that it's - it's to be targeted, it's not open for anyone to use, keep it - and my objective as the lead is keep the file simple. Is - is the Duhre investigation's a priority for me. There's a public safety aspect. But if we're having a summit meeting, which ultimately was planned for December, it's to be contained to interested parties who have the same target groups in the national tactical enforcement priority target groups.

[Emphasis added.]

[87] Thus, while the disc was distributed to the attendees who sought a copy, attendance at the conference comprised Project Scrapyard partners who shared an interest in the same target groups. The potential relevance of the information to the receiving agencies would have been self-evident. Moreover, according to the distribution list maintained by Ms. Wilson, only three people received a copy of the disc with the database (a fourth person only received an extraction report relating to the BlackBerry of Mr. Duhre), indicating there was not a mass distribution of the disc that the tenor of the applicants' submissions suggest. Outside of the December conference, six other individuals or agencies received the disc. Again, they were all law enforcement personnel. Ms. Patterson received two discs, one for Project Scrapyard and the other for the Project Nitrogen investigation in which Mr. Amero had been the target of a shooting. Ms. Irwin provided a copy to the Automatic Criminal Intelligence Services database, though they never added it to their system and simply put in a safe.

[88] In terms of safeguards regarding further use or dissemination of the information on the disc, I note the following:

- a) the physical disc bore the disclaimer "This confidential CD is the property of the Vancouver Police Department. This CD is intended solely for law enforcement purposes and any unauthorized viewing, copying, disclosure, distribution or dissemination of the information contained on this CD is strictly prohibited by law and may result in criminal prosecution";
- b) every document on the disc bore a footer stating, "This database is protected by third party rule. Please contact VPD Homicide Project Reality prior to using this material"; and
- c) Ms. Wilson maintained a distribution list of who received a copy of the disc or some portion of the information it contained.

Given that the materials were provided to other law enforcement agencies that operate under similar levels of confidentiality as the VPD, I am satisfied that the manner in which the VPD shared the disc was reasonable in this case.

- [89] Although the Crown refers to federal and provincial privacy legislation, it acknowledges itself that such regimes do not define the constitutional parameters of what the police are permitted to do with information they lawfully obtain. As it further notes, the Supreme Court has held that failure to comply with applicable privacy legislation may be relevant to the s. 8 analysis but is not determinative: *R. v. Spencer*, 2014 SCC 43 at para. 54. As I see no need to consider the federal and provincial privacy legislation to decide this application, I will say no more about it.
- [90] Finally, in respect of Mr. Amero's submissions regarding the photographs taken by Sgt. Det. Monfette, it is impossible to ignore that gang concerns feature in law enforcement and certainly have in this case. While I acknowledge, as has the Crown, that it can be inferred that the SPVM kept copies of the photographs of the Hells Angels paraphernalia and likely used them in the manner described by Sgt. Det. Monfette, I am not persuaded there was anything improper in that. While the thrust of Mr. Amero's complaint, as I understand it, is that the warrant to search the Montreal Residence did not authorize the taking of the photographs in question, he has not provided any authorities to support the proposition that a warrant was required to take the photographs. Accordingly, I do not accede to his argument on this issue.

Conclusion

- [91] I accept the submissions of the applicants that the sharing (or disclosure) of information obtained from the warrantless searches of the communication devices seized from the Montreal Residence, conceded to be a breach of s. 8 by the Crown, constitutes a violation of s. 8 of the Charter distinct from its gathering. This information consists of the extraction reports for those devices. I also find that the sharing of information obtained pursuant to the production orders for the Avis Car rental agreement and Mr. Alkhalil's RBC Visa records, as well as the dial number recorder for his cell phone, having been obtained contrary to s. 8 of the Charter, constitutes a violation of s. 8 of the Charter distinct from its gathering. The consequences of these breaches fall to be determined under s. 24(2). The balance of the applications are dismissed.

"Maisonville J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/04/2021BCSC0402.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-alkhalil-2021-bcsc-402>

Prepared on 28 October 2026 · Esheria