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R. v. Kang

2020 BCSC 2058

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2020 BCSC 2058 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2020 BCSC 2058

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Registry: Vancouver

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v.

Sameet Kang, Gary Kang, Manveer Braich, Kristoffer Ghuman and Jitesh Vagh

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Before: The Honourable Justice Winteringham

Reasons for Judgment - Application #39

(Screening of Constitutional Question Challenging the Validity of Sections 19 and 19.1 of the Correction Act, SBC 2004, C46 and Sections 14(2), 14(3) and 15(1) of the Corrections Act Regulations, BC Reg. 58/2005)

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Place and Date of Hearing:

Vancouver, B.C.

MS Teams

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I. OVERVIEW

- [1] Section 19 of the Correction Act, S.B.C. 2004, c. 46 [CA] and s. 14 of the Correction Act Regulation, B.C. Reg. 58/2005 [CAR] authorize the automatic recording of all non-privileged telephone calls made by inmates detained in BC provincial correctional centres (the "Impugned Provisions"). Jitesh Vagh is one of five accused on this multi-count indictment alleging drug trafficking and criminal organization offences. He filed a Notice of Constitutional Question challenging the constitutional authority of the Province to legislate in an area occupied by a federal law prohibiting the unauthorized interception of private

communications. Mr. Vagh asserts that the Impugned Provisions create an operational conflict between the provincial and federal powers and as such the provincial legislation must yield to the federal law.

- [2] The Attorney General of British Columbia (AGBC) and federal Crown take the position that the Court should summarily dismiss the constitutional question. They assert that this application does not meet the low threshold to allow it to proceed to a full hearing because the legal basis for the challenge has already been decided against the applicant.
- [3] Earlier this year, the same provisions withstood a s. 8 Charter challenge brought by those charged on the within and related indictments, including Mr. Vagh: *R. v. Kang*, 2020 BCSC 919 [Kang CA Decision]. In the Kang CA Decision,[1] the accused asserted a reasonable expectation of privacy in their telephone conversations contending that the passive recording of their conversations and retention of the communications by B.C. Corrections' Inmate Call Control System (ICCS) violated their s. 8 Charter rights.

II. CONSTITUTIONAL QUESTION and PARTIES' POSITIONS

- [4] On February 19, 2020, Mr. Vagh filed a Notice of Constitutional Question seeking "relief under s. 52 of the [Charter] and in particular for a declaration that sections 19 and 19.1 of the [CA] and regulation sections 14(2), 14(3), and 15(1) of the [CAR] are ultra vires as being laws relating to the criminal law and therefore beyond legislative competence of the Legislature of the Province of British Columbia."
- [5] During the hearing, Mr. Vagh altered somewhat the basis for the constitutional challenge to focus on what he described as an operational conflict between the Impugned Provisions and the federal legislation. He outlined the "particulars necessary to show the point to be argued" as the following:
 - a) Pursuant to s. 91(27) of the Constitution Act, 1867, the Parliament of Canada has the exclusive legislative authority over the criminal law;
 - b) In its exercise of its exclusive legislative authority over the criminal law, the Parliament of Canada has enacted Part VI of the Criminal Code, R.S.C. 1985, c. C-34;
 - c) Part VI of the Criminal Code was intended by the Parliament of Canada to be the exclusive regime governing the interception and use of private communications for law enforcement purposes;
 - d) The Impugned Provisions of the Correction Act and its Regulations are inconsistent with Part VI of the Criminal Code in that the Impugned Provisions of the Correction Act and its Regulations purport to allow that which Part VI of the Criminal Code explicitly and expressly prohibits; and,

