

CANADA / JUDGMENT

R. v. Correia

2020 BCSC 397

COURT

Supreme Court of British Columbia

DECIDED

20 January 2020

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2020 BCSC 397 R. v. Correia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Correia,

2020 BCSC 397

Date: 20200120

Docket: 27475

Registry: Vancouver

Regina

v.

Colin Raymond Correia

Sheldon Joseph Hunter

Restriction on Publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a witness, referred to in this judgment by the names Witness X, Witness Y, Witness W, and Witness Z and any information disclosed in or in relation to this trial that could identify any undercover police officer in the investigation of this case, including any pseudonym used by any undercover police officer. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Silverman

Oral Ruling re Voir Dire #6

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Place and Date of Trial:

Vancouver, B.C.

Dates Ongoing

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2020

[1] THE COURT: This is an oral ruling. If a transcript is ordered, I reserve the right to edit, although that process will not involve a change in the decision or in the reasoning.

INTRODUCTION

[2] This is my decision in voir dire #6, a Charter application brought by the accused Mr. Correia in which he alleges a s. 8 Charter breach in the seeking and granting of a one-party consent authorization for electronic surveillance which was granted pursuant to s. 184.2 of the Criminal Code.

- [3] The applicant does not dispute that the Information to Obtain (the "ITO") reflected what the affiant knew. Rather, he argues that it did not accurately reflect what the affiant ought to have known. This is so, he argues, because the investigating officers failed to tell the affiant everything relevant that they knew, and which he should have been told. I granted leave for the affiant, Corporal Meyers, to be cross-examined with respect to specific paragraphs of the ITO and that, in fact, occurred.
- [4] The applicant was one of several targets named in the authorization.
- [5] This decision will rely upon the bedrock principles for such applications enunciated in several Supreme Court of Canada cases, including *R. v. Garofoli*, [1990] 2 S.C.R. 1421, when the Court said this at para. 56:

56 The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

- [6] This is a sub-facial challenge and in such a situation, the Court may look at evidence behind the affidavit. Counsel made lengthy submissions with respect to the evidence of that nature and much of it has been marked as exhibits. The question of amplification was discussed in *R. v. Araujo*, 2000 SCC 65. If the reviewing judge finds that material information was omitted that should have been before the judge, then that is taken into consideration in the review. If misleading or incorrect information in the affidavit is demonstrated, then the question becomes should it simply be excised from the affidavit or can it be amplified or corrected. In order to determine that, the reviewing judge needs to make a finding of good faith and that the error was not meant to be intentionally misleading.
- [7] Here the applicant argues that several important paragraphs of the ITO should be subject to a number of excisions and amplifications, and if that is done, the applicant argues, the consequence will be that no authorization could issue as a matter of law. This will be so because the amplified ITO will no longer provide a basis for concluding that there are reasonable grounds to believe that any information concerning the alleged offence would be obtained through the intercepts. The foregoing is an essential precondition to the granting of the authorization. More detail on that momentarily.
- [8] This authorization was the subject of a similar attack in a 2012 and 2013 trial before Justice Dley, where the applicant in this matter was charged with others in a related but different offence. The ITO in that case was challenged on a similar but different basis than what has been argued before me. It was argued, and Justice Dley agreed, that the authorizing judge had not been given all of the material facts. Those facts in that case dealt exclusively with issues concerning the character of X, who was acting as a police agent and had given his

one-party consent for the interceptions. The judge agreed that the missing material facts should have been before the authorizing judge but that, upon amplification of the ITO including the new information, the authorizing judge still could have reached the decision that he did, such that the authorization was found to be valid.

