

CANADA / JUDGMENT

R. v. Bishop

2014 BCSC 2575

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bishop,

2014 BCSC 2575

Date: 20140120

Docket: 57823-3

Registry: Chilliwack

Regina

v.

Jerome William Bishop and Shawn Charles Brien

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in this proceeding, from being published, broadcast, or transmitted in any manner. These Reasons for Judgment comply with this publication ban.

Before: The Honourable Madam Justice Bruce

Oral Ruling on Voir Dire No. 3

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Place and Date of Trial/Hearing:

Chilliwack, B.C.

January 16 and 17, 2014

Place and Date of Judgment:

Chilliwack, B.C.

January 20, 2014

- [1] THE COURT: At issue is the admissibility of Telus cellular telephone records for telephones subscribed by Mr. Bishop and Kendra Williamson for the period June 10 to June 15, 2009.
- [2] The cellular telephone subscribed by Ms. Williamson was discovered by the police when they searched Mr. Bishop incidentally to his arrest for possession of marihuana. That telephone was removed from Mr. Bishop's possession and transferred to his personal effects locker in the jail where he was detained. Corporal Scriver subsequently removed this telephone from Mr. Bishop's personal effects and seized it, believing it would afford evidence of the offences for which Mr. Bishop is charged.
- [3] Another cellular telephone was seized by the police during the search of Mr. Bishop's apartment pursuant to a search warrant. The subscriber to this cellular telephone was Mr. Bishop.
- [4] Constable Gibo was charged with investigating the cellular telephones seized and the police investigation surrounding the arrest of Mr. Bishop and Mr. Brien. She examined the telephone seized from Mr. Bishop's person which she removed from the exhibit locker. This cellular telephone could not be turned on to determine its associated telephone number because it was password protected.
- [5] As a consequence, Constable Gibo opened the panel on the back of the telephone and removed the battery. Under the battery, a serial number was engraved on the telephone. Having obtained the serial number, Constable Gibo forwarded it to Ms. Wood, a civilian RCMP member, and through her obtained the subscriber name of Kendra Williamson.
- [6] Armed with this information, Constable Gibo began to prepare an Information to Obtain a Production Order ("ITO") directed to the service provider for the cellular telephone. It was Telus. Constable Gibo had never authored a Production Order before this one. She began the process shortly after the arrest of the accused in June 2009 and did not complete the ITO

until August 26, 2009. Once she completed the ITO, it was reviewed by Corporal Scriver who approved it without any apparent revision. On the same day, she swore the ITO and appeared before a Justice of the Peace who granted the Production Order.

- [7] Pursuant to this Order, Constable Gibo received from Telus its records for the corresponding telephone, which included text messages as well as records of incoming and outgoing telephone calls.
- [8] At the same time as Constable Gibo prepared the Production Order for the telephone found in Mr. Bishop's personal effects, she also prepared a Production Order for one of the cellular telephones that was seized by the police during the search of Mr. Bishop's apartment subsequent to his arrest for possession of marihuana. Constable Gibo removed the cellular telephone from the exhibit locker and obtained the serial number in the same manner as she did with the cellular telephone seized from Mr. Bishop's personal effects. The serial number was forwarded to Ms. Wood who in turn provided Constable Gibo with the subscriber name of Jerome Bishop.
- [9] Armed with this information, Constable Gibo prepared a second Information to Obtain a Production Order directed to Telus, also the service provider for the cellular telephone. The Order was for the same period, June 10 to June 15, 2009, and it was also reviewed by Corporal Scriver who approved it without any apparent changes. The Order was granted on August 26, 2009. Pursuant to this Order, Telus provided Constable Gibo the records in its possession for the corresponding cellular telephone, which includes text messages as well as incoming and outgoing telephone calls.
- [10] During the voir dire held to determine the admissibility of the Telus records associated with these cellular telephones, Constable Gibo realized for the first time that she had incorrectly described the telephones in the Production Orders and where those cellular telephones were located by the police at the time of their seizure.
- [11] The Justice of the Peace was advised on an ex parte application that the telephone registered to Ms. Williamson was found in Mr. Bishop's apartment where her then boyfriend, Mr. Brien, was arrested, while in reality the telephone registered to Ms. Williamson was found on Mr. Bishop's person. The cellular telephone registered to Mr. Bishop was located in his apartment and seized by the police from this location.
- [12] An examination of the Information to Obtain drafted regarding the Production Order for Mr. Bishop's cellular telephone revealed that it did not indicate where the telephone was located because a blue Samsung telephone is not mentioned anywhere in the Information to Obtain except in association with the serial number on Mr. Bishop's telephone.
- [13] There are several issues to address arising out of these facts; however, the primary issue in my view is the validity of the Production Order. Absent a valid Production Order for the Telus records, the act of obtaining the records constitutes a search that is prima facie unlawful and unreasonable as it violates s. 8 of the Charter.