- e) The irreconcilable operation of the Impugned Provisions of the Correction Act and its Regulations with Part VI of the Criminal Code render the Impugned Provisions of the Correction Act and its Regulations ultra vires the legislature of British Columbia.
- [6] In short, Mr. Vagh submits that the Impugned Provisions operate in such a way as to entrench on the exclusive federal authority to enact legislation with respect to the criminal law (specifically, the comprehensive scheme of Part VI of the Criminal Code). He submits that adherence to the provincial law compels a breach of the federal law and, hence, there is an operational conflict between the two.
- [7] In Mr. Vagh's written submission, he framed the issue as follows:
- ... there is an operational conflict between the prohibition against intercepting private communications in s. 184 of the Criminal Code, and the permission granted by the impugned legislation to do just that. In the language of the legal test, "one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other" - Canadian Western Bank at para. 71. In short, there is a clear operational conflict between the two legislative schemes."
- [8] The federal Crown says that Mr. Vagh's challenge is without merit and a full hearing need not be held, submitting:
- a) The Constitution Act, 1867, grants exclusive authority to the provinces to enact legislation with respect to the "Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province": s. 92(6);
 - b) The Impugned Provisions of the Correction Act and the resulting ICCS were enacted and implemented to address the management and security of provincial institutions: *R. v. Siniscalchi*, 2010 BCCA 354 [Siniscalchi] at paras. 73, 78, 83-84, 117 and the Kang CA Decision. They were not enacted to address issues underlying criminal law and criminal procedure, or to determine criminal responsibilities: *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591;
 - c) Part VI does not apply to calls in jail, as they are not "private communications" as defined by the Criminal Code: *Siniscalchi* at paras. 54-58; *R. v. McIsaac*, 2005 BCSC 385 [McIsaac] at paras. 56-59; Kang CA Decision at paras. 189-192; and
 - d) With respect to the purpose of the Correction Act and the inapplicability of Part VI to calls in the jail system, this Court is bound to apply the Kang CA Decision. This is decisive of Mr. Vagh's application for a *voir dire*.
- [9] Similarly, the AGBC contends the challenge has no reasonable prospect of success. That is because, the AGBC submits, there is no conflict between the Impugned Provisions and Part VI of the Criminal Code based upon the division of powers. The AGBC put its position this way:

[Mr. Vagh's] operational conflict argument is entirely dependent upon the proposition that recordings made under the authority of the Impugned Laws are "private communications" as defined in the Code. But Ker J., following precedent from the Court of Appeal, has already ruled that recordings made pursuant to the Impugned Provisions are not "private communications" within the meaning of Part VI. There is no difficulty in complying with both the federal and provincial legislation.

[10] The parties disagreed somewhat about the remedy available if the Court finds an inconsistency between the federal and provincial laws. The applicant described the remedy differently in the Notice of Constitutional Question and in his written submission. For the purpose of this ruling, I accept that the effect of the paramountcy doctrine would be to render inoperative the inconsistent provincial law, to the extent of the incompatibility: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 69.

III. FACTS RELEVANT TO PROPOSED CONSTITUTIONAL CHALLENGE

[11] In a pre-screening application such as this, the court is required to assume the truth of the factual circumstances as asserted by the applicant.

[12] I briefly set out the factual background now.

[13] Mr. Vagh is charged with four others on a direct indictment alleging trafficking and criminal organization offences. The charges were brought following an 18-month investigation conducted by Project Territory, an investigation into the alleged drug trafficking activities of two different groups - the Kang group and the Latimer group. The first indictment charges five individuals believed to be members of the Kang group (Mr. Vagh, Sameet Kang, Gary Kang, Manveer Braich, and Kristoffer Ghuman) and contains a number of counts related to criminal organization, drug-trafficking and firearms offences. The second indictment charges five men alleged to be members of the Latimer group with a number of offences that relate to criminal organization, drug-trafficking and firearms offences.

[14] During the Project Territory investigation, Sameet Kang, believed by the police to be a member of the Kang group, was serving a jail sentence at a provincial institution, the Fraser Regional Correctional Centre (FRCC). Much of the evidence against Mr. Vagh and the others is said to be found in Mr. Kang's telephone communications during his incarceration at FRCC. Mr. Vagh described the factual underpinnings of the application as follows:

All B.C. provincial correctional centres, including FRCC, utilize a telephone system called the [ICCS]. The ICCS automatically records telephone calls made by inmates. The only calls which are not recorded are those made to legal counsel who have registered their telephone number. The calls recorded by ICCS are stored for 30 days at both the originating correctional centre and the Telus data centre in Calgary, Alberta.

All of the telephone calls made by Sameet Kang, save for those to his counsel, were recorded and saved by ICCS.

Between July 7, 2017 and February 23, 2018, VPD investigators applied for and were granted 14 production orders to seize calls from FRCC that were made by Sameet Kang. The calls occurred between May 21, 2017 to February 23, 2018. Approximately 1700 calls were intercepted.

Project Territory relied upon the content of the telephone calls that were seized in their investigation. Specifically, portions of the calls were relied upon by the affiant of an Information to Obtain dated February 13, 2018 in support of an application for a wiretap authorization pursuant to Part VI of the Criminal Code

In [the wiretap authorization], the affiant indicated that the VPD had identified several individuals in the intercepted calls from Sameet Kang at FRCC, including Manveer Braich, Gary Kang, Jitesh Vagh and Kyle Latimer. The affiant stated that some of the intercepted calls discussed the Kang group's "structure, drug distribution, responsibilities and debt collection".