- [9] The basis of the challenge to the authorization before me is significantly different than was the case before Justice Dley, for reasons that I will explain momentarily. Because of those differences, I am satisfied that the principle in *Hansard v. Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.) is not applicable and I am not bound by Justice Dley's decision, nor would it be appropriate to apply that principle here.
- [10] The argument before me is different than it was before Justice Dley for two reasons:
1. While it is based on the notion of non-disclosure of material information, it does not concern information about X's character. Rather, it concerns information about a special condition of X's parole, an issue that was not argued on the similar application before Justice Dley; and
 2. The special condition of parole, if the applicant's argument succeeds here, would have prevented X from associating with persons involved in criminal activity thereby negating the ability of X to intercept the communications that the authorization allowed him to intercept (and that are the sole goal of the authorization). If that argument succeeds, then a statutory precondition to the granting of the authorization could not have been fulfilled, that condition being found in s. 184.2(3)(c) of the Code, which states the following:

(3) An authorization may be given under this section if the judge to whom the application is made is satisfied that

...

(c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.
- [11] It follows that if there were no such reasonable grounds, the authorization could not, as a matter of law, have been granted. The applicant argues that the authorizing judge in this case was denied the information that would have made him aware of the foregoing when he granted the authorization.
- [12] Among other evidence and exhibits before me on the voir dire, I have police notes and transcripts of portions of evidence of witnesses who gave evidence before Justice Dley, and which dealt directly and indirectly with the parole issue already referred to. These were marked as exhibits by agreement on the voir dire and are relevant to the sub-facial challenge, and I will refer to portions of some of them.

- [13] The applicant also raises a secondary ground challenging the authorization. He argues that the application and the authorization itself offend the rule against collateral attacks. Here it is argued that the collateral attack is against the Parole Board's decision concerning the release of X with special conditions.
- [14] I will refrain from concluding that an application to a judge for an authorization pursuant to the Criminal Code can never be a collateral attack against a prior decision of an administrative tribunal. However, I am satisfied that in this case, it is not such an attack.
- [15] On an application for an authorization of the sort here, an authorizing judge is required to balance the issues of public interest in effective law enforcement with the interest of protecting people's privacy rights, and is required to do all of that and hear submissions from one party ex parte. In my view, it would be a rare case where a collateral attack argument will be appropriate in this type of situation.
- [16] I reject this argument.

BACKGROUND

- [17] I will set out a brief chronology, and for that I am largely tracking Mr. Smith's written argument.
- [18] The date of the alleged offence was May 29, 2010, in Cranbrook.
- [19] The applicant and his co-accused Mr. Hunter, are alleged to have committed the homicides referred to in the indictment and on that date and place. The Crown asserts that the victims were in the wrong place at the wrong time. The intended target was a different person.
- [20] On November 19, 2009, X was arrested in Cranbrook for a statutory release violation. While in police custody, he spoke with a senior member of the Cranbrook RCMP and offered to provide the police with information about a conspiracy to murder a local drug dealer, the apparently intended target that I referred to. Over the following days, police began the process of determining whether X would be useful as a police agent on that matter.
- [21] On December 9, Corporal Meyers took on the responsibilities of affiant and began preparing the necessary documentation for the various materials that he would have to prepare, including the ITO.
- [22] On December 15, 2009, X, while still in custody, participated in a police history interview in order to assess his suitability as an agent. On February 9, 2010, the Parole Board issued a post-release decision sheet revoking his parole, indicating various crimes that had been committed while on parole, and noting that X's risk had elevated to an undue level.
- [23] X's statutory release date was March 4, 2010. On February 25, while still in custody, he met with RCMP members Staff Sgt. Skrine and Sgt. Petelle.

[24] He informed them that he wanted to be in Cranbrook after his statutory release date. After he had left their presence, Sgts. Skrine and Petelle discussed X's release conditions and possible issues with placement and the concern that he might fall back into criminal behaviour. A statutory release certificate was issued, although it was not yet his release date, on March 1, 2010, and it noted two special conditions, the first of which is at the heart of this analysis:

1. "Must avoid certain persons, not to associate with any person you know or have reason to believe is involved in criminal activity and/or substance misuse" [my italics]; and
2. "Must abstain from intoxicants".

[25] The officers realized that the condition of non-association was inconsistent with what they had in mind for X's potential work as an agent. Their hope was and their goal was that he would indeed associate with the criminal element in Cranbrook in order to further the objectives of the investigation, that he would wear a device for interception in doing so, and that this could not be done without him being in the physical presence of the targets of the investigation, persons believed to be involved in criminal activity.