- [14] Addressing the validity of the Production Orders, it is my view that they are fundamentally flawed and could not have been issued by the Justice of the Peace. The Justice of the Peace must not issue a Production Order under s. 487.012 unless he is satisfied there are reasonable grounds to believe that documents or data forming the subject matter of the Order will afford evidence of the commission of an offence. Without accurate information as to the connection between the telephone records sought and the accused in the circumstances of the offence, the Justice cannot form proper grounds for issuing the Order.
- [15] The Justice of the Peace in this case was misled by the information contained in the Information to Obtain in support of the telephone records associated with Ms. Williamson. He was told the cellular telephone was found in Mr. Bishop's apartment and Mr. Brien, Ms. Williamson's boyfriend, had also been found coincident with the telephone. However, in reality that cellular telephone was found in Mr. Bishop's personal effects. This is a significant and material change in the circumstances presented to the Justice of the Peace. Moreover, the Justice of the Peace had no information or misleading information as to how the police came into possession of the cellular telephone. Thus, the Justice of the Peace could not assess whether the seizure underlying the Production Order was lawful.
- [16] The same flaws affect the Information to Obtain requesting a Production Order for the telephone registered to Mr. Bishop and arguably more so. The Information to Obtain is completely silent as to where the police obtained the cell phone. While the ITO indicates an LG telephone was found at Mr. Bishop's apartment, the Information to Obtain indicates the telephone associated with Mr. Bishop was a blue Samsung telephone. The Information to Obtain provided the Justice of the Peace with no information as to where the cellular telephone was found by the police or how it was obtained. Thus, the Justice of the Peace had no means of determining if the cellular telephone would afford evidence of the offences charged or whether the police had lawful possession of the cellular telephone.
- [17] In my view, s. 487.012 creates a judicial pre-authorization process that is identical to a search warrant process. The privacy interests of those who have an expectation of privacy in the cellular telephone and the records held by Telus that relate to this phone are protected by a requirement that the Justice of the Peace have reasonable grounds to believe that an offence has been committed and, further, that the records will afford evidence of the offence before it is issued.
- [18] There is the same duty placed on the police during this ex parte application as reposed in them when applying for a search warrant to make a full and frank disclosure of all the material facts. There is a heavy onus on the police to accurately describe all material facts whether in support of or against the Order.
- [19] The Court must excise from the Information to Obtain all misleading or inaccurate information and ask whether the Justice of the Peace could reasonably have issued the Production Order based on the facts remaining in the ITO. This test is described in more detail at paras. 137 to 141 of my decision in *R. v. Bishop*, 2013 BCSC 522. The question is

whether there remains sufficient credible and reliable evidence to permit the Justice of the Peace to find reasonable grounds to believe that evidence of an offence will be found in the described documents or data.