On February 14, 2018, Justice Gropper granted an order authorizing the interception of communications of a number of individuals, including Gary Kang, Kristoffer Ghuman, and Jitesh Vagh. The interceptions continued until the investigation concluded in August 2018.

[15] I will say more about the Kang CA Decision shortly. However, at this stage it is useful to set out very briefly Justice Ker's findings of fact that relate to the issues raised here and to provide context to those issues. Mr. Vagh suggested that if the court granted the voir dire, the hearing could proceed by way of transcripts[2] from the Kang CA Decision without the necessity of recalling that evidence.

[16] Turning to the Kang CA Decision, Ker J. provided this helpful summary of the evidence:

[27] What is clear from the evidence, and I find as a fact, is that inmates in BC correctional centres are repeatedly notified that their non-privileged telephone calls are recorded by the ICCS. This occurs (i) upon admission when they sign the Inmate Notification document advising them of this, (ii) whenever they use a telephone on their living unit to place a call, as signs either above or beside the bank of telephones remind them that their calls are recorded and may be listened to, and (iii) when their non-privileged telephone call is connected to the recipient and before anyone can speak, as an audio notification is automatically played advising that for safety and security purposes the call will be recorded and may be monitored.

[Emphasis in original.]

[17] The Impugned Provisions set out the system of recording, intercepting and monitoring, as those terms are used. Justice Ker described this "passive recording" at para. 91:

[A]ll outgoing non-privileged inmate telephone calls (as well as incoming voice mail messages) are automatically recorded by the ICCS and stored in the ICCS database. Passive recording, in these circumstances, simply means nothing has to be actively switched on or done by an individual to capture the call. It is automatically recorded. It is not, however, automatically listened to or "monitored".

[18] As Ker J. described at para 94:

[i]t is only s. 19(3) of the CA that authorizes the "monitoring" of recorded calls so long as the preconditions in that subsection are met -- that the recorded call is listened to by an authorized person who has reasonable grounds to believe one of the statutory enumerated activities is taking place in the calls.

[19] In assessing the constitutionality of the Impugned Provisions in the context of the s. 8 Charter challenge, Ker J. determined that it was imperative that the proper character of the legislative provisions be identified. To that end, she described the Impugned Provisions as "part of a legislative regime designed to facilitate the management of provincial correctional centres in BC" and found:

[218] It is uncontroversial that the CA's and CAR's overall object in so far as correctional centres are concerned is to protect the safety and security of staff and inmates alike as well as visitors and the general public.

[219] More specifically, the impugned provisions were enacted to provide a measure of protection from inmates who abused telephone and mail privileges to threaten and harass any number of individuals. The provisions are designed to prevent revictimization of vulnerable individuals and to prevent inmates from carrying on crime from within the correctional centres. In order to achieve this, the legislation authorizes the recording of non-privileged telephone calls. However, the recorded calls cannot be listened to or monitored in the absence of reasonable grounds.

[220] Finally, the CA and CAR are not criminal statutes per se like the Code or the Controlled Drugs and Substances Act, S.C. 1996, c. 19. Rather, they are largely regulatory or administrative in nature governing the day-to-day operations of provincial correctional centres in BC. The provisions in issue, found in the divisions dealing with inmates and security measures, are but one of a number of measures to provide for the maintenance and security of the centres including the safety of the inmates, staff, visitors as well as the public and community at large.

[20] In short, in the Kang CA Decision, Ker J. conducted a detailed analysis of the Impugned Provisions and the legislative purpose they serve. She characterized the Impugned Provisions as regulatory or administrative in nature that govern the day-to-day operations of a provincial correctional facility.

[21] In the Kang CA Decision, Ker J. examined the Impugned Provisions through the lens of s. 8 of the Charter. As I will explain, her analysis presents an almost insurmountable hurdle to Mr. Vagh's division of powers challenge. That is particularly so in circumstances where Mr. Vagh seeks to rely on the identical evidentiary record.

IV. LEGAL FRAMEWORK

[22] I will first set out an overview of principles governing screening applications in the criminal context. I will then set out the Impugned Provisions and the federal legislation. Finally, I will address the authorities relevant to the determination of this application.