[26] The police were concerned about this clear conflict of their goals with the special conditions. They sought legal advice and on March 4, X was granted statutory release. The end date of his sentence, when he would no longer be subject to statutory release and the terms going with it, was not far into the future, April 29, 2010.

[27] The ITO did not contain the following information which comes from the notes of Sgt. Petelle. That same evening, he held a briefing with Cpl. Meyers and others. They discussed "associated issues" related to X's release conditions. Sgt. Petelle reported in his police notebook that "once signed up, we'd be forcing X to breach by having him approach targets under our direction". He promised to contact "HQ Ottawa UC operations" to "get a feel for their direction on this". The quotes relate to words in his notebook.

[28] The ITO also did not contain the following information. An hour later, Sgt. Petelle contacted the Ottawa-based national head of RCMP Undercover Operations, Staff Sgt. Skippon, and asked his advice about invoking certain provisions under the Criminal Code that might resolve the concerns. Sgt. Petelle recorded in his notes that Staff Sgt. Skippon had advised him of the following: "Authority from that must come from the A/Comm and that they have been loath to allow these types of authorities as they see it as going against a court order". One thing he suggested considering is going before the issuing authority to have order amended. The issue is "perverting the course of justice", especially if it is a court-ordered condition.

- [29] At 9:03 p.m., Sgt. Petelle had a conference call with Staff Sgt. Skrine and another sergeant to discuss the same concerns. Sgt. Petelle recorded that the other sergeant suggested getting an opinion from RCMP Legal Services. At 10:00 p.m., that is an hour later, Sgt. Petelle met with Staff Sgt. Skrine and another sergeant to discuss the "pros and cons" of getting X's parole supervisor, Ms. Linda Lutes, to alter X's statutory release certificate "to ensure we are not placing X in parole violation".
- [30] The ITO did not contain the following information from Staff Sgt. Skrine's notes: the following day he met with Ms. Lutes and spoke with Mr. Brian Lang, the Correctional Service of Canada District Director. According to Staff Sgt. Skrine's notes, Mr. Lang indicated that he "did not wish to go to the Parole Board to have the condition altered", but that he could authorize the condition be "ignored".
- [31] That evening, Mr. Lang sent an email to Ms. Lutes in which he indicated that he was "prepared to support the offender's involvement with the police in order to contribute to their investigation in the prevention of serious criminal activities". On March 16, Staff Sgt. Skrine requested written authorization from Mr. Lang about the concern about a breach of X's special conditions. Mr. Lang sent him an email confirming that he was "comfortable as long as the offender's interactions with individuals with known criminal backgrounds are being monitored by police" That comes from the testimony of Staff Sgt. Skrine, which was given in the trial before Justice Dley.
- [32] On March 25, 2010, Cpl. Meyers swore the affidavit in support of his application for the authorization which was granted by Justice McEwan later that day.
- [33] The next several entries post-date the authorization of March 25 and an argument could be made it therefore should not be considered in the circumstances of this case. In my view, that argument fails. These all relate to matters that occurred prior to the March 25 date, although they are spoken of and written about afterwards. I am conscious of the danger that might pose.
- [34] On March 30, Staff Sgt. Skrine emailed Mr. Lang again to request "Follow-up documentation supporting an exemption for X in relation to his no-contact condition. Your email would probably suffice, but as it stands this will create a defence argument downstream if I don't have something to follow up on the file."
- [35] On April 1, Mr. Lang sent Staff Sgt. Skrine a letter that said the following, according to the testimony of Mr. Lang given at the trial before Justice Dley, "This letter is written confirmation of my support for the offender to be in contact with individuals with known criminal backgrounds as long as these contacts are being monitored by the police."
- [36] The authorization has resulted in X having direct contact with criminals contrary to the terms of the Parole Board's special condition.

AUTHORITY TO ALTER PAROLE BOARD SPECIAL CONDITIONS

[37] The Corrections and Conditions Release Act, S.C. 1992, c. 20 (CCRA) is the statute that governs the Parole Board and issues relating to parole.

