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R. v. Kang

2020 BCSC 919

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2020 BCSC 919 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2020 BCSC 919

Date: 20200619

Docket: 29411

Registry: Vancouver

Regina

v.

Sam Kang

Gary Kang

Manveer Braich

Kristoffer Ghuman

Jitesh Vagh

Gurcharn Singh Kang

Mohanbir Kaur Kang

Kyle Latimer

Craig Latimer

Jacob Pereira

Anduele Pikientio

Csongor Szucs

Pashminder Bopari

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Before: The Honourable Madam Justice Ker

Reasons for Judgment on Joint Hearing # 2 Re: Jail Calls Voir Dire

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Place and Date of Hearing:

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I. INTRODUCTION

[1] This application deals with defence challenges to the constitutionality of s. 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] as they relate to the practice of passively (automatically) recording all non-privileged telephone calls made by inmates detained in BC provincial correctional centres. The telephone system used by BC Corrections in all 10 provincial correctional centres for inmates to make telephone calls out to the community is referred to as the Inmate Call Control System (the "ICCS").

[2] One of the accused, Sameet (Sam) Kang (VA27786), started serving a sentence of imprisonment in May 2017 at a BC correctional centre - the Fraser Regional Correctional Centre ("FRCC"). All of his telephone calls were automatically recorded pursuant to the provisions of the CA and the CAR. Between July 7, 2017 and February 23, 2018, investigators with the Vancouver Police Department (the "VPD") applied for and received 14 production orders to seize all of Mr. Kang's recorded calls from FRCC that spanned the time period of May 31, 2017 through February 23, 2018.

[3] The applicants contend that the operation of the ICCS system, by automatically recording all non-privileged inmate telephone calls in the absence of individualized suspicion, as well as the retention of the calls and the associated call detail records (the "CDRs") violates their s. 8 Charter right to be free from unreasonable search and seizure.

- [4] This voir dire was conducted as a joint hearing pursuant to s. 551.7 of the Criminal Code (the "Code") for the 12 accused charged on three related indictments (VA 27786, VA 27787 and VA 27798) as well as one accused - Pashminder Bopari - on a fourth related indictment (VA 28709).
- [5] All of the charges on the four indictments included in this joint hearing have their genesis in an investigation that was spawned from "Task Force Tourniquet" in the spring of 2017. Task Force Tourniquet was a proactive task force that the VPD and other neighbouring police agencies commenced in the spring of 2017 to investigate a number of criminal groups operating in the Lower Mainland of BC that were believed to be in conflict with one another and responsible for numerous acts of violence across the Lower Mainland. Out of Task Force Tourniquet various project investigations were initiated. The indictments under this joint hearing are all housed in an investigation with the moniker "Project Territory", an investigation of the alleged drug trafficking activities of two different groups - the Kang group and the Latimer group.
- [6] Three separate direct indictments charging a total of 12 individuals have been preferred in respect of Project Territory. A brief background overview to the investigation can be found in my reasons on an earlier application, *R. v. Kang*, 2019 BCSC 2109 at paras. 19-32, which I incorporate into these reasons by reference hereto.
- [7] A fourth direct indictment under the Project Territory umbrella, VA 28709, charges Pashminder Bopari and three others with conspiracy to commit murder and firearms offences for events that occurred in June 2018 during the course of and related to the Project Territory investigation [the "Bopari indictment"].
- [8] The Kang brothers, Sam and Gary Kang, are unindicted co-conspirators on the Bopari indictment. Mr. Bopari, an alleged associate of Sam and Gary Kang, is an unindicted co-conspirator on the Kang indictment and is said to be a member of the Kang group, an alleged criminal organization.[1]
- [9] The lead applicants on this voir dire are Sam Kang (VA 27786) and Kyle Latimer (VA 27798). Their counsel carried the bulk of the argument on this voir dire. The remaining 11 accused, through their counsel, added further perspectives to the evidence and adopted the submissions of the lead applicants. All 13 accused assert a reasonable expectation of privacy in their telephone conversations and argue that the passive recording of their conversations and retention of the associated CDRs by the ICCS violates their s. 8 Charter rights.
- [10] Sam Kang's application addresses the issues from the perspective of inmates detained in custody making telephone calls out of the correctional centres. As previously noted, Mr. Kang was serving a sentence of imprisonment at FRCC during the time frame captured by this voir dire.

- [11] Kyle Latimer's side of the application represents the interests of the outside parties receiving telephone calls from detained inmates, both first recipients and recipients subsequently added in, be it through a three-way call patch by the first recipient or by the first recipient handing the telephone over to another individual.
- [12] For the most part, Kyle Latimer received telephone calls from Sam Kang via Amandeep Mattu, Sam Kang's girlfriend. Manveer Braich, a co-accused on the Kang indictment, also had conversations with Sam Kang in a similar fashion to that of Kyle Latimer - indirect three-way calls facilitated by Ms. Mattu performing the role of an administrative assistant connecting Mr. Kang and Mr. Braich. Mr. Bopari was also involved in telephone conversations with Sam Kang while Mr. Kang was in jail at FRCC. Those conversations occurred well prior to the June 2018 events that ground the Bopari indictment.
- [13] Sam Kang also had direct telephone conversations with his brother, Gary Kang, who is one of his co-accused, as well his parents Gurcharn and Mohanbir Kang. Sam Kang's parents are charged on the second Kang indictment in the Project Territory investigation.
- [14] All telephone calls made by Sam Kang to either his girlfriend, Ms. Mattu, or to others (directly or indirectly through Ms. Mattu's three-way connection assistance) - save for his privileged calls with counsel - were recorded and saved by the ICCS at FRCC pursuant to the legislative provisions of the CA and CAR (the "Kang calls"). Except for perhaps one set of calls, BC Corrections did not listen to the content of the Kang calls.
- [15] Project Territory investigators obtained production orders to seize, and did seize, these passively recorded calls on the ICCS system as well as the accompanying CDRs. The content of the calls formed a significant plank in the Project Territory investigation.
- [16] More specifically, the content of the Kang calls seized by the Project Territory investigators was incorporated into the Information to Obtain ("ITO") filed in support of an application pursuant to Part VI of the Code to obtain a wiretap authorization. On February 14, 2018, Madam Justice Gropper made an order authorizing the interception of communications - P.2018/05F - of a number of individuals that are charged on the three Project Territory companion indictments. The wiretap interceptions went up after P.2018/05F was issued and continued until the investigation concluded in August 2018.
- [17] The applicants argue they have a reasonable expectation of privacy in their telephone communications and as such have standing to challenge the seizure of their telephone communications by the ICCS practice of passively recording all of their non-privileged calls. They bear the onus of establishing a reasonable expectation of privacy on a balance of probabilities.
- [18] Should the applicants establish they have a reasonable expectation of privacy in their telephone calls, they assert that the passive recording of their calls is not authorized by law and rely on the analytical framework established in *R. v Collins*, [1987] 1 S.C.R. 265 for this aspect of their argument.

- [19] If the Court finds that the passive recording of all inmate telephone calls is authorized by law, the applicants rely on the second branch of the Collins framework to argue the law is not reasonable. If the applicants are successful in their argument that the law is not reasonable, then a s. 1 justification hearing will be necessary to determine if the impugned law is a reasonable limit.
- [20] The Attorney General of BC (the "AGBC") and the federal Crown (collectively the Crowns) argue that the weight of the jurisprudence on this issue from both this Court and other courts is directly contrary to what the applicants assert. Moreover, they argue, the Court of Appeal's decision in *R. v. Siniscalchi*, 2010 BCCA 354 is binding and determinative of the issue. The Crowns concede the applicants have a diminished expectation of privacy in the contents of their recorded telephone calls given the decision in *Siniscalchi*. They argue that (i) the recordings are authorized by law, and, (ii) the law is reasonable.
- [21] The third stage of the Collins analysis - whether the search or seizure was carried out in a reasonable manner - is not in issue at this stage of the proceedings. Resort to the third stage will only be necessary if I conclude that the applicants have established that they have a reasonable expectation of privacy in their telephone calls recorded by the ICCS and that the Crown has satisfied the first two branches of the Collins test.

II. FACTUAL BACKGROUND

- [22] Two witnesses were called on this voir dire - Nathan Buckham, Director of Strategic Technology for BC Corrections, and Hector DeGrace, the Assistant Deputy Warden for Standards and Communications at FRCC.
- [23] Mr. Buckham provided detailed evidence, to the best of his abilities, of the workings of the ICCS including the process of enrolment of inmates into the ICCS upon admission to one of the province's correctional centres, the signage on display next to all the telephone banks located on the inmate living units of all correctional centres, the recorded message that is played to recipients of a telephone call from an inmate at the point of connection and before the conversation can commence, and the data captured when a call is made (the CDRs).
- [24] Mr. DeGrace addressed the intake process that inmates admitted to a provincial correctional centre go through which includes the ICCS enrolment process.
- [25] The evidence adduced on this hearing largely mirrored, with some further details and a few changes, the evidence reviewed in a number of authorities that were relied upon in this application, most particularly *R. v. Akins* and *R. v. McIssac* (citations *infra.*) as well as *Siniscalchi*.
- [26] I propose to outline only the more salient features of the facts that arise from their 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,[2] (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,[3] 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.[4]

A. The Inmate Call Control System Utilized by BC Corrections

- [28] The ICCS is a service that BC Corrections obtains from Telus for the facilitation of inmate telephone communications and employs in the 10 correctional centres in the province.
- [29] As noted in Siniscalchi, the ICCS has been in place in all of the provincial correctional centres in BC since 2001. It is a system designed to give all inmates the ability to make telephone calls while providing a measure of security for the correctional centres and the public at large: Siniscalchi, para. 72. On the evidence of Mr. Buckham, the ICCS underwent a contract renewal that completed in 2013.
- [30] Telus contracts with Lattice Incorporated, an American company, for the ICCS software and program. The data collected by the ICCS (recorded calls and the CDRs) is held both at the correctional centre where the calls are recorded and the Telus data centre in Calgary, AB.
- [31] The telephone calls of all inmates detained in provincial correctional centres are automatically recorded and saved in a database for a period of 30 days - with the exception of privileged calls to counsel (and others listed in the regulations as privileged) whose numbers are registered with the ICCS. The ICCS does not distinguish between sentenced inmates, immigration hold inmates or inmates detained pending trial.
- [32] All of the recorded calls are to be automatically deleted at the expiry of 30 days, unless certain criteria are met. However, BC Corrections has only recently implemented a requirement for Telus to confirm the non-retained calls have been deleted.
- [33] Inmate calls are restricted to 30 minutes in length, save certain numbers where the restriction has been reconfigured, e.g. intake calls with the Ministry of Social Development and Poverty Reduction.
- [34] The number of inmate calls made on a daily basis varies with the population count for the 10 correctional centres. On average there are about 2400 to 2600 inmates in total in the correctional centres around the province. The average daily inmate count for BC Corrections in November 2019 was 2,245 inmates.
- [35] Statistics for inmate calls made on the ICCS in January 2020, were as follows:
- 58,808 debit, collect and prepaid inmate calls
 - 25,209 subsidized and privileged inmate calls