A. Pre-Screening (Vukelich) Principles

- [23] An applicant who seeks a Charter-based voir dire must show a reasonable likelihood that a voir dire can assist in determining the issues before the court. In other words, the applicant must show a reasonable prospect of success in obtaining the remedy sought: *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255 ("Trans Mountain"). In *Trans Mountain*, Justice Dewitt-Van Oosten described the process available to trial judges to assess the viability of a particular constitutional challenge. She stated at paras. 48-52:
- [48] At trial, the appellants and Crown counsel agreed to have the availability of the necessity defence determined by way of a Vukelich hearing (named after *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A), leave to appeal ref'd [1997] 2 S.C.R. xvi).
- [49] A Vukelich hearing is a summary process typically used by trial judges to determine whether a Charter-based challenge to the admissibility of evidence warrants an evidentiary voir dire: *R. v. Edwardsen*, 2019 BCCA 259 at para. 28; *R. v. Frederickson*, 2018 BCCA 2 at para. 26.
- [50] Judges might also employ Vukelich hearings in assessing the viability of an application for a constitutional remedy that does not seek the exclusion of evidence; for example, an application to strike legislation or an application for a stay of proceedings based on an alleged abuse of process: *R. v. M.B.*, 2016 BCCA 476 at para. 15; *R. v. Armstrong*, 2012 BCCA 242, leave to appeal to SCC ref'd, 34957 (20 December 2012).
- [51] The discretion to deny a voir dire is an important trial management power, allowing judges to "control the course of proceedings and to not embark upon enquiries that will not assist the real issues in the trial": *R. v. Vickerson*, 2018 BCCA 39 at para. 61, citing *M.B.* at para. 45; see also *R. v. Joseph*, 2018 BCCA 284 at para. 19.
- [52] When requesting a Charter-based voir dire, the applicant is required to show a reasonable likelihood that a voir dire can assist in determining the issues before the court: *M.B.* at para. 45, citing *R. v. Pires*; *R. v. Lising*, 2005 SCC 66. Or, as otherwise articulated in *Cody*, the applicant must show a "reasonable prospect of success" in obtaining the sought-after remedy:
- [38] . . . before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the voir dire and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily. This screening function applies equally to Crown applications and requests. As a best practice, all

counsel -- Crown and defence -- should take appropriate opportunities to ask trial judges to exercise such discretion.

[24] I agree with Mr. Vagh's submission that a Vukelich hearing is meant to be both flexible and expeditious, aimed at efficiency and should "not involve a protracted examination of the issues": R. v. Frederickson, 2018 BCCA 2 at para. 33.

[25] Further, I agree with Mr. Vagh that the threshold he must meet on this application is low. All that needs to be shown is that there is a reasonable likelihood that the requested voir dire can assist in determining the issues before the court. In the context of a constitutional challenge to legislation, Chief Justice Baumann summarized the principles engaged in R. v. M.B., 2016 BCCA 476:

[45] Vukelich established the well-known principle that judges are entitled to decline to hold an evidentiary hearing where an applicant is unable to show that, even assuming the allegations could be proven, there would be no remedy. The discretion to decline to hold a voir dire is founded in the need for trial judges to control the course of proceedings and not embark upon enquiries that will not assist the proper trial of the real issues (Vukelich at paras 30-31)

[26] The parties agree that the threshold test is the same whether the applicant seeks exclusion of evidence under s. 24(2) of the Charter or a Charter remedy more broadly, such as a challenge to legislation as advanced here.

B. Legislative Challenge

[27] I will now set out the statutory provisions at issue and the legal authorities governing a legislative challenge such as this. I will then turn to a review of the authorities that the parties suggest govern this application.

1) Statutory Provisions

[28] The applicant submits that the provisions from Part VI of the Criminal Code relevant to this application are as follows:

Definitions

183. In this Part,

authorization means an authorization to intercept a private communication given under section 186 or subsection 184.2(3), 184.3(6) or 188(2);

electro-magnetic, acoustic, mechanical or other device means any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing;

intercept includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;

...

private communication means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it;

...

Interception

184(1) Every person who, by means of any electro-magnetic, acoustic, mechanical or other device, knowingly intercepts a private communication is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
 - (b) an offence punishable on summary conviction.
- (2) Subsection (1) does not apply to
- (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;
 - (b) a person who intercepts a private communication in accordance with an authorization or pursuant to section 184.4 or any person who in good faith aids in any way another person who the aiding person believes on reasonable grounds is acting with an authorization or pursuant to section 184.4;

...