[38] By virtue of the CCRA, the Parole Board has exclusive jurisdiction over issues relating to "special conditions".

[39] Relevant provisions of the CCRA are as follows:

99 (1) In this Part,

Board means the National Parole Board continued by section 103 and includes a provincial parole board where it exercises jurisdiction in respect of parole as provided by section 112 or in respect of which any other provision of this Part is, by virtue of section 113, rendered applicable;
(Commission)

...

Jurisdiction of Board

107 (1) Subject to this Act, the Prisons and Reformatories Act, the International Transfer of Offenders Act, the National Defence Act, the Crimes Against Humanity and War Crimes Act and the Criminal Code, the Board has exclusive jurisdiction and absolute discretion

- (a) to grant parole to an offender;
- (b) to terminate or to revoke the parole or statutory release of an offender, whether or not the offender is in custody under a warrant of apprehension issued as a result of the suspension of the parole or statutory release;
- (c) to cancel a decision to grant parole to an offender, or to cancel the suspension, termination or revocation of the parole or statutory release of an offender;

...

Definition of "releasing authority"

133 (1) In this section, releasing authority means

- (a) the Board, in respect of
 - (i) parole,
 - (ii) statutory release, or
 - (iii) unescorted temporary absences authorized by the Board under subsection 116(1);
- (b) the Commissioner, in respect of unescorted temporary absences authorized by the Commissioner under subsection 116(2); or

- (c) the institutional head, in respect of unescorted temporary absences authorized by the institutional head under subsection 116(2).

Conditions of release

- (2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.

Conditions set by releasing authority

- (3) The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

...

Duration of conditions

- (5) A condition imposed pursuant to subsection (3), (4) or (4.1) is valid for such period as the releasing authority specifies.

Relief from conditions

- (6) The releasing authority may, in accordance with the regulations, before or after the release of an offender,
 - (a) in respect of conditions referred to in subsection (2), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or
 - (b) in respect of conditions imposed under subsection (3), (4) or (4.1), remove or vary any such condition.

1992, c. 20, s. 133; 1995, c. 42, ss. 48, 71(F); 997, c. 17, s. 28.

[40] The Crown argues that, despite the CCRA, Mr. Lang, the person who was charged with managing conditionally released Federal offenders in British Columbia, had the authority to use his discretion to allow a parolee to ignore a special condition imposed by the Parole Board. The Crown argues that this discretion is similar to that sometimes exercised by police officers who break the law, from time to time, in conditions where courts have sometimes found it acceptable that they have done so where it has been for the greater good. Here, the Crown argues that he did not purport to amend the Parole Board's special condition. Rather, he exercised his discretion not to enforce it, under certain conditions, and he believed it was in the public interest to do so.

[41] The applicant argues that Mr. Lang's supposed exercise of discretion was contrary to the clear provisions of the CCRA, and he had no authority to exercise it without the direct approval of the Board.

[42] I refer to several passages of the evidence of Mr. Lang from the previous trial in front of Justice Dley in 2013. At page 60 of the transcript [my emphasis]:

Q Mr. Lang, how are you employed?

A I'm the district director for the Correctional Service of Canada. I'm responsible for Community Corrections in the Pacific Region.

Q And how does that relate to the word parole?

A This -- the area that I'm responsible for is -- is charged with managing conditionally released offenders, federal offenders and provincial offenders in B.C. and Yukon.

Q And is it -- is the act that governs that the Corrections and Government Release Act?

A The Corrections and Conditional Release Act.

[43] At page 67, starting at line 18:

Q And that was at -- it came to your attention that Sergeant Skrine had wanted certain conditions changed, is that correct?

A Well, I was approached. I was advised by Linda Loutts that -- that I would receive a call from Sergeant -- Staff Sergeant Skrine, and I did and he informed me that -- that [X] was . . . I can't totally recall whether [X] had offered to provide certain services to the RCMP in relation to a very serious investigation --

. . .

A . . . or whether the police were recruiting him to do that, but one way or another they had, and I considered a number of factors in -- in coming to the conclusion that it would be in the best interest to -- to permit that to take place.