- [36] In total, there were 84,017 ICCS calls for January 2020.[5] Out of the total number of recorded calls from January 2020, there were 1,247 "listening events" where authorized persons accessed the recorded calls and listened to them - a process termed "monitoring" in the CAR. This number does not mean that that many unique recorded calls had been accessed. Some listening events may have been repeated access to one recorded call. Thus, approximately 1% of all recorded non-privileged inmate ICCS telephone calls were the subject of monitoring in January 2020.
- [37] Also captured in the automatic recording of the inmate calls are 16 points of data, referred to as the CDRs. This data collection is a feature included in the software designed by Lattice Inc., the maker of the ICCS product.
- [38] The CDRs only capture the data as between the living unit telephone used by the inmate to make the call and the recipient number called by the inmate. The CDRs generated by the ICCS software do not capture the data generated when a recipient number connects the inmate to another telephone number using the three-way calling feature on the recipient's telephone.
1. General Features of the ICCS
- [39] The ICCS utilized by BC Corrections provides inmates with telephone access to the outside community. Inmates are not permitted and should not have their own cellphones when they are detained in a correctional centre. Accordingly, the only way they can communicate with their family, friends, counsel, doctors, and service providers is through letters, in-person visits at the institution, or telephone calls placed through the ICCS or voice-mails received on the ICCS.
- [40] To protect victims and to prevent threats to public safety or institutional security, all inmate telephone calls, save for privileged calls to counsel (and a number of other specified individuals as per s. 13 of the CAR), are automatically recorded and stored in a database. The interception, recording, monitoring or restricting of inmate communications - oral or written - is governed by s. 19 of the CA and ss. 13-15 of the CAR.
- [41] The ICCS is explained fully in the BC Corrections Branch Adult Custody Policy, Chapter 7: Administration. More specifically it is detailed in Chapter 7.8 - Inmate Call Control System. [6] The policy includes numerous sub-headings delineating the parameters of the ICCS. For the purposes of this ruling it is unnecessary to repeat the policy in detail. Suffice to say it commences with a statement of purpose - that the ICCS provides inmates with telephone access to the community while protecting victims and preventing threats to public safety.
- [42] Included in the policy are subheadings with details addressing all facets of the ICCS including, germane to this application, the following:
- 7.8.3. Inmate access - outlines how inmates are enrolled into the ICCS and how they are able to use the ICCS;

- 7.8.5. and 7.8.6. Call types (debit, collect and subsidized)
- 7.8.8. Privileged Communications
- 7.8.9. Call blocking
- 7.8.10. Automated system notification - includes the text of the audio notification provided to the inmate and called party (call recipient) at the point-of-call connection;[7]
- 7.8.11. Notification - outlines the contents of the notification document that inmates receive upon admission to a correctional centre and the confirmation process to ensure the admitted inmate understands the parameters of the ICCS, including that all non-privileged calls are recorded;[8]
- 7.8.12. System Access - delineates how authorized users access the ICCS;
- 7.18.13. System security, data integrity and safeguards - delineates how the data on the ICCS is protected;
- 7.8.14. Designation - delineates who is authorized to monitor calls or listen to recorded calls;
- 7.8.19. Monitoring calls and access to recorded calls - sets out the circumstances when an authorized person may monitor an ICCS call or call recording. It enumerates that reasonable grounds are necessary, a ICCS Record of Monitoring form must be completed and the warden or designate must approve, sign and date the completed ICCS Record of Monitoring.
 - o In so far as the monitoring by an authorized person is concerned - the policy states as follows:
 1. An ICCS call or call recording may be monitored and accessed only by a manager or correctional supervisor designated by the person in charge (the warden) as an "authorized person" to carry out the powers and duties described in s. 14 of the Correction Act Regulation and s. 19 of the Correction Act in circumstances when:
 - The authorized person has reasonable grounds to believe that the inmate is involved in illegal activities, harassing or causing harm to others, or participating in an activity that may jeopardize the management operation or security of the centre. Refer to section 14(3)(a) of the Correction Act Regulation;
 2. The reasonable grounds must be directly related to the inmate or inmates whose call recordings are being monitored. The reasonable grounds are not required to meet the standard of "reasonable and probable grounds"; however, the grounds must be objectively discernable facts that support any of the criteria set out in section 14 of the Correction Act Regulation.

· 7.8.20. Retention and Destruction - delineates the regular retention period as 30 days consistent with s. 15(1) of the CAR; retention past the 30 day period requires the call be marked as "do not delete" and is only permitted where there are "reasonable grounds to believe" that the inmate is involved in illegal activities, harassing or causing harm to others, or participating in an activity that may jeopardize the management, operation or security of the correctional centre.

[43] Mr. Buckham confirmed that recorded calls are retained for 30 days pursuant to the legislation and then automatically deleted, unless the criteria for retaining a call past the 30 days is met and the call is flagged "do not delete".

[44] The ICCS permits inmates to make calls anywhere in the world, unless BC Corrections has administratively blocked a telephone number, e.g. the telephone number for a victim or witness where a no contact order has been included in the detention order. The only other instance where an inmate telephone call on the ICCS will not be connected is where the recipient blocks the incoming telephone call at the point of connection.

[45] In addition to recording all non-privileged inmate calls, the ICCS has the capability of permitting live-monitoring of an inmate's call - listening in to a call in real-time. No notice is provided to the parties that a call is being live-monitored and they are unable to detect whether a call is being live-monitored, save, perhaps, for the circumstance when a live-monitored call is terminated by the monitor.

2. Enrolling Inmates into the ICCS upon Admission

[46] Upon admission to a BC correctional centre, an inmate attends at the admissions section of the institution and is "booked in". As part of the admitting process, the intake officer provides the inmate with a one-page document entitled "Inmate Call Control System (ICCS) Notification to Inmates" (the "Inmate Notification"). The content of the document (only printed in English) is as follows[9]:

This is to advise you that this correctional centre uses an Inmate Call Control System (ICCS) for all inmate telecommunications.

All telecommunications (telephone calls), other than those to privileged parties, are recorded. Recorded telephone calls may be monitored (i.e. listened to) when an authorized person has reasonable grounds to believe that an inmate is involved in illegal activities, harassing or causing harm to others, or participating in an activity that may jeopardize the safety, or security or operation of the correctional centre; a court order restricts or prohibits communication or contact between the inmate and the other person; or another person has indicated to the authorized person that he or she does not wish to communicate with the inmate.

Inmates are to use only those telephones specifically designated for their use.

Inmates are required to use biometrics (voice identification) to access designated inmate telephones.

There is a fee for all calls except those to privileged parties and agencies approved for subsidized calling.

During initial set up of the voice verification feature, all inmates are required to use their first and last name to enroll in the ICCS.

No inmate can use a telephone activated by another inmate. A violation of this condition is a breach of the Correction Act and Correction Act Regulation.

No inmate shall use the ICCS for inappropriate, fraudulent or other illegal purposes. A violation of this condition is a breach of the Correction Act and Correction Act Regulation.

No inmate shall make, attempt to make or participate in third party telephone calls (3-way calls).

I have read and understand this notice.

Inmate Signature: _____ Date: ____

Officer Signature: _____ Date: ____

- [47] According to Mr. DeGrace, the intake officer either has the inmate read the Inmate Notification or goes through it with them. The intake officer asks the inmate if they understand the document and if they indicate that they do, the officer has the inmate sign it. The officer witnesses the signature.
- [48] Mr. DeGrace indicated that if the inmate refuses to sign the document, that fact is noted on the Inmate Notification and entered into the CORNET system. According to the ICCS Notification Policy §7.8.11(3), where an inmate refuses to sign the form, the staff member reads the contents of the written notice to the inmate and records this on the form.
- [49] Once the inmate has completed the intake process and has been classified to a living unit, a classification officer conducts a one-on-one interview with the inmate, reviews the inmate's file and placement and ensures that the inmate understands the rules of the correctional centre, including the operation of the ICCS.
- [50] In cross-examination, Mr. DeGrace acknowledged the obvious, that the level of education and English proficiency of inmates admitted into correctional centres varies widely as do the intellectual abilities, the mental stability and the addictions histories of the admitted inmates. He also noted that admissions of inmates to the centres can occur in single and multi-group instances, depending on the type of transport the inmate was included in. He further acknowledged that the Inmate Notification is not the only document that an inmate must review and sign at the time of admission.

[51] If an inmate does not speak English or does not understand the Inmate Notification, then there are a variety of ways to ensure the inmate understands the contents of the document. Another officer may interpret it for the individual if there is an officer who speaks the inmate's language. Sometimes other inmates who speak the same language assist in interpreting the document. If no one within the institution can assist then outside translation services are employed.

3. Notice to Inmates that Telephone Calls are Recorded

[52] In addition to the Inmate Notification signed by all inmates, two signs are posted next to every bank of telephones on the living units of all correctional centres in BC. Ex. #2 contains two photographs depicting what this signage looks like. Two signs are clearly posted either above or next to the bank of telephones that inmates use when making a telephone call from their living unit.

[53] In large, bold red font on a white background with a red border is the following notice:

All written, oral and or telecommunications within this centre may be monitored and subject to electronic surveillance. All visitors and effects are subject to search and seizure

[54] Adjacent to the above sign or immediately below it (depending on how the centre has mounted it on the wall) in mainly bold, black, ALL CAPS font on a beige or putty background is the following warning:

ALL

TELECOMMUNICATIONS

OTHER THAN THOSE TO

PRIVILEGED PARTIES

ARE

RECORDED

AND MAY BE

LISTENED TO

4. Notice to Recipients that Telephone Calls are Recorded

[55] When an inmate places a telephone call through the ICCS, once the call is connected and before the recipient and inmate can speak, a recording is played warning the recipient of the origins of the call and that the call is recorded and giving the recipient the opportunity to accept or reject the call. The tenor of the warning is the same for all calls out on the ICCS, although the preamble varies depending on the type of call being placed by the inmate - debit, collect, subsidized and voicemail messages. Privileged calls have a different form of notification. The audio notification that calls are recorded is only in English.

[56] A CD with the various recordings was played in the voir dire - Ex. #3 - and a transcript of the ICCS audio notifications was included as Ex. #4. When the recipient of a telephone call answers the telephone they hear the following:

{This is a prepaid call from / You have a collect call from / This is a call from}[10] [inmate pre-recorded name here], an inmate at a BC correctional centre. For safety and security purposes, this call will be recorded and may be monitored as authorized by the Correction Act and the Correction Act Regulation. If you are legal counsel, please do not discuss privileged information. If you have questions about this or to register a legal counsel phone number as privileged, please call 1-888-952-7968. You can leave a message for this inmate by calling 1-855-200-1250 and entering mailbox ID [inmate mailbox#]. Please select from the following options: if you consent to this call being recorded and to accept this call, dial 1 now. To reject this call, dial 2 now. To block your number from further calls from this facility, dial 7 now.

[Emphasis added.]

[57] This audio notification is only played once, at the commencement of the call. If the receiving line is passed to another participant in the conversation, if another participant joins the call mid-way through on another telephone at the location called, or if the recipient "three-ways" another individual into the call, those individuals do not hear the audio notification that the call is being recorded.

[58] When a caller tries to reach an inmate to leave a voicemail message they hear the following notification:

Please enter your voice mail box number followed by the # key [inmate pre-recorded name here]. Messages left in this mailbox are recorded and may be monitored. For safety and security purposes, this call will be recorded and may be monitored as authorized by the Correction Act and the Correction Act Regulation. If you have questions about this, please call 1-888-952-7968. If you are legal counsel do not leave privileged information in this mailbox. If you consent to your message being recorded or monitored, press 1 now. To disconnect, press 7 now. To repeat this message, press 8.

[59] If an inmate makes a telephone call to a lawyer who has registered in the privileged call category with BC Corrections, the individual answering the incoming call will hear the following notification before the inmate is connected:

This is a call from [inmate pre-recorded name here], an inmate at a BC correctional centre. This is a privileged call and will not be monitored or recorded. To register a legal counsel phone number as privileged, please call 1-888-952-7968. If you wish to accept this call please stay on the line, otherwise hang up. You can leave a message for this inmate by calling 1-855-200-1250 and entering mailbox ID [inmate mailbox #]. Please go ahead with your call.