[29] The Impugned Provisions of the CA are:

Inmate communication

19(1) An authorized person may restrict, intercept, monitor or record inmate communication in accordance with this section and the regulations.

- (2) An authorized person may without individualized suspicion intercept or record inmate communication.
- (3) An authorized person may restrict, intercept or monitor inmate communication if one or more of the following apply:

- (a) the authorized person has reasonable grounds to believe that the inmate is
 - (i) involved in illegal activities,
 - (ii) harassing or causing harm to others, or
 - (iii) participating in an activity that may jeopardize the safety, security or operation of the correctional centre;
- (b) a court order restricts or prohibits communication or contact between the inmate and the other person;
- (c) the other person has indicated to the authorized person that he or she does not wish to communicate with the inmate.
- (4) If inmate communication has been restricted, an authorized person must as soon as practicable inform the inmate in writing and give the reasons under subsection (3) for the restriction.

Disclosure

19.1(1) An authorized person may,

- (a) in prescribed circumstances or in relation to prescribed classes of inmate communication, disclose in the prescribed manner that a communication is inmate communication, and
- (b) in prescribed circumstances or in relation to prescribed classes of communication specified under section 33 (2) (u) as privileged, disclose in the prescribed manner that a privileged communication originates from the correctional centre.
- (2) For the purposes of subsection (1) (b), an authorized person may without individualized suspicion intercept a privileged communication.

[30] The CAR at issue provides:

Inmate communication

14(1) In the Act and this section, "monitor" means

- (a) to listen to an inmate communication that is made by electronic means or to an inmate communication that was made by electronic means and recorded, or
- (b) to read inmate communication delivered to the correctional centre or sent from within the correctional centre.
- (2) Inmate communication by telephone or other electronic means may be recorded.
- (3) Inmate communication may be monitored or recorded by an authorized person if the authorized person has reasonable grounds to believe that
 - (a) the inmate is

- (i) involved in illegal activities,
- (ii) harassing or causing harm to others, or
- (iii) participating in an activity that may jeopardize the management, operation or security of the correctional centre, or
- (b) the monitoring is necessary to maintain or repair the recording system and the monitoring is performed only for the length of time and to the extent that is necessary to effect the maintenance or repair.
- (4) Inmate communication by mail may be intercepted and examined by an authorized person to determine if the mail contains contraband.

Circumstances and manners of disclosure

14.1 An authorized person may do one or both of the following:

- (a) attach the name and address of the correctional centre to inmate communication or privileged communication, if the recipient is outside of the correctional centre;
- (b) at the beginning of an inmate communication or of a privileged communication by telephone to a place outside of the correctional centre, play a recorded announcement that the telephone call comes from the correctional centre.

Retention of inmate communication

15(1) A recording of an inmate communication made under section 14 (2) or (3) may be retained for a period not longer than 30 days, unless there are reasonable grounds to believe that the inmate is

- (a) involved in illegal activities,
- (b) harassing or causing harm to others, or
- (c) participating in an activity that may jeopardize the management, operation or security of the correctional centre.
- (2) A recording of an inmate communication under section 14 (2) or (3) must not, without lawful authority, be released or disclosed by a person employed in or about a correctional centre.

2) Federal Paramountcy

[31] Where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails. Of course, the doctrine of paramountcy only applies where there is a federal law and a provincial law which are each valid and inconsistent. If one of the laws is found to be invalid then the matter is at an end without resort to the doctrine of paramountcy. Similarly, if no inconsistency is found, the matter is at an end without resort to the doctrine.

[32] Here, the applicant's submissions focused on whether there was an inconsistency in the operation of the federal and provincial law. Little was said about the validity of each. On this point, I simply note that validity depends upon whether the "matter" (or pith and substance) of the law come within the "classes of subjects" (or heads of power) allocated to the enacting Parliament or Legislature. As Peter Hogg wrote in *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2007) at §16.1, if one law fails this test, then the problem is resolved without recourse to the doctrine of paramountcy:

It is only if each law independently passes the test of validity that it is necessary to determine whether the laws are inconsistent. This may appear to be labouring the obvious, but there are a startling number of judicial opinions which confuse the issue of consistency with the antecedent, and entirely different, issue of validity.