Q Okay. When you say permit that, what are you referring to?

A Permit him to work with the police.

[44] Page 80, starting at line 2:

Q Now, you in fact indicate on [the date is] March 16th, 2010 [I am told that is not correct, I do not think it matters] at 9:49 a.m., in your email to Sergeant Skrine -- after the opening paragraph you write . . .

In the meantime, I am comfortable. As long as the offender's interactions with individuals with known criminal backgrounds are being monitored by the police, we can continue with the project.

And the words are, "being monitored by the police". Again, that was in the context of your conversation with Sergeant Skrine that that would be supervised contact structured, so to speak, in the furtherance of an investigation that the police were conducting.

A That's right.

Q And nothing outside of that.

A No.

[45] Page 83, starting at line 43:

Q I just want to make clear, Mr. Lang. The -- I take it the Parole Board was never actually informed that [X] was going to be working as an agent.

A No.

Q And as I understand it, with reference to that condition, non-association with known criminals, that's something that only the Parole Board has the legal authority to change.

A Yes.

Q And so when you changed it, or when you set it aside or gave permission, what -- were you just exercising your discretion, or?

A It was my judgment, and --

Q Your judgment.

A -- and it was my judgment in relation to the police monitoring that condition -- monitoring his activities while he was engaged in -- in any interaction with known criminals.

Q But just to be clear, legally it's -- the Parole Board is the body that should have amended that condition.

A The Parole Board has the authority. Only the Parole Board has the authority to adjust special conditions.

[46] And page 86 at line 38:

Q And in terms of public safety, Mr. Lang, in the big picture of things, in your view, would the successful investigation of an ongoing conspiracy to murder one or more persons be in the public interest in terms of safety of the public?

A That was certainly a -- a major factor in the decision I made. I -- my understanding was of very serious allegations, a very serious investigation, and if that -- if a murder could be prevented obviously that is in the best interests of public safety.

Q And in your view would that, in terms of public interest, outweigh the risk posed of someone having trafficked something less than an ounce of cocaine?

A It's a tough call, but I -- I think overall I would say yes.

[47] There are also several relevant quotations from the transcript evidence, in the same trial, of Ms. Lutes. Speaking of X, she is asked:

Q And what's your or relationship with him?

A I supervised [X] when he was on conditional release, from the beginning of March 2010, to the end of April 2010.

[48] Page 2, line 47:

Q And in terms of changing, as in amending a condition or deleting a condition, do you have the authority to do that?

A No, I don't. That has to be done through the Parole Board of Canada.

Q All right. And as I understand it, only the National Parole Board of Canada has the right to do that; is that correct?

A To take the conditions off, yes.

Q Okay. What about amend them, or provide exceptions to them? Say, for example, no known -- no association with known criminals, except as authorized by someone?

A Yes, it can be except in the -- with permission of your parole officer or supervisor.

Q All right. And how is that done?

A That would be done in writing.

[49] And page 4, going onto page 5, starting at line - at page 4, starting at line 42, make it 40:

Q Were you aware of him [speaking of X] associating with any known criminals?

A Well, we knew that he was associating with -- with known criminals, yes.

Q And when you say "we," who do you mean?

A Me and the district director of Community Corrections, Brian Lang.

Q And he's -- all right. Now, does Brian Lang have the ability to delete or amend a condition?

A He amended the condition, yes. I - that's - I'm - I'm not aware - I'm not sure if he had that authority, or not. That's something that he did. He's the district director of Community Corrections. He wrote a letter saying that we were aware that he was associating with known criminals, and as long as he was in the presence of -- of the police at the time.

Q All right. And your understanding is that it's only the National Parole Board that has the ability to amend a condition?

A To delete the condition, yes.

Q Okay. And that's, effectively, what he did with this letter?

A Yes, he amended it, saying that as long as he was in the presence of the police, that he could associate with the known criminals.

- [50] The applicant notes that, while the ITO refers to Mr. Lang's involvement as to why and how the special condition was varied, it makes no reference to the CCRA or to the jurisdiction of the Parole Board.