5. The Recording of Inmate Telephone Calls

- [60] All non-privileged calls made by inmates on the ICCS are passively recorded, including subsidized calls to outside agencies, e.g. the John Howard Society, Social Services, etc.[11] Lawyers are directed to register their telephone numbers with BC Corrections. When such a request is received and Corrections has confirmed the authenticity of the lawyer's telephone number, that number is inputted to the ICCS system so that when an inmate calls the number the call is not recorded.
- [61] If an inmate makes a telephone call and has the recipient contact a lawyer's office from the outside through the three-call function, that call will be recorded as the ICCS does not obtain the number being contacted by the recipient through the three-way calling feature.
6. Three-Way Calling is Prohibited by BC Corrections
- [62] Neither the CA nor the CAR include provisions that specifically prohibit the making of three-way calls. However, the Inmate Notification makes it clear that the practice is prohibited by BC Corrections.[12] While inmates are aware that BC Corrections prohibits three-way calling, recipients of inmate telephone calls receive no notification that such calls are prohibited.
- [63] Three-way calling is facilitated by the recipient of the inmate's call "patching a new number into the conversation" which then allows the inmate to speak with both the recipient of the ICCS call and also the person added to the call. Smartphones facilitate the making of three-way calls much more easily than traditional landlines and they are less likely to be detected by the ICCS. Similar difficulties for detection of three-way calls occurs with the VOIP or voice over internet protocol offered by both Telus and Shaw.
- [64] Individuals that join a conversation with an inmate by means of a three-way call - or at anytime after the original connection between the inmate and the recipient of the inmate's call - do not hear the audio notification that the call is automatically being recorded.
- [65] The reason that three-way calls are prohibited is obvious - it defeats the security of the ICCS. Moreover, BC Corrections has no idea what number is being accessed when a party is added into a conversation using the three-way call feature. There is no record available to BC Corrections in so far as the CDRs of the third-party number are concerned - three-way calls are untraceable by the ICCS.
- [66] Three-way calls have the potential to
- i. circumvent the firewall of the automatic blocked calls feature that some recipients activate when receiving an unwanted telephone call from an inmate;
 - ii. violate no contact conditions thereby harassing or causing harm to others;
 - iii. facilitate the engaging in of illegal activities while providing no data trail, or significantly obscuring any data trail; and

iv. jeopardize the management, operation or security of the centre through, for example, organizing incidents of violence or reprisals on inmates or arranging for contraband to be brought into the institution.

[67] Three-way calling presents significant challenges to BC Corrections to conduct any investigation into internal infractions or internal offences. For instance, if BC Corrections receives information that a specific telephone number is being used by inmates to facilitate illegal activities or activities that could jeopardize the safety, security and operation of the correctional centre, BC Corrections is unable to investigate telephone calls to the number if those calls were enabled by means of three-way calling on a recipient's telephone. The ICCS records only the telephone number the inmate calls (the recipient's number) and the telephone number that the inmate placed the call from. The ICCS cannot capture the data related to the telephone number that the recipient calls when using the three-way calling feature to add another participant to the conversation.

[68] The use of a speaker phone by the recipient or the passing of the recipient's telephone to other parties or having several people on the same line does not pose the same sort of concerns to Corrections that three-way calling does.

[69] The ICCS employs an algorithm to determine if a three-way call is being made and if the algorithm is able to detect that such a call has been made, it disconnects the inmate from the call. The ICCS is set to a certain sensitivity level to determine from the recipient side of the call if there is a change in the threshold of power. If a change is detected, the ICCS provides a brief notification that a fraud event has been detected and the inmate's call is disconnected.

[70] However, the algorithm is far from perfect as Mr. Buckham indicated in his evidence. Initially, there was a high instance of false positives which resulted in complaints and implementation of a cumbersome refund procedure. A further indicator that the algorithm is not overly sensitive is the fact that there are said to be a number of three-way telephone calls between Sam Kang and others on the various Project Territory indictments that went undetected by the ICCS. These calls were automatically recorded by the ICCS and are some of the calls captured in the 14 production orders obtained by Project Territory investigators between May 31, 2017 and February 23, 2018 for Sam Kang's recorded telephone conversations while at FRCC.

[71] The three-way calling detection algorithm can be deactivated and is deactivated for subsidized calls and privileged calls in order to permit the transfer of calls within an agency's or a lawyer's office.

7. The Monitoring of Non-Privileged Inmate Calls

- [72] All non-privileged inmate telephone calls are recorded. These calls can either be live-monitored or the recorded call can be monitored, that is, listened to, but only if the reasonable grounds criteria set out in the CA and the CAR are met and the warden or a designate has approved the monitoring. In practice, true live-monitoring in real time does not occur as the software is not enabled, but monitoring in the form of listening to the recorded call can be almost real time with a delay of only seconds.
- [73] Both the grounds for monitoring and the approval to monitor are documented in a form as outlined in the policy manual.[13] The reason for the form is that the policy intends that the grounds to monitor be documented.[14] The form is archived for at least three years.
- [74] The ICCS has an audit function that includes the creation of a digital footprint to identify the Corrections officials who access recorded calls. Only authorized individuals who have been granted permission to access recorded calls can do so and only if the statutory criteria for monitoring have been met and the monitoring or listening event has been authorized by the warden or their designate.
- [75] There is no process within Corrections to notify inmates or recipients of inmate calls that their recorded conversation has been accessed and listened to by an authorized person.

8. The ICCS Call Detail Records

- [76] In addition to automatically recording inmates' non-privileged conversations, the ICCS platform also captures various pieces of data related to a call. Collectively this information is known as the "call detail records" and from these records a number of different types of reports can be generated. Lattice Inc. is responsible for the development and creation of the ICCS software and it determined what elements of data to collect in the CDRs. Accordingly, the 16 points of data that comprise the CDRs is intrinsic to the ICCS product and its software package. The CDRs generated by the ICCS are not points of data that BC Corrections specifically sought to have included in the ICCS platform, rather they are part of the product provided by Telus to BC Corrections.
- [77] Neither the CA nor the CAR specifically address the capture and retention of CDRs. Similarly, the Adult Custody Policy Chapter 7.8 does not specifically address CDRs, although they are considered to be ICCS records for the purposes of the policy manual and disclosure limitations. Inmates are not advised in the Inmate Notification they sign at admission that the ICCS collects the information that forms the CDRs.
- [78] Mr. Buckham explained that 16 points of data collected in the CDRs are as follows:
- i. Date and time the call was placed;
 - ii. Time the call was terminated;
 - iii. Duration of the call;
 - iv. Number called by the inmate;

- v. Number of the telephone used by the inmate to make the call;
- vi. Correctional centre where the telephone is located;
- vii. The inmate's CS (correctional service) number and name;
- viii. The type of call (debit, collect, subsidized, privileged);
- ix. The termination reason (e.g., hang up, call blocked by recipient at connection, fraud event such as a detected three-way call);
- x. Number of times an inmate has attempted to call a number;
- xi. Number of times an inmate has tried to call a blocked number;
- xii. Cost of the call;
- xiii. Block code details;
- xiv. Region;
- xv. Doc-ID - a unique number associated to each call made; and
- xvi. Card-ID - an item the details of which Mr. Buckham was unfamiliar.

[79] Items xiii through xvi are not commonly used pieces of data. The first 12 enumerated pieces of data are what is useful to BC Corrections and the operation of the ICCS.

[80] The ICCS captures the CDRs for all telephone calls made by inmates, including privileged calls.

[81] Using the CDRs any number of reports can be generated for analytical and information purposes depending on how one seeks to configure the data. The reports could include:

- i. the number of calls placed on the ICCS by all inmates for any particular time period (day, week, month, year);
- ii. the number of calls made from a particular correctional centre for any particular time period (day, week, month, year);
- iii. the number of times an inmate calls a particular number;
- iv. the CS numbers of all the inmates calling a particular number;
- v. how many calls a particular inmate made on any given day (or any other time period); and
- vi. all the telephone numbers that an inmate calls.

[82] There are also a number of specific "canned reports" that cannot be re-configured as they are pre-determined, mainly for billing purposes;

[83] Mr. Buckham explained that the CDRs serve a number of purposes including:

- i. assisting in the billing and reconciliation process as between Corrections and Telus;
- ii. determining if telephones are working in various living units and responding to inmate complaints that a telephone is not functioning;
- iii. following up on complaints by individuals who have blocked their telephone number but continue to receive calls;
- iv. determining whether no-contact orders are being obeyed;
- v. investigating complaints of harassing or threatening calls by checking the CS number of the inmate and calls made to a particular number associated with the threat complaint;
- vi. investigating internal discipline matters such as complaints that an inmate is abusing the phone system or using it for illegal activities; and
- vii. ensuring that Telus's Telecommunications Service Master Agreement is being adhered to.

[84] The ICCS has various searchability functions, including an audit function to capture the digital footprints of who (Corrections staff) has accessed the recorded calls and what actions were taken by the individual. The authorized individuals who are permitted to access the CDRs is larger than the authorized persons who are able to monitor recorded calls. Corrections staff permitted to access the CDRs are designated managers and correctional supervisors, K-File clerks, victim notifiers, trust clerks, headquarters staff and individuals in the Operation Support Unit.

[85] The CDRs are to be retained by Telus for between a minimum of three to ten years depending on policies governing the retention of government documents. The inmate's voice biometrics, that is, the recording of the inmate's voice when enrolled in the ICCS at admission, is retained for the same amount of time along with the inmate's date of birth. Significantly, however, Mr. Buckham agreed in cross-examination that since November 2013 no CDRs have been deleted. As a consequence of the non-deletion of the CDRs, Corrections is able to generate any number of analytical reports in respect of the CDRs for all inmate calls since November 2013.

9. Information Sharing with the Police

[86] BC Corrections requires a production order to provide any police or investigative agency with a copy of the recorded calls or the CDRs from the ICCS. However, if BC Corrections has initiated a complaint to the police seeking an investigation into criminal activity, they will provide a copy of the ICCS records to the police without a production order in order for the police to investigate and respond to Corrections' complaint.

III. THE LEGISLATIVE SCHEME GOVERNING INMATE COMMUNICATIONS

[87] The legislative provisions in issue on this application are s. 19 of the CA and s. 14 of the CAR.

A. Correction Act, S.B.C. 2004, c. 46

[88] Inmate communication is defined in s. 1 of the CA and means:

communication made or intended to be made by oral, written, electronic or prescribed means between an inmate and another person, including another inmate, other than a privileged communication specified under section 33(2)(u);

An expansive definition for inmate communications is necessary given that inmates, while detained, communicate with their family, friends, counsel and others in any of the following ways: (i) in-person visits which involve oral communications; (ii) letters which involve written communications; and (iii) telephone calls on the ICCS, including voicemail messages, both of which are captured by the term electronic communications.

[89] Authorized person is defined in s. 1 of the CA and means:

the person in charge of the correctional centre and includes:

- (a) a staff member designated by the person in charge of the correctional centre to exercise the powers and perform the duties and functions under section 19 and
- (b) a member of a class of persons designated by the person in charge of the correctional centre to exercise the powers and perform the duties and functions under section 19

[90] Section 19 of the CA, located in Part 2 under Division 3 of the CA - Security Measures - contains the provisions governing the "capture" of inmate communications[15]:

Inmate communication

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

19(2) An authorized person may without individualized suspicion intercept or record inmate communication.

19(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.

19(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.

- [91] The CA does not contain the term "passive recording" but the evidence establishes that this is a term of art that has seeped into the lexicon of the correctional authorities and counsel. It means that all 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".
- [92] While the term "intercept" is not defined either, read in the full context of s. 19 of the CA which includes written communications such as mailed letters, "kites" or notes, "intercept" means that the written communication can be opened - intercepted - before it is delivered to the addressee, be it an inmate mailing or sending a note out or an inmate receiving mail from outside the institution or from another inmate within the institution.
- [93] "Record" means to capture the oral communication. "Monitor" means to either listen to electronically recorded inmate communications or read written inmate communications as s. 14(1) of the CAR below makes plain.
- [94] Understood in this context, s. 19(1) is the general authorizing provision that permits the overall regulation of inmate communications. Germane to this application, s. 19(2) permits the automatic recording of all telephone calls. It 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.
- [95] Importantly, s. 19 is found in Part 2 of the CA, which contains the provisions dealing with custody of inmates. More specifically, s. 19 is contained within Division 3 of the CA, the provisions dealing with security measures for the management of inmates in a custodial setting. Other security measure procedures authorized in Division 3 include:
- s. 12 - the use of force and restraining devices;
 - s. 13 - the search of inmates;
 - s. 14 - the search and detention of visitors;
 - s. 15 - the search and detention of staff members;
 - s. 16 - the search of vehicles;
 - s. 17 - contraband and trespassing offences;
 - s. 18 - powers of seizure and disposition of things seized; and

· s. 20 - the use of urinalysis screening.