- [20] The Crown argues that when the record is amplified by evidence called during the voir dire, it is clear that the Production Orders could have been granted by the Justice of the Peace.
- [21] It is trite law that amplification evidence is not a means by which the police can add information that would retroactively justify a Production Order or a search warrant. Amplification is to correct minor errors, not to add material facts that would have been necessary to permit the Justice of the Peace to grant the order. As I discussed at paras. 141 and 142 of Bishop, the reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the Justice of the Peace. Rather, the reviewing court must exclude erroneous information included in the original ITO: *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 58.
- [22] Furthermore, the reviewing court may have reference to amplification evidence; that is, additional evidence presented at the voir dire to correct minor errors in the ITO as long as this additional evidence corrects good faith errors of the police in preparing the ITO rather than deliberate attempts to mislead the authorizing Justice: *R. v. Morelli*, 2010 SCC 8, para. 41. As the Court said in *Morelli* at paras. 42 and 43:
- [42] Amplification evidence is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds. The use of amplification evidence cannot in this way be used as "a means of circumventing a prior authorization requirement" (*Araujo*, at para. 59).
- [43] In all cases, the focus is on "the information available to the police at the time of the application" rather than information that the police acquired after the original application was made (para. 59).
- [23] In my view, if the Information to Obtain was amended to substitute the proper associations with the correct phone number and facts were added as to how and where the police located and seized the cell phones, it would amount to a retroactive authorization of the Production Order. These are fundamental facts that should have been included in the ITOs from the outset and cannot now be added as minor details based on the principles of amplification.
- [24] It follows that there was no lawful pre-authorization of the Telus records and, further, that the resulting search of the cellular telephone data was unreasonable and in violation of the accused's rights under s. 8 of the Charter.
- [25] The accused also argued that Constable Gibo conducted an unlawful search of the cellular telephones to obtain the subscriber information necessary to obtain the Production Order. In support of this argument, they cite *R. v. Vu*, 2013 SCC 60. The Crown argues that the manner in which Constable Gibo obtained the serial numbers was not a search.

- [26] I find that Constable Gibo's actions constitute a search of the cellular telephones. She opened up the back of the telephones, removed the batteries, and located the serial number. Her intention was to take the cell phone apart to obtain information necessary to identify the telephone subscriber and this is clearly a search.
- [27] Further, I find the ratio of Vu applies directly to the cellular telephone found in Mr. Bishop's apartment. As in Vu, the search warrant authorizing the police to enter the apartment and search for offence-related items did not expressly authorize them to search any computer or cellular telephone device found therein. As the Supreme Court of Canada said in Vu, computers and cellular telephones are synonymous as they both contain the capacity to store personal and very private information. I find that paragraph 3 of Vu applies to Mr. Bishop's cellular telephone:
- [3] In practical terms, the requirement of specific, prior authorization means that if police intend to search computers found within a place with respect to which they seek a warrant, they must satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If, in the course of a warranted search, police come across a computer that may contain material for which they are authorized to search but the warrant does not give them specific, prior authorization to search computers, they may seize the device but must obtain further authorization before it is searched.
- [28] Accordingly, while the police were entitled to seize the LG telephone from Mr. Bishop's residence, they were not entitled to search it until they obtained prior authorization by a search warrant.
- [29] One might think that the same principle logically applies to a cellular telephone seized from the accused incidental to arrest. However, in para. 63 of Vu, the Supreme Court of Canada makes it clear that its ruling does not apply to cellular telephones that are searched incidental to arrest.
- [30] While Ms. Williamson's cellular telephone was located on Mr. Bishop's person incidental to arrest, it was not seized until some hours later when Corporal Scriver took the telephone from the personal effects locker. I see no practical difference between the seizure in these circumstances and the seizure directly from the accused on arrest. Clearly, Vu did not intend to change the law regarding a search of a cellular telephone in these circumstances, particularly a relatively unintrusive search such as taking out the battery and looking for the serial number.