THE ITO

- [51] The applicant argues that the ITO was carelessly drafted, factually incomplete, and materially misleading, such that the authorization could not have been granted. In that regard, counsel questions the accuracy of three paragraphs. in the ITO, paras. 15, 59, and 60.
- [52] Paragraph 15 of the ITO is a list of the police officers who provided Corporal Meyers with information to be used in the ITO and who apparently "confirmed the accuracy" of the information, including Staff Sgt. Skrine and Sgt. Petelle. It stipulates that the affiant has received information from others, notably Staff Sgt. Skrine and Sgt. Petelle, who had apparently reviewed the information in the ITO and confirmed its accuracy. The applicant argues that people reading it should be entitled to rely on that, but further argues that this was in fact not the case.
- [53] Paragraph 59 is a summary of the information in X's statutory release certificate, including the special conditions. The applicant argues that para. 59 of the ITO is the groundwork for interpreting the most important paragraph - 60.
- [54] Paragraph 60 purports to provide a summary of police attempts to regularize the breach of X's release conditions.
- [55] I set out paras. 15, 59, and 60 of the ITO in their entirety:

Accuracy of Information Confirmed by Other Peace Officers

15. In this Affidavit, I rely on information provided to me by other peace officers. Where I have relied on this information, each peace officer has read the information as related in this Affidavit and confirmed the accuracy as follows:
- a. Sergeant Bill BIRNIE, a member of the R.C.M.P. CFSEU-Kelowna-BC (Sgt. BIRNIE) confirmed the accuracy of the Information he provided to me;
 - b. Staff Sergeant Cary SKRINE, a member of the R.C.M.P. CFSEU-Kelowna-BC (S. Sgt. SKRINE) confirmed the accuracy of the Information he provided to me;
 - c. Constable Joe BELLIA, a member of the R.C.M.P. CFSEU-Kelowna-BC (Cst. BELLIA) confirmed the accuracy of the information he provided to me;
 - d. Constable Cory ABBOTT, a member of the R.C.M.P. CFSEU-Kelowna-B.C. (Cst. ABBOTT) confirmed the accuracy of the information he provided to me;
 - e. Constable Kyle WEATHERHEAD, a member of the R.C.M.P. CFSEU-Kelowna-BC (Cst. WEATHERHEAD) confirmed the accuracy of the information he provided to me;

- f. Constable Ken RYMER, a member of the R.C.M.P. CFSEU-Kelowna-BC (Cst. RYMER) confirmed the accuracy of the Information he provided to me;
- g. Constable Shaun ACHTYMICHUK, a member of the R.C.M.P. CFSEU-Kelowna-BC (Cst. ACHTYMICHUK) confirmed the accuracy of the information he provided to me;
- h. Constable Cheryl HANCOCK, a member of the R.C.M.P. CFSEU-Kelowna-BC (Cst. HANCOCK) confirmed the accuracy of the information she provided to me;
- i. Corporal Michael TRAAS, a member of the R.C.M.P. CFSEU-Kelowna-BC (Cpl. TRAAS) confirmed the accuracy of the Information he provided to me;
- . . .
- 59. On March 21, 2010, I reviewed a copy of [X]'s Correctional Service Canada Statutory Release Certificate. From this document I learned the following:
 - a. [X]'s date of release was listed as March 4, 2010;
 - b. The expiry of [X]'s conditions of release was listed as April 29, 2010;
- C. [X]'s "Special Conditions" of release were listed as follows:
 - i. Must Avoid Certain Persons: Not to associated with any persons you know or have reason to believe is involved in criminal activity and/or substance misuse;
 - ii. Must Abstain from intoxicants.