[96] Collectively, the provisions in Division 3 of the CA are designed to assist in regulating the internal day-to-day operations of a correctional centre in a manner that is secure, safe and protects everyone - staff, inmates, and visitors, as well as the greater public and community at large.

[97] Significantly, s. 19 of the CA cannot be read in isolation from the companion provisions in the CAR outlined below.

B. Correction Act Regulation, B.C. Reg. 58/2005

[98] Sections 13, 14, 14.1 and 15 of the CAR, contained in Part 3 - Custody of Inmates, Division 1 - Security Measures, are the companion regulations to s. 19 of the CA and provide further context to the regulatory scheme.

Privileged communication

13. Communication between an inmate and the following is a privileged communication:

- (h) the inmate's lawyer, or a lawyer from a jurisdiction other than British Columbia who is able to satisfy the person in charge that he or she is qualified to practise law in that jurisdiction and is a lawyer representing the inmate in respect of a legal matter in that jurisdiction

Inmate communication

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

- (a) 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) read inmate communication delivered to the correctional centre or sent from within the correctional centre.

14(2) Inmate communication by telephone or other electronic means may be recorded.

14(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.

14(4) Inmate communication by mail may be intercepted and examined by an authorized person to determine if the mail contains contraband.

14(5) [Repealed B.C. Reg. 191/2007, Sched., s. 1(b).]

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.

15(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.

[99] Section 13 of the CAR is the statutory declaration of the obvious - inmate communications with their lawyers are privileged. The evidence adduced is clear that if a lawyer's telephone number is registered with BC Corrections as a privileged telephone number then calls to that privileged number will automatically be exempted by the ICCS from the passive recording procedure - they will not be recorded.

[100] Section 14 of the CAR sets out the conditions under which inmate calls may be recorded. All calls may be recorded. It is only where an authorized person has reasonable grounds to believe that one or more of the prohibited activities enumerated in s. 14(3)(a) are being discussed in the recorded call that the call may be monitored.

- [101] Section 15 of the CAR outlines the conditions for the retention of recorded inmate calls. They are not to be retained for longer than 30 days: s.15(1). The exception to the retention policy is that the calls may be retained for longer than 30 days where there are reasonable grounds to believe that the inmate has engaged in one of the enumerated categories of prohibited conduct: s. 15(1)(a)-(c). Moreover, inmates' telephone calls are not to be provided to others in the absence of lawful authority, e.g. a production order or a search warrant: s. 15(2).
- [102] Like the CA, the CAR provisions regulating inmate communications (ss. 14-15) are included in a larger scheme found in Part 3 of the CAR - the provisions dealing with custody of inmates. More specifically ss. 14 and 15 are contained within Division 1 of the CAR - the provisions dealing with security measures of inmates in a custodial setting. Other security measure procedures authorized in Division 1 include:
- s. 9 - the use of physical restraint devices;
 - s. 10 - the search of inmates;
 - s. 11 - strip searches;
 - s. 12 - strip searches under certain circumstances;
 - s. 13 - privileged communications;
 - s. 16 - urinalysis demands;
 - s. 17 - separate confinement - short term;
 - s. 18 - separate confinement - long term;
 - s. 19 - voluntary separate confinement; and
 - s. 20 - termination of separate confinement by person in charge.
- [103] Collectively, the provisions in Division 1 of the CAR, dealing with security measures in the correctional centres, are designed to assist in regulating the internal day-to-day operations of a correctional centre in a manner that is secure, safe and protects everyone - staff, inmates, visitors, and the greater public and community at large.
- [104] The legislation and regulations in issue here are part of a larger regulatory scheme governing the operation, security and safety of the institutions, its residents and staff, and the public.

IV. ISSUES AND POSITIONS OF COUNSEL

- [105] Two core issues arise on this application. The first is whether the applicants have a reasonable expectation of privacy in the telephone calls sufficient to engage s. 8 of the Charter. The second is whether, assuming the applicants establish the former, the legislative provisions they impugn are reasonable.

A. The Position of the Applicants

- [106] The applicants assert that they have a reasonable expectation of privacy in the passively recorded telephone calls that the ICCS captures. They argue, however, that *Siniscalchi* is not determinative of the issue and that the findings in that decision in respect of the passively recorded ICCS telephone calls are obiter dicta and therefore not binding on this Court.
- [107] The applicants further argue that the analytical framework for assessing whether there is a reasonable expectation of privacy has evolved since *Siniscalchi* and that the normative approach to the assessment is now the governing approach. Moreover, they assert that *Siniscalchi* is based on the risk approach to assessments of privacy, an approach now eschewed by the normative approach. In essence, the applicants argue that *Siniscalchi* adopted the wrong approach to the assessment of the reasonable expectation of privacy. Rather than looking at the reasonableness of the privacy interest relative to the law, the Court ought to have first assessed the privacy interests as a normative value then considered the reasonableness of the law. To put it another way, the applicants say that *Siniscalchi* reversed the considerations thereby getting the analysis backwards.
- [108] If the applicants establish they have a reasonable expectation of privacy in their telephone calls on the ICCS, then the considerations set out in *Collins* require consideration.
- [109] Here, the applicants argue that the legislation in issue does not specifically authorize the indiscriminate passive recording of all non-privileged telephone calls on the ICCS. In order to be authorized by law, argue the applicants, there must be a specific authorization in the enabling legislation that permits the passive recording of all such calls.
- [110] If the Court finds that the passive recording is authorized by law, then the applicants argue that the law itself is not reasonable as there is no standard provided for the recording of all non-privileged telephone calls, not even reasonable suspicion. Accordingly, the applicants contend that the standardless sweep of the law in permitting the recording all non-privileged calls is unreasonable, particularly in light of the meaningful and substantial reasonable expectation of privacy that people have in their personal telephone conversations.

B. The Position of the Crowns

- [111] The Crowns concede that the applicants have a reasonable expectation of privacy in the content of their passively recorded telephone calls, acknowledging that this is what is established in *Siniscalchi*. However, they argue the expectation of privacy is significantly diminished given the custodial setting and the regulatory context. They also argue that *Siniscalchi* establishes that the act of passively recording all non-privileged inmate calls does not engage any reasonable expectation of privacy and that it is only the content of the recordings that attract a reasonable expectation of privacy.

- [112] The Crowns argue that while the applicants have a reasonable expectation of privacy in the content of the telephone conversations captured by the ICCS (albeit a diminished expectation of privacy), the passive recording and retention of the calls is authorized by law and the law, when read contextually and as a whole in its grammatical and ordinary sense, is reasonable.
- [113] All parties agree that the third component of the Collins analysis, whether the manner of the search conducted was reasonable, does not arise at this stage of the litigation.
- [114] Although the Crowns concede an expectation of privacy in the content of the passively recorded non-privileged inmate telephone calls on the ICCS, in my view it is necessary to review the jurisprudential evolution of this principle before moving to the Collins analysis.

V. GOVERNING LEGAL PRINCIPLES

- [115] Before setting out the governing legal principles, it is helpful to situate the applications in the appropriate context as that informs both the expectation of privacy analysis and the reasonableness analysis under Collins.
- [116] As in any analysis of Charter issues, understanding the contextual framework in which the issues are raised is critical. Moreover, the coda employed through out the jurisprudence is that individuals have different expectations of privacy in different contexts and in respect of different kinds of information.

A. The Specific Context of Correctional Centres and the Diminished Expectation of Privacy Therein

- [117] A central contextual feature of these applications is the fact that the telephone calls in issue originate from a correctional centre. They are made by a detained inmate either directly to a recipient or indirectly to a third person via the recipient's use of the three-way calling feature on their phone - a practice specifically prohibited by BC Corrections in order to protect the public and maintain the security and integrity of the institution. As the evidence clearly establishes, inmates are notified of this prohibition upon their admission. Furthermore, they are also notified that all their telephone calls, save privileged calls to lawyers, will be recorded. This warning is provided both upon admission and is clearly announced in signage at the telephone banks on the inmate's living unit.
- [118] As the AGBC correctly notes, inmates in a custodial setting have a greatly reduced expectation of privacy, largely because they are confined to a regulated environment in which all their movements and activities are monitored and circumscribed. The Supreme Court of Canada's decision in *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 clearly establishes this point:

[5] 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.

[Emphasis added.]

[119] Weatherall dealt specifically with a challenge by male inmates to the practice of having female correctional officers conduct frisk searches and be involved in the "count" and the "wind".[16] The constitutional challenge to these practices brought in Weatherall pursuant to ss. 7, 8 and 15 of the Charter was dismissed.

[120] Accordingly, Weatherall clearly establishes that there is a substantially reduced expectation of privacy in a custodial setting and that for some practices -frisk searches, the count and the wind, all conducted for safety and security purposes - there is no reasonable expectation of privacy.

[121] The jurisprudence since Weatherall further demonstrates that there is either a greatly reduced or even non-existent expectation of privacy within the custodial setting, depending on the type of search in issue. A sample of this jurisprudence was outlined in the written submissions of the AGBC:

- Fieldhouse v. Canada, [1995] B.C.J. No. 975 (C.A.) - there is no reasonable expectation of privacy with respect to random urinalysis testing conducted in a penitentiary (para. 17);

- Gagnon v. LeClerc Institution, [1997] F.C.J. No 1613 (T.D.) - visitors had no reasonable expectation of privacy with respect to the application of the IONSCAN policy and searches they were subjected to prior to entering a federal correctional facility (paras. 11-18);

- R. v. Guimond, [1999] M.J. No. 213 (Q.B.) - an accused detained in a correctional centre was found to have no reasonable expectation of privacy in documents found on her person and in her cell following her admission. The searches, undertaken for the purposes of the security of the institution, were pursuant to the governing rules and regulations of which the accused was aware (paras. 32-38);

- R. v. Stevens, 2001 ABQB 340 - two accused detained in custody challenged the seizure and review of letters to each other arguing breaches of their s. 8 Charter rights. Both accused had been informed that their correspondence could be read (paras. 30-35). The trial judge held that the context of a custodial setting made it reasonable to assume a seriously curtailed expectation of privacy (paras. 20-23). The applications were dismissed as in the totality of the circumstances there was no reasonable expectation of privacy and so s. 8 of the Charter was not engaged (para. 36);

· R. v. Blais, [2004] O.J. No. 40 (C.A.) - upon admission to a detention centre, an accused's personal possessions were placed in a transparent plastic bag. A police officer investigating the offences the accused was charged with looked at the contents of the plastic bag and compared a key obtained from a co-accused to one in the accused's personal possessions. The officer then obtained a warrant to seize the key from the accused's possessions. Mr. Justice Rosenberg, writing for the Court, applied the "totality of the circumstances" analytical framework from R. v. Edwards, [1996] 1 S.C.R. 128 to determine whether the accused had a reasonable expectation of privacy in the goods in the bag. He concluded that the expectation of privacy was restricted to the belief that the state would preserve and return the goods upon release. The accused could not reasonably expect that agents of the state would not inspect the goods, although he could expect that the police would obtain a search warrant before seizing them (paras. 11-13);

· R. v. Johnston, 2014 ONSC 5789 - a detained accused had documents both in his cell and in his institutional administrative file that were seized by the police pursuant to a search warrant but which correctional officers had gathered prior to the attendance of the police with the search warrant. The accused had no expectation of privacy in the documents in his administrative file and only a limited privacy interest in the documents in his cell. While the accused could reasonably expect that the police would not seize his belongings without a search warrant and that the staff would not hand the documents over to the police in the absence of a search warrant, he could not reasonably expect that the institutional staff would not search his belongings, inspect them, or cause them to be removed from his immediate possession (paras. 41-47).