- [31] The question that flows from these findings is whether the evidence should be excluded from the trial based on the factors considered under s. 24(2) of the Charter. Section 24(2) provides that where the Court concludes that evidence was obtained in a manner that infringes the rights of an accused under the Charter, the evidence must be excluded from the trial if it is established that "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."
- [32] The onus rests with the accused to justify exclusion of the evidence under s. 24(2) on the balance of probabilities. In *R. v. Grant*, 2009 SCC 32, the Supreme Court of Canada described the correct approach to the application of s. 22 of the Charter at para. 71:
- [71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.
- [33] The inquiry under s. 24(2) is an objective one: whether a reasonable person informed of the relevant circumstances and the values underlying the Charter would consider that the admission of the evidence would bring the administration of justice into disrepute: *Grant* at para. 68.
- [34] Section 24(2) of the Charter also mandates a prospective approach. It is presumed that the administration of justice has already been damaged by the Charter violation and the question is whether the admission of the evidence derived from the breach would inflict additional damage on the reputation of the justice system: *Grant* at para. 69.
- [35] Lastly, the focus of the s. 24(2) inquiry is primarily concerned with the interests of society and the broader impact of constitutionally-tainted evidence. Section 24(2) is not a means of punishing the police or providing compensation to an accused: *Grant* at para. 70.
- [36] Turning to the first stage of the inquiry, the admission of evidence derived from a breach of Charter rights sends a message to the public that the courts essentially condone state deviation from the rule of law: *Grant* at para. 72. Thus, where the infringement of Charter rights is severe or deliberate, the court needs to disassociate itself by excluding evidence linked to the breach. This preserves public confidence in the justice system and ensures that the police adhered to the rule of law. The admission of evidence obtained by inadvertent or

minor violations of the Charter may only have a nominal effect on the public's confidence in the justice system. However, "admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute": Grant at para. 74.

- [37] In this case, Constable Gibo searched Mr. Bishop's cellular telephone in the belief that she was lawfully entitled to do so. Indeed, the state of the law in 2009 would not have alerted Constable Gibo to the need to obtain prior authorization to search the cellular telephones under a valid search warrant: Vu at para. 71. This renders the initial search of the cellular telephone less serious. Further, Constable Gibo obtained the recorded data from Telus under a belief that the Production Orders were valid, thus there was no wilful violation of the accused's s. 8 rights.
- [38] Constable Gibo's errors in the drafting of the ITOs also cannot be regarded as deliberate or wilful. However, Constable Gibo's errors in the drafting of the ITOs can only be described as grossly negligent and her omissions egregious. It is particularly negligent to fail to include any information as to where the telephone associated with Ms. Williamson was located by the police, as otherwise there is very little evidence to support a connection to the offences charged.
- [39] The negligence of Constable Gibo is rendered more egregious when one considers that her work was reviewed by a senior officer, Corporal Scriver, before it was presented to the Justice of the Peace. It is also rendered more egregious when one considers the Production Orders permitted a search and examination of highly personal data contained on cellular telephones.
- [40] In Vu and Morelli, the Supreme Court of Canada recognized the highest privacy interests in data we store on our personal computers including data-storing cellular telephones: see Morelli at para. 103.
- [41] The breaches of s. 8 are compounded in Mr. Bishop's case because the police not only obtained production of his cellular telephone records without a valid order, but they also searched his telephone without prior authorization. In addition, I note that there is also a pattern of s. 8 violations associated with seizure of items from his apartment that were not expressly or implicitly authorized by the search warrant.
- [42] Although the Crown has abandoned its application to admit these items, the police conduct in keeping them in violation of s. 8 must still be considered in this s. 24(2) analysis.

- [43] I also found that the police violated Mr. Brien's s. 10 rights by neglecting to properly inform him of the reasons for arrest. However, this breach does not enhance the seriousness of Constable Gibo's actions. The breach of Mr. Brien's s. 10 rights is in no way connected with the search and seizure of Ms. Williamson's cellular telephone and cannot be regarded as part of the same transaction. In addition, the failure to apprise Mr. Brien of the reasons for his arrest on the break and enter did not lead to any incriminating evidence.
- [44] Accordingly, I find the infringing state conduct was serious in Mr. Bishop's case and somewhat less serious in Mr. Brien's case. This favours exclusion but in Mr. Brien's case less strongly.
- [45] Addressing the second stage of the inquiry, the Court must address the impact of the violations of the Charter-protected interests of the accused. The impact of a breach may range from fleeting and technical to profoundly intrusive. The more serious impact on the accused's rights, the greater the risk the admission of the evidence will bring the administration of justice into disrepute.
- [46] Since the Supreme Court of Canada judgment in *Morelli*, and now *Vu*, there can be no doubt that a search of one's cellular telephone amounts to extremely intrusive indifference with a person's privacy rights as Fish J. says at paras. 105 and 106 of *Morelli*:
- [105] As I mentioned at the outset, it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. Computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet.
- [106] It is therefore difficult to conceive a s. 8 breach with a greater impact on the Charter - protected privacy interests of the accused than occurred in this case.
- [47] Precisely the same view is accorded to such privacy interests in personal computers and cellular telephones in *Vu* at paras. 24, 38, 40 and 41-42.
- [48] In this case, the data obtained by the police includes every text message and call recorded by Telus in the period in question. The police obtained access to material via the Production Orders that may be entirely irrelevant to the offences charged. There was no filtering process to extract only those text messages that relate to the offences charged. Thus, the police in violation of s. 8 obtained access to far more information than would have been appropriate in the circumstances.