[33] For the purpose of this threshold application, I have assumed that both are valid as independent enactments. In *Canadian Western Bank*, Justices Binnie and Lebel wrote:

[76] The above review of constitutional doctrines inevitably raises questions about the logical order in which they should be applied. It would be difficult to avoid beginning with the "pith and substance" analysis, which serves to determine whether the legislation in question is in fact valid. The other two doctrines [interjurisdictional immunity and federal paramountcy] serve merely to determine whether a valid law is applicable or operative in specific circumstances.

[34] I turn to examine the operation of the federal paramountcy doctrine. As Chief Justice McLachlin wrote in *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39:

[62] . . . Paramountcy is relevant where there is conflicting federal and provincial legislation. As Major J. explained in *Rothmans*, at para. 11, "[t]he doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency".

[35] At para. 64, McLachlin CJ explored the applicability of federal paramountcy, describing it this way:

[64] Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other": *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, per Dickson J. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation: see also *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 72; *Lafarge Canada*, at para. 84. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal

purpose: Rothmans, at para. 14.

[36] The key point of the federal paramountcy jurisprudence is that the doctrine does not apply unless the court finds an inconsistency between the two laws.

3) Operational Conflict

[37] Mr. Vagh contends there is an operational conflict between the federal and provincial legislation because compliance with the Impugned Provisions force defiance of s. 184 of the Criminal Code.

[38] In the conflict assessment, the court is to be guided by interpretative guidelines. Where it is possible to interpret either the federal law or the provincial law so as to avoid the conflict that would trigger paramountcy, that interpretation should be preferred to an alternative that brings about a conflict between the two laws. The Supreme Court of Canada, in *Marine Services International v. Ryan Estate*, 2013 SCC 44, stated at para. 69:

Courts must not forget the fundamental rule of constitutional interpretation, "when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction that would bring about a conflict between the two statutes": *Canada Western Bank*, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356.

[39] The Federal Crown and AGBC submit there is no operational conflict because case authorities have determined the point raised by Mr. Vagh.

[40] To that point, Mr. Vagh submits the Attorneys' analysis is flawed because they rely on cases that interpret the Impugned Provisions. Mr. Vagh submits that if the court removes the Impugned Provisions from the analysis, then the court can test whether inmate telephone conversations are truly captured in the definition of "private communications." He submits that the court must look at the lay of the land absent a law that authorizes provincial correctional officials to monitor inmate telephone communications. That is because, Mr. Vagh submits, the Impugned Provisions impermissibly carve out an exception to the Criminal Code's definition of "private communications." Mr. Vagh contends that regard must be had to earlier authorities that specifically recognize the civil liberties of individuals while in jail.

[41] To that end, Mr. Vagh relies heavily on a passage from *Solosky v. The Queen*, [1980] 1 S.C.R. 821, where Justice Dickson stated at 839:

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

- [42] Mr. Vagh contends that this passage supports his position that prisoners' communications fit within the Criminal Code definition of private communications.
- [43] I agree with Mr. Vagh that in this passage, Justice Dickson is reiterating the importance of the rights of incarcerated persons. However, I do not agree that the passage governs in the manner proposed. That is because I am not persuaded that I can turn back the judicial and legislative clock to 1974, as Mr. Vagh would have me do. I will return to this point later in my analysis.
- [44] The Attorneys submit that the following three cases decide the point against Mr. Vagh: McIsaac, Siniscalchi, and the Kang CA Decision.
- [45] In McIsaac, the accused sought to exclude audio-recordings of telephone communications with his common law spouse. He had been charged with a number of violent offences relating to her. While detained, the accused made 36 telephone calls to her. After placing most of the calls, his spouse recanted her allegations. The police, pursuant to a warrant, seized the recordings of the telephone calls from the correctional centre to investigate her recantations.
- [46] Justice Parrett stated that the "first and most important issue" on this voir dire was whether the accused had any reasonable expectation of privacy in the telephone calls he placed from the correctional facility to the complainant. To answer this question, at least in part, Parrett J. considered that the accused was an inmate held on remand in a provincial correctional facility. He then referred to *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, at 877:

Imprisonment necessarily entails surveillance, searching and scrutiny. A prison cell is expected to be exposed and to require observation. The frisk search, the count and the wind are all practices necessary in a penitentiary for the security of the institution, the public and indeed the prisoners themselves. A substantially reduced level of privacy is present in this setting and a prisoner thus cannot hold a reasonable expectation of privacy with respect to these practices. This conclusion is unaffected by the fact that the practices at times may be conducted by female guards. There being no reasonable expectation of privacy, s. 8 of the Charter is not called into play; nor is s. 7 implicated.