[122] Collectively, these decisions establish that inmates in custodial facilities are subject to surveillance, search, and scrutiny as prisons, penitentiaries, and correctional centres are necessarily highly regulated and regimented environments in order to preserve the security and safety of all within such facilities - staff, inmate, and visitor - as well as the public in general. It is an environment in which an inmate has a substantially diminished expectation of privacy: R. v. McIsaac, 2005 BCSC 385 at para. 27.

[123] In addition to the above cases, a number of authorities have specifically addressed the degree of privacy that inmates can expect in their telephone calls from correctional facilities.

B. Jurisprudence Addressing the Recording of Inmate Calls from a Correctional Centre

[124] This case is certainly not the first time the propriety of the practice of recording all inmate calls has been addressed by this Court or other trial courts. It might be the first time the recording of three-way calls has been raised by the recipient of the three-way call. However, again, the context is fundamentally important. These are telephone calls that originate from a provincial correctional centre and the inmate caller and the first recipient of the call are clearly notified that their call will be recorded.

1. BCSC Decisions Addressing the Expectation of Privacy in Inmate Telephone Calls

- [125] In *R. v. Hansen*, 2003 BCSC 927, Mr. Justice Joyce relied on two earlier decisions of this Court - *R. v. Rodney* (1991), 65 C.C.C. (3d) 304 (B.C.S.C.) and *R. v. Stubinski*, 2002 BCSC 613 - to conclude that an inmate is entitled to a reasonable expectation of privacy with respect to telephone calls, albeit one that is less than that of an ordinary citizen. Accordingly, the accused in *Hansen* was found to have a reasonable expectation of privacy and was entitled to rely on the assumption that his calls would only be recorded to the extent permitted by law.
- [126] The ICCS system was in use at the time of the recordings made in the *Hansen* case, but the legislative provisions in existence were not the same as exist now. Specifically, the legislation in issue in *Hansen*, s. 43 of the Correctional Centre Rules and Regulations, did not authorize the blanket recording of all inmate calls. Moreover, as Mr. Justice Parrett pointed out in *McIsaac*, the decision in *Rodney* pre-dated the Supreme Court of Canada's seminal decision in *Weatherall* as well as the decisions in *R. v. Plant*, [1993] 3 S.C.R. 281 and *R. v. Edwards*, [1996] 1 S.C.R. 128 that set out the analytical approach to s. 8 of the Charter (para. 63). The reach of *Hansen* has been limited by subsequent decisions of this Court.
- [127] In *R. v. Akins*, 2003 BCSC 1648, Madam Justice Boyd considered whether the accused's s. 8 Charter right was breached when his telephone calls from the Surrey Pretrial Centre ("SPC") were recorded by the ICCS and then provided to police when they attended with a warrant to obtain the accused's calls. Justice Boyd outlined the workings of the ICCS at paras. 8-13. The evidence was similar to what was adduced in this hearing, albeit the ICCS is now in a second iteration and appears to collect more call data than what was outlined in *Akins*.
- [128] Justice Boyd squarely addressed the conflict in the authorities of the Court and summarized the relevant authorities in each branch of the jurisprudential debate (at paras. 16-26). She declined to follow the *Stubinski* and *Hansen* line of authority, in part because the evidence adduced before her was more detailed as to the history of the telephone system within BC Corrections facilities and the rationale for the design of a passive computer recording system (at para. 26). In the end, she found no breach of s. 8 of the Charter. Absent from the analysis in *Akins* was the question of whether the accused in that case had a reasonable expectation of privacy in his telephone calls. Rather, this was implicit in the decision.
- [129] The concluding observations of Boyd J. in *Akins* are salutary and apposite to the circumstances that the current ICCS creates:
- [34] I am satisfied that the assumption an inmate's telephone calls might well pose some security risk underlies the entire operation of the ICCS system. Despite that concern an inmate is nevertheless allowed unrestricted access, albeit subject to advance notice of the limitations of his privacy. There is a passive recording of all telephone calls which he places, which recordings will only be accessed and listened to if a security issue is raised. The telephone recipients are also allowed the opportunity to block calls.

- [35] While it is expected that abuses will and do occur, the system nevertheless represents the most refined telephone system presently available which both respects the accused's right to be secure from any unreasonable search and seizure (or at least the accused's residual privacy rights) and the public's interest in being protected from whatever security risks arise from inmates' unlimited telephone access.
- [36] In light of all of this evidence, I am satisfied that while the passive recording or interception of the accused's telephone calls might amount to a "seizure" of his "information", that seizure cannot be characterized as an unreasonable seizure. Thus I conclude there has been no breach of s.8 of the Charter of Rights and Freedoms.
- [130] In *R. v. Bartkowski*, 2004 BCSC 44, Mr. Justice Macaulay dismissed a defence application for a declaration that s. 43 of the Correctional Centre Rules and Regulations, BC Reg 284/78 (the "CCRR") made pursuant to the Correction Act, RSBC 1996, c. 74 (the "CA 1996") offended s. 8 of the Charter and was unconstitutional. The CA 1996 and the CCRR were repealed in 2005 and replaced with the current legislative provisions engaged on this hearing. For the purposes of these reasons it is sufficient to note that in *Bartkowski*, Macauley J. was dealing with calls that had been monitored - meaning listened to - as distinct from calls that were simply passively recorded and held on the ICCS database. Nevertheless, Macauley J. took into account the fact that all non-privileged calls were automatically recorded by the ICCS (para. 39).
- [131] Justice Macauley declined to follow the *Rodney / Stubinski / Hansen* line of authority (paras. 33-43). The decision also confirms that inmates in correctional facilities have a substantially reduced expectation of privacy. In the end, Macauley J. found that monitoring calls was a useful prevention tool of sufficient importance to override an inmate's residual expectation of privacy and that the requirement of a reasonable belief protected against indiscriminate use of the tool (paras. 47-48). The constitutionality of the impugned provision was upheld (para. 49). With respect to the s. 8 analysis, Macauley J. concluded that the accused did not have the necessary subjective expectation of privacy given his intimate familiarity with the procedures respecting use of the telephone (paras. 54-60).
- [132] It is worth noting at this juncture that the decisions in *Akins* and *Bartkowski* pre-date the refinement of the analytical framework solidified in the *Tessling*, *Patrick* and *Spencer* line of authority.[17] *Akins* and *Bartkowski* appear to merge the assessment of whether there is a reasonable expectation of privacy in recorded inmate telephone calls with whether there has been a breach of s. 8 of the Charter. The decisions determine that in the circumstances of those cases - that is, telephone calls made by inmates to outside parties - using the ICCS did not constitute an unreasonable search or seizure within the meaning of s. 8 of the Charter.
- [133] In *R. v. McIsaac*, 2005 BCSC 385, Mr. Justice Parrett reviewed the diverging lines of authority in this Court and followed the approach in *Akins* and *Bartkowski*. The accused in *McIsaac* had made threatening telephone calls to the complainant, his common law spouse, while

detained on various charges including assault causing bodily harm, sexual assault causing bodily harm and uttering threats. The police were made aware of the threatening telephone calls through the complainant and her grandparents. Investigators attended at the correctional centre to obtain the automatically recorded telephone calls. Corrections officials required a warrant and so a search warrant was obtained and the recorded calls were produced on 14 CDs.

- [134] The accused argued that his s. 8 Charter rights were breached by the passive recording of his telephone calls. Justice Parrett reviewed the principles from *Edwards* with respect to reasonable expectation of privacy before discussing the operation of the ICCS at length (paras. 28-48). That evidence largely mirrors the evidence adduced in the instant case. Justice Parrett observed that there is a substantially reduced expectation of privacy in a custodial setting and that inmates are notified and warned in numerous ways that their telephone calls are recorded (paras. 27 & 51-55).
- [135] In addressing the accused's s. 8 challenge Parrett J. found that the institution made it abundantly clear to inmates that if they chose to use the ICCS telephone system all calls, save privileged calls, were subject to recording and monitoring (para. 52). Moreover, given the visual warnings placed by the telephones on the living unit and the audio notification or "voice over" that was played when an inmate placed a call, Parrett J. found that it was virtually impossible for the accused to use the ICCS without being reminded of the fact that his calls were recorded (para. 53).
- [136] In the end, Parrett J. concluded the accused had neither the necessary subjective expectation of privacy nor, in any event, would such an expectation have been objectively reasonable in the circumstances (paras. 68-70). Accordingly, *McIsaac* is authority for the proposition that an accused inmate has no objectively reasonable expectation of privacy in their passively recorded telephone conversations captured by the ICCS.
- [137] Significantly, Parrett J. also examined whether the conversations were "private communications" within the meaning of the term in Part VI of the Code (paras. 56-58). He concluded that because inmates are fully aware of the recording and monitoring policy in so far as their non-privileged telephone communications are concerned, they are not private communications:
- [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.

- [138] In *R. v. Ballantyne*, 2008 BCSC 1566, Mr. Justice Chamberlist addressed the accused's claim that his s. 8 Charter rights had been breached when police seized his recorded telephone calls from two correctional centres in Manitoba as well as a letter he wrote to his mother while detained in one of those correctional centres. The accused sought to exclude the evidence from his trial.
- [139] Following the *Akins / Bartkowski / McIsaac* line of authority, Chamberlist J. found that inmates have a "greatly reduced objective expectation of privacy" in a custodial setting (para. 32). The totality of the evidence established overwhelmingly that the accused was advised and aware that his telephone calls were recorded (paras. 39-44). In applying *McIsaac* and the totality of the circumstances test from the jurisprudence, Chamberlist J. concluded in *Ballantyne* that the accused had no reasonable expectation of privacy in either his recorded telephone calls (paras. 51-52) or his mail sent from the correctional centre (para. 88).
- [140] The accused in *R. v. Pickford*, 2005 BCSC 161 had been detained at the North Fraser Regional Correctional Centre ("NFRCC") where his calls had been recorded through the ICCS process that BC Corrections employed. In addressing the accused's claim that his s. 8 rights had been infringed by the recording of his calls, Mr. Justice Truscott followed the *Akins / Bartkowski / McIsaac* line of authority and stated:
- [12] All three decisions determined that an inmate in a pre-trial centre or a corrections centre has a substantially reduced expectation of privacy in his non-privileged telephone calls as a result of his lawful detention. The knowledge of the monitoring and recording policy reduces the accused's expectation of privacy to the point where it ceases to be reasonable.
- [141] Justice Truscott went on to conclude that the passive recording of all non-privileged calls did not constitute an unreasonable search and seizure under s. 8 of the Charter (para. 13). Carved out on its own from the rest of the ruling, this could suggest that there was a reasonable expectation of privacy (albeit significantly diminished) in the calls but that the recording of the calls did not violate s. 8 of the Charter. However, when paras. 12 and 13 of *Pickford* are read as a whole with the concluding paragraphs of the ruling (paras. 35-36) it is clear that Truscott J. made his findings in the alternative. Read as a whole, *Pickford* establishes:
- The inmate accused had no subjective expectation of privacy in his ICCS recorded non-privileged telephone calls (paras. 12 & 35).
 - Even if the inmate accused had a subjective expectation of privacy in his ICCS non-privileged recorded calls, the expectation of privacy was not objectively reasonable (paras. 12 & 35).
 - Even if the expectation of privacy in an inmate's passively recorded non-privileged calls on the ICCS was objectively reasonable, the process does not constitute a breach of s. 8 of the Charter (para. 13).

· In the alternative, if Truscott J. was in error as to the reasonable expectation of privacy result, he adopted the conclusions of Boyd J. and ruled that the calls were admissible under s. 24(2) (para. 36).

[142] Although the decisions relied upon in Pickford were decided under the previous iteration of the CA and CAR, that did not undermine the authority of those rulings (para. 21-33).

[143] What Truscott J. did note, however, is that there appeared to be an inconsistency between the provisions of the CA and the CAR - specifically, as between the provisions of s. 14(2) and (3) of the CAR (paras. 24-32). In the end, he concluded that it was s. 19 of the CA that authorized the recording of all non-privileged calls of an accused without individualized suspicion (para. 32).