- [49] Moreover, what the police obtained with invalid Production Orders were private communications, which must be afforded the highest protection from state intrusion. This conclusion underlies Justice Abella's reasoning in *R. v. Telus Communications Co.*, 2013 SCC 16, that a prospective collection of this type of data constitutes an intercept of private communications that could only be authorized by a wiretap under Part 6 of the Code.
- [50] While Mr. Bishop's privacy rights in the data from his cellular telephone must be regarded as of the highest order, Mr. Brien's privacy rights in Ms. Williamson's telephone must be regarded as something less substantial.
- [51] Assuming, for the purpose of this Charter application, the Crown's theory that it was Mr. Brien who was using Ms. Williamson's cellular telephone during the relevant dates, I find that Mr. Brien has a lesser expectation of privacy because he was using someone else's telephone. Ms. Williamson at the very least would have access to the text messages sent and received on the telephone. Mr. Brien must be taken to have known about this possibility. Further, the telephone was found on Mr. Bishop's person. He too had access to the telephone stored data and Mr. Brien must be taken to have known of this possibility. Moreover, it must be presumed that Mr. Brien permitted Mr. Bishop to handle and use the cellular telephone. I find in these circumstances Mr. Brien's privacy interests in any communications recorded by Telus are significantly reduced. Thus I find that the second stage of the inquiry favours exclusion in Mr. Bishop's case, but far less so in Mr. Brien's.
- [52] The third stage of the s. 24(2) inquiry requires the Court to determine whether the truth-seeking function of the trial process would be better served by admission of the evidence or by its exclusion.
- [53] This inquiry requires consideration of the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the offence. All the data obtained from Telus records for the cellular telephones is reliable real evidence. This factor favours admissibility.
- [54] On the other hand, the evidence is not essential to the Crown's case. The telephone records may bolster the evidence of Mr. Dahlgren who is the key Crown witness. However, the Crown does not require the evidence to prove its case and there is no suggestion that the absence of the evidence would seriously undermine the strength of the Crown's case. The Crown may rely on Mr. Dahlgren's cellular telephone records to establish the connection it alleges between him and the accused.
- [55] Lastly, the offences charged are extremely serious and there is a clear societal interest in adjudicating such cases on their merits. The serious nature of the offences charged cannot however be over-emphasized. As the Court said in *Grant* at para. 84:
- [84] In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system.

Yet, as discussed, it is the long-term reputé of the justice system that is s. 24(2) 's focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term reputé of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

- [56] Weighing the factors in each stage of the inquiry, I find that on balance the evidence obtained in violation of Mr. Bishop's right under s. 8 of the Charter should be excluded from the trial.
- [57] In light of Mr. Brien's less significant privacy interests in the data on Ms. Williamson's telephone, and the absence of any pattern of violations by the police that affect Mr. Brien, I find that on balance the relevant factors favour admission of the evidence. Although this finding does not render the evidence inadmissible due to a Charter violation, the Crown must still establish threshold relevance for admission of the evidence in the trial.
- [58] Although much of the parties' argument was focussed on the police choice of a Production Order as a means of obtaining the impugned cellular telephone data, and the applicability of the ratio in *Telus*, I find it is not necessary to determine if *Telus* applies to historical text messages recorded by them on each subscriber's file.
- [59] I have concluded that the Production Orders were invalid for other reasons and the case is not put any higher for the accused if a wiretap was in fact necessary to obtain the evidence. As outlined earlier, regardless of whether or not Part 6 of the Code applies to the data received from *Telus*, there is a high expectation of privacy in such communications.

"Bruce J."

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