- [47] Justice Parrett considered the definition of "private communication" as found in Part VI of the Criminal Code and concluded, at para. 58, that "the communication, in these circumstances cannot fall within the definition of private communications." He stated it this way at para. 59:

This is not a situation in which officers of the state intrude upon a private citizen and intercept his or her private communications, but rather one in which the inmate is made fully aware of the policy with respect to monitoring and recording and is given the option of using the telephone under those circumstances or not. The decision to do so or not is entirely in the inmate's hands.

[48] Justice Parrett specifically addressed the offence provisions found in s. 184(1) of the Code stating:

It is unnecessary to consider whether or not an inmate who knows conversations over a prison telephone are recorded and chooses to place a call consents to the interception expressly or by necessary implication within the meaning of s. 184(2)(a) because the communication in these circumstances cannot fall within the definition of private communications.

[49] There was a similar body of evidence before Parrett J. as was before Ker J. in the Kang CA Decision regarding the operation of ICCS. Justice Parrett recognized that a significant factor in the case before him was that an inmate in a correctional facility "lives in an environment in which there exists a substantially reduced expectation of privacy."

[50] Likewise, in Siniscalchi, the Court of Appeal concluded that inmate phone communications did not fall within the definition of private communications.

[51] In the Kang CA Decision, Ker J. examined Siniscalchi in detail. She provided the following summary of the Court of Appeal's conclusion that inmate calls, in the circumstances presented, did not constitute private communications. Justice Ker stated:

[191] And, in Siniscalchi, Groberman J.A. also rejected the application of the Part VI Code provisions in respect of the term "private communications" stating:

[56] Part VI of the Criminal Code is detailed and technical, and is aimed at regulating the interception of particular types of communication defined as "private communication". I do not think that it can be assumed that the noun "interception" in s. 189(6) is to be interpreted solely by reference to the statutory definition of the verb "intercept". As I read Part VI of the Code, when it refers to an "interception" it is referring to the interception of a "private communication", which is defined in s. 183 as follows:

"private communication" means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it[.]

[57] The communications at issue in this case did not fall within the definition of "private communication" because it was known to all participants that all calls were intercepted (i.e. recorded) by prison authorities. I would therefore reject the contention that s. 189(6) of the Criminal Code is engaged in this case.

[192] The decisions in McIsaac and Siniscalchi clearly establish that the private communications conditions of Part VI of the Code are not engaged in the circumstances of these applications. . .

[52] Justice Ker determined she was bound by both McIsaac and Siniscalchi, stating:

[189] In so far as Mr. Latimer argues that the recorded calls amount to "private communications" as defined in the Code, the jurisprudence does not support him on this contention both at the trial level thereby engaging the principles of engaging the principles of *Re Hansard Spruce Mills, Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C) and at the appellate level thereby engaging the principles of vertical stare decisis.

[53] I am similarly bound. For the reasons set out in more detail below, I am not satisfied that there is a basis for the court to decide otherwise.

V. ANALYSIS

[54] Mr. Vagh invites the court to be guided by an analysis that does not require, he submits, adherence to the above line of authority.

[55] That is because, Mr. Vagh submits, the question posed is different and one not answered by previous jurisprudence. Counsel framed the question as, "whether, in the absence of the impugned legislation, [the] prisoner would have an expectation of privacy." Later, counsel for Mr. Vagh posed the issue this way:

Distilled to its essence, the operational conflict is this: Parliament has made it an offence for anyone to intercept "private communications" without first obtaining an "authorization", while the Legislature of British Columbia has created a situation where state actors can intercept prisoner's private communications without first obtaining an authorization under Part VI of the Criminal Code.

[56] Mr. Vagh submits that McIsaac, Siniscalchi and the Kang CA Decision have no application to the issue as framed because those cases consider an entirely different question. In his reply and in considering the question as posed, Mr. Vagh contended that there is support for the analytical framework he presents when one looks at the history behind earlier provincial legislation dealing with inmates' communications and some of the cases interpreting that earlier legislation. Relying on a number of cases to explain his point, Mr. Vagh submits that inmates' communications made while in police custody were found to be private communications triggering the need for the police to obtain prior judicial authorizations for their interception. He gave the following examples:

- a) In *R. v. Pickton*, 2006 BCSC 383, Justice Williams found that Mr. Pickton had a reasonable expectation of privacy in his cell such that prior judicial authorization was necessary to record his communications;
- b) In *R. v. Mohamud*, 2010 ONSC 6264 at para. 43, Justice Pomerance, in her consideration of *Pickton*, found that:

... It is equally reasonable for detainees to expect that their words will not be indiscriminately recorded. In certain places, recording will be expected; in other places, it will not. Detainees must expect significant incursions on liberty and privacy, but it is going too far to suggest that as a consequence of detention one's every word can, at any time, be recorded. This is particularly so in pre-conviction context where the presumption of innocence is still operative.