[144] On balance, with the exception of the Hansen / Stubinski line of authority, this Court has held that an inmate in a BC correctional centre has no subjective expectation of privacy in the recording of their non-privileged telephone calls on the ICCS. In the alternative, in the totality of the circumstances, particularly in light of the numerous and repeated warnings that non-privileged telephone calls on the ICCS are recorded, any subjective expectation of privacy that an inmate might have would not be objectively reasonable. In the further alternative, the recording of such calls does not violate s. 8 of the Charter.

[145] Ultimately, however, those decisions from this Court are not determinative of the reasonable expectation of privacy as the Court of Appeal's 2010 decision in Siniscalchi squarely addressed the issue.

2. What did R. v. Siniscalchi decide?

[146] Siniscalchi was a conviction appeal of two counts of robbery and one count of aggravated assault. The main issue on appeal was whether the trial judge had erred in admitting into evidence the transcripts of telephone calls between the accused and his wife. The accused had been detained at the NFRCC in January 2007. His telephone calls had been recorded on an earlier iteration of the ICCS. The accused made 21 telephone calls to his wife over a nine-day period. The police obtained a production order and obtained the recordings of the conversations which were translated and transcribed. The transcripts contained no confessions of guilt. Although the Crown sought to use the transcripts to infer guilt given the tenor of the conversations, the trial judge did not use the transcripts for that purpose but rather used them in assessing the accused's credibility in the context of his alibi defence.

[147] At trial, the accused argued the recordings had been obtained in violation of his s. 8 Charter rights but did not argue the separate admissibility issue of spousal privilege. On appeal, Mr. Justice Groberman, writing for the court, addressed and dismissed the spousal privilege argument (paras. 30-63).

[148] Turning to the s. 8 issue, Groberman J.A. addressed the question of whether inmates had a reasonable expectation of privacy in their recorded telephone conversations. The analytical framework employed to assess this issue was essentially the Edwards line of inquiry (paras. 65-69). However, the two determinative considerations from the Edwards inquiry in *Siniscalchi* were whether the accused had a subjective expectation of privacy and whether any such expectation was objectively reasonable (paras. 68-69, 71).

[149] In order to assess these questions, Groberman J.A. conducted a considered review of the context engaged by the totality of the circumstances, including:

- the legislative provisions of the CA and the CAR (para. 74-76);[18]
- the governmental policy with respect to the ICCS as contained in the policy manual "B.C. Corrections Branch Adult Custody Policy" - specifically s. 7.8.10 (Notification), s. 7.8.13 (Access to Records), s. 7.8.14 (Dissemination of ICCS Records), s. 7.8.15 (Monitoring Calls) and s. 7.8.16 (Disclosure of Information)[19] (para. 77);
- the inmate notification document signed by the appellant[20] (para. 78);
- the signage near each of the telephones that inmates use to make calls on the ICCS[21] (para. 79); and,
- the general practice of how calls are made by an inmate on the ICCS system (paras. 80-82).

[150] Justice Groberman then made the following determinations in respect of the reasonable expectation of privacy:

- i. The policies represent a considered compromise between inmate privacy and prison security. Inmates know their conversations are not absolutely private given the numerous warnings that their calls are recorded and may be listened to in limited circumstances (para. 84);
- ii. Inmates have a diminished (but not extinguished) expectation of privacy in their telephone calls (para. 85):
 - a. They must expect their calls will be recorded (para. 85);
 - b. They are on notice that their calls may be listened to in certain circumstances (para. 85);
 - c. They are entitled to expect the content of their calls will be kept confidential by the authorized individuals entitled to access them, save where there are reasonable grounds to believe that the subject matter of the calls trenches on the three prohibited areas - illegal activities, threats to others or threats to the security and operations of the correctional centre (para. 85);
- iii. Inmates have a privacy interest in their telephone calls that engages s. 8 of the Charter (para. 88).

- [151] After briefly referring to the trial court decisions on this issue - specifically Stubinski, Hansen, Akins, Bartkowski and McIsaac - Groberman J.A. concluded there was no violation of s. 8 of the Charter in the passive recording of inmate telephone calls (paras. 95-98). However, he disagreed with the Akins, Bartkowski, McIsaac line of reasoning that once a call is recorded an inmate has no privacy interest in its content (para. 98).
- [152] Mr. Justice Groberman went on to hold:
- [98] Rather, I agree with Tysoe J.'s observation in Stubinski that an inmate has some reasonable expectation of privacy in telephone calls, even though they are subject to being monitored. The expectation is not absolute. It is tempered by the realization that the calls will be intercepted to the extent authorized by the regulations. It is an expectation that calls will only be listened to for proper purposes by prison officials, and that those officials will not disseminate the recordings further in the absence of a judicial authorization or exceptional circumstances (e.g. where the calls disclose concerns for the security or operation of the institution).
- [99] In summary, Mr. Siniscalchi could not expect his telephone conversations to be immune from interception by prison authorities. He could also hold no expectation that those authorities would refrain from involving the police if his conversations disclosed threats to security. He was entitled, however, to expect that prison authorities would listen to the conversations only where the statutory pre-conditions were met, and to expect that routine conversations that had no apparent connection with crime or prison security would be kept confidential by any prison official who heard them.
- [100] I conclude, then, the recording of the telephone conversations was proper (Mr. Siniscalchi does not contend otherwise). It was also appropriate for prison authorities to refuse to provide the recordings to the police absent judicial authorization. They acted appropriately in so doing. Mr. Siniscalchi had a privacy interest in the contents of the recordings sufficient to found a right under s. 8 of the Charter.
- [153] Accordingly, Siniscalchi is authority for the proposition that inmates do have a reasonable expectation of privacy in their recorded telephone calls, albeit significantly reduced given the custodial setting and the repeated warnings that calls are recorded. Although no inmate can be under the illusion that their calls will not be recorded, they nevertheless, on the authority of Siniscalchi, do have a sufficient privacy interest in their recorded calls to found a right under s. 8 of the Charter (paras. 98-101).
- [154] I do not propose to review the numerous other provincial trial court decisions that were provided on this application in respect of the reasonable expectation of privacy in inmate telephone calls. Although informative, they are not binding on this Court.

VI. The Two Analytical Frameworks Engaged by These Applications

[155] There are two analytical frameworks in play on these applications - the reasonable expectation of privacy analysis to determine if the applicants have standing to advance a s. 8 Charter challenge and the Collins analysis to assess the reasonableness of the impugned legislative provisions if the applicants establish standing.

A. Reasonable Expectation of Privacy Generally

[156] I set out in detail the general principles that animate the reasonable expectation of privacy analysis in an earlier ruling in the Latimer indictment proceedings: *R. v. Latimer*, 2020 BCSC 488 ("Latimer 488").

[157] The legal principles reviewed (paras. 97-104) and the analytical framework applied in that ruling inform the assessment of the first issue on this application and are therefore incorporated into these Reasons by reference to them. In summary, as noted in Latimer 488 (para. 162) the existence of a reasonable expectation of privacy is determined by assessing the totality of the circumstances. The jurisprudence from the Supreme Court of Canada mandates that the factors relevant to this contextual analysis can be grouped into four lines of inquiry:

- i. The subject matter of the alleged search;
- ii. The applicant's interest in the subject matter;
- iii. Whether the applicant had a subjective expectation of privacy in the subject matter; and
- iv. Whether the subjective expectation of privacy was objectively reasonable.[22]

[158] In respect of the assessment of the fourth line of inquiry, whether the subjective expectation of privacy was objectively reasonable, as noted in Latimer 488 (para. 194) the "totality of the circumstances" assessment mandates consideration of the following factors:

- a. The place where the alleged "search" occurred; in particular, did the police trespass on the applicant's property and, if so, what is the impact of such a finding on the privacy analysis?
- b. Whether the informational content of the subject matter was in public view.
- c. Whether the informational content had been abandoned.
- d. Whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
- e. Whether the police technique was intrusive in relation to the privacy interest.
- f. Whether the use of this evidence gathering technique was itself objectively unreasonable.
- g. Whether the informational content exposed details of the claimant's lifestyle, or information of a biographical nature: Tessling at para. 32; Marakah at para. 24.

[159] Of course, as the assessment is contextual, some factors will have more significance than others, depending on the circumstances. Indeed, some factors will either have no application at all depending on the materials in issue and where they are held or be of such limited application that little weight is given to them: *Siniscalchi*, at paras. 67-69.

B. The Analytical Framework of *R. v. Collins* for Assessing the Reasonableness of the Impugned Legislative Provisions

[160] In *Collins*, the Supreme Court of Canada set out the framework for determining whether a search or seizure complies with s. 8 of the Charter (para. 23). Where it is established that an individual has a reasonable expectation of privacy in the materials searched or seized, the Crown must satisfy three conditions for the search or seizure to be Charter compliant:

- i. the search or seizure was authorized by law;
- ii. the law authorizing the search or seizure was itself reasonable; and
- iii. the search or seizure was carried out in a reasonable manner.

VII. ANALYSIS

[161] I propose to use a number of specific terms in my analysis which are defined as follows:

- i. **Originator** - the inmate making the telephone call on the ICCS from inside a correctional centre;
- ii. **Recipient** - the person accepting the originator's telephone call and can be the person connecting the originator with another person (the "third party recipient") on another telephone line by means of the three-way calling feature on the recipient's telephone or by handing the telephone to another person present with the recipient or by using the speaker function (the "other recipient participants");
- iii. **Third party recipient** - the person connected to the originator by means of a three-way connection initiated by the recipient by calling the third party recipient's telephone number from the telephone that has received the originator's call and then links the originator and third party recipient together through the technology available on the recipient's telephone; and,
- iv. **Other recipient participants** - individuals joining into the conversation with the originator by means of the recipient
 - a. handing the telephone to them after the call has been connected; or
 - b. utilizing the speaker function on the telephone to permit more than one person present with the recipient to join in a conversation with the originator.

- [162] Only the originator's telephone number and the recipient's telephone number are captured as part of the CDRs within the ICCS program. The third-party recipient's telephone number would only be captured through the originator actually advising the recipient of the telephone number to call to facilitate a three-way call. The ICCS does not record the third-party recipient's telephone number, only the conversation between the inmate and third party recipient.
- [163] As in *Akins*, *Bartkowski*, *McIsaac* and *Siniscalchi*, several overarching features inform the analysis of the issues in this case: (i) inmates in a custodial setting have a substantially reduced expectation of privacy given the highly regulated and controlled environment they find themselves in, (ii) they are informed in a myriad of ways that their telephone calls are recorded, and (iii) they are told that three-way calls are prohibited.
- A. Do the applicants have a reasonable expectation of privacy in their conversations recorded on the ICCS?
- [164] The first issue is whether the applicants have established on a balance of probabilities that they have a reasonable expectation of privacy in telephone calls that originated from a provincial correctional centre and were recorded on the ICCS. Section 8 of the Charter is engaged only if the applicants have a reasonable expectation of privacy in the subject matter of the alleged search or seizure.
- [165] Curiously, Mr. Kang asserts that *Siniscalchi* is not binding on this Court because (i) the part of the decision addressing the recording of inmate calls is obiter dicta, (ii) a normative analysis of privacy principles developed after *Siniscalchi* in decisions like *Marakah* and *Jarvis*, and (iii) the analytical approach in *Siniscalchi* erroneously uses the risk approach to assessments of privacy, an approach now eschewed by the normative approach. The applicants assert that the Court of Appeal in *Siniscalchi* ought to have first assessed the privacy interests as a normative value then considered the reasonableness of the law, rather than looking at the reasonableness of the privacy interest relative to the law.
- [166] I must respectfully disagree with those assertions.
- [167] As can be seen from my review of *Siniscalchi*, the Court of Appeal's privacy analysis of the issue of recording of inmate calls on the ICCS was central to its conclusion that s. 8 of the Charter was engaged. Rather than being obiter dicta and therefore superfluous to the decision as to whether the appellant could claim a s. 8 Charter violation, the privacy analysis was central to the decision and the need for the Court to determine if there had in fact been a breach of the appellant's s. 8 rights.
- [168] As the federal Crown rightly points out in her written submission (para. 14), the Supreme Court of Canada jurisprudence shaping the analytical framework for the assessment of an expectation of privacy has been fully engaged since *Tessling*. While the decisions in *Marakah* and *Jarvis* have added to the jurisprudence considering the parameters of informational privacy, they have not changed the architecture of the analytical framework

for determining whether or not an individual has a subjective and objectively reasonable expectation of privacy. Indeed, the analysis in *Siniscalchi* is framed in that fashion.