Authorization from Parole to Breach [X]'s Contact Conditions

- 60. On March 19, 2010, I read a report completed by S.Sgt. SKRINE regarding details associated to the terms of [X]'s release conditions and authorization to breach them for the purpose of the investigation. From this report I learned the following:
 - a. On March 5, 2010, S. Sgt. SKRINE learned that [X] was released from custody on a Statutory Release Certificate with one of the release conditions outlining that [X] must avoid certain persons, effective from March 4, 2010 to April 29, 2010:
 - i. This condition was further clarified to mean [X] was not to associate with any person he knew or had reason to believe was involved in criminal activity and/or substance misuse;
 - b. This condition made it difficult to proceed with the approved Operational Plan within the effective term as [X] would be asked to make contact with persons believed involved in criminal activity in order to garner evidence and as a result breaching a Court Order;
 - c. On March 9, 2010, S. Sgt. SKRINE spoke with Brian LANG (LANG), Director of Community Parole, who granted authority for investigators to supervise contact between [X] and persons defined in the release condition for the purpose of furthering our investigation during the term the condition was in effect.

- [56] Nowhere in the ITO is it noted that, by virtue of the CCRA, only the Parole Board has jurisdiction to remove or vary a condition of parole.
- [57] During cross-examination of the affiant on December 4, Cpl. Meyers was presented with portions of Mr. Lang's testimony (set out earlier in this judgment). He agreed that he was surprised to read that Mr. Lang had testified that "only the parole board has the authority to adjust special conditions". When asked whether this was information that should have been communicated to him, he responded, "Absolutely" and agreed that he would have included this information in the ITO. He also agreed that his reference to "parole" in the heading to paragraph 60 of the ITO meant parole "in the institutional sense".
- [58] Counsel for the applicant argues that the ITO is fatally flawed because nowhere does it state that, by virtue of statute, the CCRA, only the Parole Board has jurisdiction to remove or vary a condition of parole. The ITO erroneously creates the impression that a senior employee, Mr. Lang, who was not a member of the Parole Board, had the authority to vary or amend the special condition in this case. The applicant argues that Mr. Lang only had authority to not enforce the breach of the special condition that he had allowed. That, however, does not make the breach lawful, nor does it make para. 60 of the ITO accurate.
- [59] In *Araujo*, to which I referred earlier, the Supreme Court of Canada held that erroneous information must be excised from ITOs. Where erroneous information results from a simple error and not from a deliberate attempt on the part of the police to mislead the authorizing judge, the reviewing court may amplify and correct the information. I asked Mr. Smith, counsel for the applicant, directly, when he was in the course of delivering his submissions on this matter, whether he was advancing an argument of bad faith on the part of the various police officers involved and his response was, "I don't think I need to go there." I consider that something less than a "No, I am not advancing it", but it is obviously also something less than a "yes".
- [60] While there is an argument to be made that the police, other than the affiant, were acting in bad faith and attempting to mislead, the totality of their evidence, particularly their discussions amongst themselves and in seeking legal advice and in attempting to find a way through the problem that they were facing causes some concern, but precludes me from making the finding that they acted in bad faith and/or deliberately attempted to mislead the authorizing judge.
- [61] The heading to para. 60 of the ITO is "Authorization from Parole to Breach [X]'s Contact Conditions". The applicant argues this is misleading. It suggests that the Parole Board had provided the necessary authority. At most, Mr. Lang, who had not used the word "authorization", when speaking to the police, had stated his support for X to be in contact with various of the individuals in question. The Parole Board did not authorize anything.

- [62] Paragraph 60(b) states that the no-contact condition made it, according to the ITO, "difficult" to proceed with the approved operational plan. The applicant argues that "difficult" is the wrong word. The no-contact order made it "impossible" and/or "unlawful" to proceed with the plan in the absence of an amendment by the Parole Board.
- [63] Paragraph 60(c) also states that Mr. Lang granted "authority" thereby implying that he had authority to allow investigators to supervise contact between X and persons with whom he was prohibited from having contact, by virtue of the special condition. The applicant argues that, in fact, Mr. Lang had no such authority.
- [64] Further, it says nothing about monitoring, which was a condition imposed, with ostensible authority by Mr. Lang. The police knew, the applicant argues, that having X violate the no-contact condition posed a legal problem for the investigators. They had discussed it amongst themselves. They had sought legal advice. They spoke to Ms. Lutes and Mr. Lang, and even wrote to Mr. Lang subsequently, indicating that the problems would create a "defence argument downstream" if he did not have some documentation to go along with it.