- c) In *R. v. Shevaley*, 2018 BCSC 1608, Justice Wedge dealt with the admissibility of communications between the accused and a friend while they were together in a police wagon after having been arrested and interrogated in relation to the death of the applicant's father. Justice Wedge found that s. 8 of the Charter was engaged, agreeing with Pickton and Mohamud that

[19] ... the accused was a person in police custody who had been warned that his statements would be recorded while in custody, his expectation of privacy was considerably diminished. However, I conclude, on the evidence in this case, that it did not entirely obviate it. ...

[57] Mr. Vagh submits that these cases show what the legal landscape would look like absent the Impugned Provisions stating:

... when the impugned legislation is viewed in an historical context it becomes readily apparent that the provincial legislature created an operational conflict with the Criminal Code by passing the Correctional Centre Rules and Regulations in 1978. It is equally apparent that the operational conflict has never been cured, and it persists to this day. Accordingly, the federal legislation must prevail, and the provincial legislation is rendered inoperative to the extent of the incompatibility.

[58] However, I do not accept that this is the correct approach.

[59] In my view, Mr. Vagh is not stating a new question. Rather, he is inviting the court to engage in a hypothetical inquiry - that is, what could the province do if "private communications" had not been interpreted as it has. However, it is not the Impugned Provisions that carve out anything from the federal definition of private communications. On the contrary, the cases interpreting "private communications" do that.

[60] When approaching paramountcy, the court is not to go back in time, or consider hypothetical scenarios, to assess whether the province could have legislated to authorize interception of prisoner communication in the abstract, regardless of whether Parliament had occupied the field. Rather, once the court has determined that the provincial law is in pith and substance valid, the province's competence to enact the law has been determined and the court's only task is to look at the actual provisions of the two laws to see if they conflict. Here, that means asking if the definition of "private communications" in the federal law, conflicts with the provincial permission to record inmate communications. And to answer that question, the court relies on cases interpreting the nature and scope of each legislative provision as it currently exists.

[61] Since "private communication" does not include inmate communications other than to their lawyers, there is no conflict.

[62] Indeed, the AGBC made this point, stating:

[Mr.] Vagh's operational conflict argument is entirely dependent upon the proposition that recordings made under the authority of the Impugned [Provisions] are "private communications" as defined in the Code. But Ker J., following precedent from the Court of Appeal, has already ruled that recordings made pursuant to the Impugned Laws are not "private communications" within the meaning of Part VI. There is no difficulty in complying with both the federal and provincial legislation.

[63] I agree.

[64] As stated earlier, before the doctrine of federal paramountcy applies, the court must be satisfied that there is a conflict between the provincial and federal law. The weight of the authority presented on this application suggests there is no conflict and hence no need to resort to the doctrine of federal paramountcy.

[65] In other words, there is no inconsistency between the provincial and federal provisions. And I am not satisfied that an evidentiary hearing will lead to a different result.

[66] Based on the submissions advanced, including taking into account the proposed evidentiary record, I decline to hold an evidentiary hearing because I am not satisfied that to embark upon the proposed enquiry will assist the real issues in the trial.

VI. CONCLUSION

[67] For the reasons set out above, the court declines to order an evidentiary hearing on the issue raised by Mr. Vagh's Notice of Constitutional Question.

"Winteringham J."

[1] It was suggested that Mr. Vagh should have joined this Notice of Constitutional Question with the earlier constitutional challenge. Though it may have been preferable to have determined both constitutional challenges at the same hearing, I have not resolved Mr. Vagh's application on the timing of his notice.

[2] Two witnesses were called on the voir dire; the Director of Strategic Technology for BC Corrections (describing the workings of the ICCS, signage in the institution, the recorded message played to recipients of inmate calls and the data captured when a call is made) and the Assistant Deputy Warden for Standards and Communications at Fraser Regional Correctional Centre (describing the inmate intake process including ICCS enrolment).

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