- [169] In so far as the criticism that *Siniscalchi* engaged in a risk analysis approach rather than a normative approach is concerned, I disagree. Justice Groberman did not engage in a risk analysis when he concluded that inmates have a diminished expectation of privacy in their telephone calls. In my view, that finding is simply the result of an application of the contextual or totality of the circumstances approach mandated by the jurisprudence including in *Tessling* and *Marakah*. Privacy interests occur along a continuum and the totality of the circumstances assists in determining where on the continuum a particular privacy interest is placed.
- [170] While I would have reached a different conclusion on the application of the reasonable expectation of privacy framework and adopted the reasoning from *McIsaac* - that there is no objectively reasonable expectation of privacy in the ICCS recorded inmate non-privileged telephone calls - the Court of Appeal has ruled differently in *Siniscalchi*.
- [171] On a straight application of the principles of *stare decisis*, I am bound by the decision in *Siniscalchi*: *R. v. Kang*, 2019 BCSC 2109. Accordingly, it is not necessary that I independently assess whether there is a reasonable expectation of privacy in the impugned calls.
- [172] As noted previously, *Siniscalchi* is authority for the proposition that inmates do have a reasonable expectation of privacy in their recorded telephone calls, albeit a significantly reduced one given the custodial setting and the numerous and repeated notifications that calls are recorded. Although no inmate can be under the illusion that their calls will not be recorded (paras. 98-101), they nevertheless, on the authority of *Siniscalchi*, do have a sufficient privacy interest in their recorded calls to found a right under s. 8 of the Charter.
- [173] Indeed, both the provincial and federal Crowns concede that on the basis of *Siniscalchi* inmates have an expectation of privacy in their ICCS passively recorded telephone calls, albeit a greatly attenuated expectation of privacy.[23]
- [174] The Crowns contend, however, that *Siniscalchi* suggests there is no reasonable expectation of privacy in the act of passively recording the calls and only a low expectation of privacy in the content of those calls. I would not parse *Siniscalchi* so finely. What *Siniscalchi* makes clear is that participants to inmate telephone calls on the ICCS platform have a reasonable, albeit reduced, expectation of privacy in the content of those calls. While originators and recipients must expect their calls to be recorded, they do not expect their calls to be listened to in the absence of the statutory grounds. It would make little sense for there to be no expectation of privacy in the act of recording the calls but to then imbue the content of those calls with a privacy interest for monitoring purposes. The act of recording the calls makes the intangible tangible and creates a permanent record of the conversation.

- [175] In my view, the decision in *Siniscalchi* ends the inquiry as to whether or not inmates have a reasonable expectation of privacy in their telephone calls recorded on the ICCS - the Court of Appeal has determined that they do. Moreover, it follows that if an inmate has a reasonable expectation of privacy in their non-privileged telephone calls on the ICCS, then the recipients of the calls who hear the same warning would have a similar expectation of privacy as would third-party recipients and other recipient participants who join the conversation - to conclude otherwise would be absurd.
- [176] What has not been addressed in the jurisprudence, or in detail in the submissions on this application, is the level of privacy that can be expected with respect to the CDRs that are part of the information captured in ICCS recorded calls. In my view, given the breadth of information they capture there could well be a higher expectation of privacy around the CDRs in some cases than the actual recorded calls. The information contained in the CDRs can be fairly personal, such as the amount of time an inmate spends talking to a lawyer or a doctor or how frequently an inmate contacts particular friends or family members. This information, in my view, is not simply general data or information metrics; rather, the CDRs, depending on what analytical reports are generated by Corrections officials, could reveal details of the lifestyle and personal choices of the inmate or information of a biographical nature: *Marakah*, para. 24. However, the CDRs on their own are relatively meaningless. It is only when an action, such as the preparation of an analytics report specific to an inmate's CS number and the numbers called by that inmate, is undertaken that the information collected has a more personal meaning. In my view, that issue relates more to implementation or a specific search than to the constitutionality of the legislation. Suffice to say, there is a reasonable expectation of privacy in the CDRs.
- [177] On the strength of the reasoning in *Siniscalchi* and the Crowns' concession, the applicants have standing to challenge whether the impugned provisions of the CA and the CAR violate their s. 8 Charter right to be secure from unreasonable search and seizure.
- [178] In my view, the real issue on this application is whether the passive recording of inmate telephone calls violates s. 8 of the Charter. That assessment, given the way these applications have been framed, must be conducted under the *Collins* analytical framework.
- [179] However, before engaging in this assessment it is first necessary to address the argument of the applicants that the recorded ICCS calls are interceptions within the meaning of Part VI of the Code as well as other arguments that are more properly characterized as implementation, as opposed to constitutional validity, issues.

B. Are the Recorded ICCS Calls "Interceptions" as that Term is Employed in Part VI of the Code

[180] The applicants refer to the term "intercept" as employed in s. 184 of the Code. Mr. Kang argues that the use of "intercept" in the CA and CAR is confusing. Both Mr. Kang and Mr. Latimer argue that "intercept" in the CA and CAR should be interpreted to have the same meaning as in Part VI of the Code.

[181] "Intercept" is specifically defined in s. 183 of the Code:

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

[182] A further term of relevance to this issue is "private communication" which is also defined in s. 183 of the Code:

"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;

[183] The term "intercept" is not defined in the CA or the CAR. I would not import the specific definition from the Code into the provisions of the CA and CAR as the Code definition is highly specific to the wiretap and interception of private electronic communications provisions of the Code, which largely delineate the use of these investigative tools in the hands of law enforcement.

[184] In contrast, the ICCS records all non-privileged inmate calls pursuant to a regulatory or administrative scheme, the purpose of which, in broad terms, is to ensure that inmates have the ability to communicate with friends, family and service providers in the community while at the same time maintaining the safety and security of the institution and the community at large, including victims and witnesses. Thus, the ICCS system of recording all non-privileged calls represents a considered compromise between inmate privacy and prison security: Siniscalchi, para. 84

[185] Accordingly, "intercept" must be read in context with the whole of the relevant sections in the CA and CAR, where different modes of communication beyond just telephone calls are concerned, specifically, written communications. In that respect, "intercept" used as a transitive verb is defined by the Oxford English Dictionary[24] to mean:

To seize, catch, or carry off (a person, ship, letter, etc.) on the way from one place to another; to cut off from the destination aimed at.

- [186] Given that the term "monitor" in the CAR is defined as "to listen" (in the context of telephone calls - s. 14(1)(a)), and "to read" (in the context of written communications - s. 14(1)(b)) the definition of intercept from the Code would be surplusage in the circumstances. Accordingly, "intercept" in the context of the CA and CAR relates to interrupting or seizing a written communication as between sender and recipient of the communication.
- [187] Indeed, s. 14(4) of the CAR makes this abundantly clear as this is the only place in the CAR provisions relating to inmate communications that the term is employed:
- 14(4) Inmate communication by mail may be intercepted and examined by an authorized person to determine if the mail contains contraband.
- [188] Thus, it is clear that the word "intercept" in s. 19 of the CA and s. 14 of the CAR refers to the act of diverting or interrupting the path of written communications as between sender and recipient. It has nothing to do with the recording of non-privileged inmate telephone calls through the ICCS.
- [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 *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.
- [190] In *McIsaac*, Parrett J. found that the calls were not "private communications" within the meaning of that term and its use in Part VI of the Code:
- [58] 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.
- [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.
- [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. Mr. Kang knew his conversations were recorded. He used his girlfriend to contact his friends and associates by means of the three-way calling feature on her telephone. That the recipients of Ms. Mattu's calls connecting Mr. Kang and others on the indictments before the Court did not hear the notifications about the calls being recorded is of no moment. Mr. Kang would have heard the notification and known his calls were being recorded. Ms. Mattu or any other recipient would have heard the notification and known their calls were being recorded. The three-way calls were in clear violation of BC Corrections policy that prohibits three-way calls. That Mr. Latimer and others did not hear the audio notification cannot sanitize the calls and turn them into private communications as that term is used in the Code. They were not. They were telephone calls made by an inmate in a correctional centre who "must expect the calls will be recorded, and [is] on notice that they may be listened to by authorized officials in limited circumstances": Siniscalchi, para. 85.

C. Issues that Pertain to the Implementation of the Legislation, not its Constitutionality

[193] Counsel for Mr. Latimer raises a number of issues that, in my view, relate more properly to the implementation of the impugned legislation than to its constitutional validity.

- [194] With respect to Mr. Latimer's concerns about solicitor-client calls potentially being recorded if made through the prohibited three-way calling procedure, again, the process ties back to the inmate making the telephone call.
- [195] Where an inmate chooses to engage in a prohibited process to contact their counsel (three-way calling) and then discuss privileged matters with or without others on the line, the inmate themselves have initiated the process. Moreover, depending on who else is on the telephone line with the inmate and the lawyer, privilege may not attach to the conversation in any event.
- [196] Again, context is critical to this issue and to those summarily rejected below. While true that the state (here BC Corrections) provides the telephone access and operates the recording system, the actions relating to the use of the telephone and engaging others in calls without the benefit of the audio notification is that of the inmates and the call recipients. Accordingly, the lack of notification to the third party recipients is caused by the actions of the inmate and the call recipient, both of whom have heard the audio notification. No state action has played a role in the third party missing the audio notification. The mischief is created by the inmate and the call recipient, not the state.
- [197] Unlike the circumstances in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 where there was a sufficient causal connection between the impugned laws and the prejudice suffered by the claimants, the circumstances in the case at bar do not have a sufficient causal connection. Any causal connection between the legislation and the state operated ICCS is negated by the actions of third parties. The AGBC adroitly distills the proposition this way:
- It is the inmate and call recipient who have wilfully engaged the third party in a conversation, which they know was being recorded. It is these private parties that have caused the theoretical lack of notice to the third party.
- [198] The AGBC describes the call participants who have been patched into a telephone call as "ignorant call participants" in reference to the possibility that they did not hear the audio notification warning that the call was being recorded. The fact of the matter remains, the inmate as the call originator and the call recipient have created the problem by circumventing the rules of the correctional centre.
- [199] The AGBC's written argument summarily addresses a number of other points that counsel for Mr. Latimer raises as constitutional issues and points out why the issues are more properly characterized as implementation issues.[25] I agree with the analysis contained therein and apply it to dismiss those concerns:
- Issue: There is no recurring audio notification. Response: The legislation does not contain provisions mandating any particular audio notification. Corrections has made decisions with respect to the implementation of the legislation, with the audio notifications this Court has heard evidence about. The audio notification procedures could be made more or less comprehensive. Such a decision rests with Corrections.

- Issue: The ICCS Notification form explicitly prohibits 3-way calling, but not other ways in which a person could be added to an inmate call and remain uninformed about calls being recorded. Response: The legislation does not contain any provision prohibiting 3-way calling. Corrections has decided, in the course of implementing the legislation, to prohibit 3-way calling, and to advise inmates of this rule. Corrections has also instituted the notifications to the inmates and to call recipients about the fact that all calls are recorded.
- Issue: The 3-way call prevention technology used by Corrections could be set at a level that would detect more 3-way calls. Response: The way in which Corrections attempts to prevent misuse of the ICCS is not something that need be set out in legislation. Corrections has the authority to make decisions with regards to how it operates the ICCS.
- Issue: Ignorant call participants have not consented to being recorded. Response: The legislature has crafted a regime that authorizes passive recording. For all the reasons set out in the Crown's response to Kang, that regime is constitutionally sound. That a class of ignorant call participants can be created does not relate to the constitutionality of the legislation, any more than the fact that some unknown persons may be intercepted during the course of a Part VI authorization, and may thus never receive notification per s. 196 or s. 196.1, brings the constitutionality of the wiretap provisions into question.