EXCISION AND AMPLIFICATION

- [65] Counsel for the applicant submits that excisions and amplifications are appropriate. Concerning para. 60 of the ITO, he suggests the following:
1. The heading to para. 60, "Authorization from Parole to Breach [X]'s Contact Conditions". There are two complaints:
 - a) that according to the evidence it was not an authorization, and
 - b) it did not come "from parole". Rather, it came from the District Director of Corrections, who was, according to his description, "charged with managing conditionally released offenders in British Columbia."

Consequently, it is suggested that the heading should be deleted. I do not agree. I agree that the word "authorization" without more in that heading goes farther than the evidence permits. I will not delete that word. I will put another in front of it by way of amplification. That word is "ostensible". It will now read "Ostensible Authorization From the District Director of Corrections to Breach X's Contact Conditions".

2. In the third line of para. 60, the words "authorization to breach them for the purpose of the investigation". It is suggested that should be excised. Again, I disagree. I would insert the word "Ostensible" prior to the word "Authorization".
3. In para. 60(b), the fifth word is "difficult". The applicant suggests that should be excised and amplified with a replacement word which should be "unlawful". I disagree with that. My view is, considering the evidence of Ms. Lutes and Mr. Lang, that it may be lawful. I am not able to say that it would be. "Difficult" therefore is the better word. I simply decline to make that change.

4. At the end of (b), I do agree that the words "Court Order" should be deleted and replaced with the words "Special Condition".
 5. Subsection (c), it is suggested that the entirety of that paragraph should be deleted on the basis that the sole point of it is to suggest that authority for investigators to do those things had been given. Again, I would insert the word "Ostensible" before the word "Authority".
 6. I would add a phrase in the third line, near the end of the line, after the words "release condition", and that phrase would be "while monitoring him during such contact", then it will pick up with the words "for the purpose of".
 7. I would add one more thing by way of amplification - the relevant provisions of the CCRA as set out earlier in this ruling.
- [66] Those are the excisions and amplifications that I am satisfied flow from the new information that was put before me.
- [67] As amplified, para. 60 of the ITO would appear as follows (the amplifications are in bold face):

Ostensible Authorization From District Director of Corrections to Breach [X]'s Contact Conditions

60. On March 19, 2010, I read a report completed by S.Sgt. SKRINE regarding details associated to the terms of [X]'s release conditions and ostensible authorization to breach them for the purpose of the investigation. From this report I learned the following:
- a. On March 5, 2010, S. Sgt. SKRINE learned that [X] was released from custody on a Statutory Release Certificate with one of the release conditions outlining that [X] must avoid certain persons, effective from March 4, 2010 to April 29, 2010:
 - i. This condition was further clarified to mean [X] was not to associate with any person he knew or had reason to believe was involved in criminal activity and/or substance misuse;
 - b. This condition made it difficult to proceed with the approved Operational Plan within the effective term as [X] would be asked to make contact with persons believed involved in criminal activity in order to garner evidence and as a result breaching a special condition;
 - c. On March 9, 2010, S. Sgt. SKRINE spoke with Brian LANG (LANG), Director of Community Parole, who granted ostensible authority for investigators to supervise contact between [X] and persons defined in the release condition while monitoring him during such contact for the purpose of furthering our investigation during the term the condition was in effect.
 - d. [Those provisions of the CCRA set out earlier in this judgment should be set out in this amplified paragraph of the ITO.]
- [68] With the ITO amplified, an authorizing judge could conclude that:

1. The Parole Board, and only the Parole Board, has authority to relieve parolees from compliance with parole conditions; and
 2. In addition, certain senior representatives of the Parole Board, such as Mr. Lang, have a discretion to not enforce special conditions in appropriate but limited circumstances, where it is in the public interest to do so.
- [69] I am of the view, an authorizing judge could come to one or both of the foregoing conclusions based upon the amplified authorization. In that case, I am satisfied that some judges might not conclude that granting the authorization was appropriate. Others might conclude that it was appropriate. It follows that a judge could have granted the authorization.
- [70] Therefore, the authorization is valid and the application is dismissed.
- "Silverman J."

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