[200] I agree with the AGBC's submission that these issues do not relate to the constitutional validity of the legislation; rather, such complaints relate to BC Corrections' implementation of the legislation, a distinct matter not before the Court on this application.

[201] A further issue raised in Mr. Latimer's written argument was that there might be s. 15 Charter concerns in so far as the audio notification to call recipients is only in English and this has implications for non-English call recipients. The argument was not developed any further than this casual mention. Section 15 Charter challenges are highly fact-specific and contextual inquiries. There is no evidence that Mr. Latimer's s. 15 language rights have been infringed. Nor is there evidence that any of the other accused on this application have had their language rights infringed. Even if s. 15 of the Charter and the unilingual nature of the audio notifications were properly before the Court, in my view, this too is an implementational issue not an issue related to the constitutional validity of the legislation. Accordingly, it is not necessary to address this issue in these reasons. It does not arise on the state of the evidence or the submissions advanced.

D. Application of the Collins Test to the Provisions of the Correction Act and Correction Act Regulations

[202] Before assessing the first two branches of the Collins analytical framework it is imperative that the proper character of the legislative provisions be identified as well as the context in which the legislative provisions are set.

1. Context and Statutory Interpretation

- [203] As this part of the application concerns the interpretation of statutory language, it is important to recall that when embarking on such a task the words of the statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, both quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87. The Interpretation Act, R.S.B.C. 1996, c. 238, s. 8 reinforces the importance of taking a comprehensive approach to interpretation, stating an enactment "must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
- [204] This application is specifically concerned with s. 19 of the CA and s. 14 of the CAR. These two provisions are part of a legislative regime designed to facilitate the management of provincial correctional centres in BC. Integral to that management is ensuring the safety and security of the centres. As outlined in the legislative scheme section of these reasons (paras. 87-104) the provisions are each within the "security measures" division of the CA and the CAR and are but one of a suite of measures that relate to the management, operation and security of the heavily regulated correctional centre environment.
- [205] Part of the evidence adduced on this application was the debates of the Legislative Assembly when the provisions of Bill C-44, which became the CA, were introduced in May 2004.[26] While Hansard evidence is not determinative, it may play a role in clarifying legislative intent: *Rizzo* at para. 35; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, para. 47 [*Canadian National Railway*]; *R. v. Tannhauser*, 2020 BCCA 155, para. 35.
- [206] In addition to the printed version of the debates, video footage from the legislative debates was also tendered.[27] The video footage makes clear that there are a number of grammatical and word use errors in the printed version of the Hansard debates.
- [207] For the purposes of this application the following parts of the Hansard debates are relevant and assist in clarifying the legislative intent and purpose of the CA.
- [208] Bill C-44 was introduced by Solicitor General Coleman on May 10, 2014, who explained at first reading that the legislation was to "create a new, modern Correction Act [that] replaces the old statute and consolidates and modernizes existing provisions." Specifically, Minister Coleman explained that the legislation had three main objectives: (i) enhancing public safety "through new or strengthened legislation for the supervision and control of offenders"; (ii) protecting staff and inmates "through new security provisions for correctional centres"; and (iii) enhancing accountability of officers discharging the powers and duties of the legislation.[28]
- [209] Second reading of Bill C-44 occurred on May 12, 2004. At that time the Solicitor General spoke in more detail about the purposes of the legislation and gave a precis of some of the proposed legislative provisions. The Solicitor General reiterated the three purposes of the

legislation that he had enumerated at first reading and then explained that the legislation "creates a new, modern Correction Act which enhances public safety and [improves] accountability." [29] He went on to note that the provisions were "to protect the public and make correctional centres safer for staff, inmates and visitors." [30]

[210] More specifically, the Solicitor General explained:

The citizens of British Columbia will be protected by this legislation from inmates in correctional institutes who misuse telephone or mail privileges to threaten and criminally harass victims, spouses, witnesses and others. A very important piece of this legislation is that the people that are in custody in British Columbia are not revictimizing or threatening or carrying on crime from within our correctional institutions. [31]

[211] The video clip of this speech (Ex. #7) was played during the hearing of this application and I have listened to it again in writing these reasons. It is apparent that there are a number of differences between what is said on the video and what appears in the Hansard transcript. I agree with the submission of the AGBC that some of the Solicitor General's comments have not been transcribed as stated. The Hansard transcript is not a word for word translation of the Solicitor General's comments as phrases such as "Mr. Speaker" in the middle of a sentence have been edited out.

[212] Specific to the issues on this application there is one area of grammatical mis-transcription. I set both versions out here:

Hansard Transcript

Version as Heard in Ex. #7

p. 11065 - We have the ability to record passively all non-privileged telephone calls between inmates and other persons when corrections officials have reasonable grounds to believe an inmate is abusing a telephone privilege by engaging in criminal activity or threatening individuals. Staff will be authorized to listen recordings to verify the infraction and take action as appropriate to prevent further abuse.

We have the ability to record passively all non-privileged telephone calls between inmates and other persons. When corrections officials have reasonable grounds to believe an inmate is abusing a telephone privilege by engaging in criminal activity or threatening individuals, staff will be authorized to listen recordings to verify the infraction and take action as appropriate to prevent further abuse.

[213] Mr. Kang relies upon the Hansard transcript to support his argument that the legislation does not authorize the passive recording of all calls. Rather, only calls where corrections officials have reasonable grounds to believe the inmate is abusing the telephone privileges can be recorded. I would not accede to this interpretation as the video of the Solicitor General's comments, as contained in Ex. #7, makes it abundantly clear that the punctuation in the Hansard transcript is in error and that the proper punctuation is as outlined above in

the "Version as Heard in Ex. #7" column.

[214] The video recorded version, with the proper punctuation in place, demonstrates that the intention was to record all non-privileged telephone calls as Corrections had the ability to do. However, listening to the recordings was predicated on authorized corrections officials having the requisite reasonable grounds to do so.

[215] The Solicitor General went on to make further general remarks about the purposes of the proposed legislation and then provided a summary overview of the various new provisions in Bill C-44. In respect of communications he stated:

Communications: a new provision to authorize and control the recording, monitoring and restrictions of inmate communications to protect victims, witnesses and others from criminal activity by inmates. Authorized persons may intercept, record or monitor communications by inmates and other persons according to regulation.[32]

[216] At the conclusion of the second reading of Bill C-44 and the related debates over it, Bill C-44 was referred to a Committee of the Whole House for consideration. That clause by clause analysis and debate occurred on May 17, 2004. Ms. Kwan, a member of the Opposition NDP and the MLA for Vancouver-Mount Pleasant, conducted the lion's share of the questioning of the Solicitor General on the clause by clause analysis of Bill C-44 with a sustained focused upon s. 13 of the Bill - the provision that authorizes strip searches.[33]

[217] When s. 19 of the Bill - the provision in issue on this application - was considered there was minimal debate and questioning on the provision. The extent of the examination of s. 19 was as follows:

On section 19

J. Kwan: This is entirely new language, section 19. Was there a particular basis for devising this section, or is it just to catch up with new technology that's coming into play?

Hon. R. Coleman: Yes, it is to do catch-up. Also, it's at the advice of counsel to have it in legislation so that while we doing catch-up, the authorization is in the legislation.

Section 19 approved.[34]

[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.
- [221] With that context and the principles of statutory interpretation in mind I turn to the application of the Collins analytical framework to the arguments raised on this application.
- [222] The applicants advance sequential submissions in arguing that the impugned legislation violates s. 8 of the Charter. First, they argue that the practice of the ICCS automatically or passively recording all non-privileged inmate calls is not authorized by law. The thrust of their argument, as I understand it, is that the CA and the CAR do not specifically state that all non-privileged inmate calls on the ICCS shall be recorded. Citing *R. v. Shoker*, 2006 SCC 44 at para. 20 and *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 12, they submit that implicit authorization of a search or seizure under the enabling statute is insufficient.
- [223] Second, if the applicants are unsuccessful on the "not authorized by law" branch of the Collins analysis, they then assert that the legislative provisions that authorize the automatic recording of all non-privileged inmate calls is not reasonable.
2. Collins Step One - Is the passive recording of all non-privileged inmate telephone calls on the ICCS authorized by law?
- [224] To briefly reiterate, the question that arises at this juncture of the analysis is whether s. 19 of the CA and s. 14 of the CAR authorize the passive recording of all non-privileged inmate calls made on the ICCS. To put it another way, is the practice of BC Corrections automatically recording all non-privileged inmate telephone calls authorized by law under the provisions of s. 19 of the CA and s. 14 of the CAR?
- [225] As noted above, the applicants' argument on this point distills to an assertion that the impugned Act and regulations must specifically authorize the recording of all non-privileged calls and in fact it does not. In order to advance their argument, however, the applicants microscopically parse the impugned provisions and seek to read them not as a whole but individually without reference to the overall context of the provisions or the scheme of the Act, the object of the Act, and the intention of the legislature. By adopting this approach, the applicants assert that the legislation is confusing, unclear and open to contradictory interpretations.

- [226] In my view, the applicants' approach to interpreting the impugned provisions in the CA and the CAR is not only inconsistent with the modern approach to statutory interpretation, it is, respectfully, an exercise in obfuscation generated by an examination of the impugned provisions in isolation.
- [227] I begin by noting that the overall purpose and scheme of the CA and the CAR is threefold:
- i. To enhance public safety through legislation governing the supervision and control of offenders (both out of custody, e.g. probation and CSO supervision, and while in custody as inmates in a correctional centre);
 - ii. To ensure the protection of staff and inmates alike at correctional centres, as well as the public and vulnerable individuals such as complainants and witnesses through legislation that authorizes and governs the resort to various security measures; and
 - iii. To improve the accountability of officials authorized to use various powers granted by the legislation in respect of security and maintenance of correctional centres.
- [228] Within the suite of security measures designed to assist in the management of inmates within provincial correctional centres, thereby ensuring the safety of inmates, the staff and visitors as well as members of the public, are the specific provisions governing inmate communications - s. 19 of the CA and ss. 13-15 of the CAR.
- [229] As Groberman J.A. succinctly noted in *Siniscalchi*:
- [84] The comprehensive policies that are in place represent a considered compromise between inmate privacy and prison security. Inmates cannot be under any illusion that their conversations are absolutely private. They are warned on coming into the institution, on attending to make a phone call, and on the call being connected, that their calls are recorded, and may be listened to in limited circumstances. They are also told (and s. 15(2) of the Regulation establishes) that the recordings will not be accessed by persons outside the correctional service without lawful authority.
- [230] While Groberman J.A. was addressing policies in this passage, those policies find their genesis in the legislation and so it is fair to say that the legislation represents the Legislature's efforts to reach a balanced compromise between inmate privacy and the ability to communicate with the community beyond the correctional centre walls on the one hand and the security and integrity of the correctional centre as well as the safety of the general public on the other.
- [231] The Solicitor General's comments in the Legislative Assembly at both the introduction of Bill C-44 and second reading confirm the scheme and object of the legislation and the intention of the Legislature in enacting the CA as I have previously outlined at paras. 208-210 of these reasons. I acknowledge that this evidence, which may be relied upon as evidence of the background and purpose of the legislation, is of limited reliability and weight in determining the purpose of specific provisions; nevertheless it can and does

assist in determining the background and purpose to the CA: Canadian National Railway at para. 47.

- [232] It is also clear that the impugned provisions must be read in the context of the CA and CAR as a whole.
- [233] From that perspective, it is clear that the definition of "inmate communications" contained in s. 1 of the CA is broadly defined to cover various forms of communication - written, in-person through visits at the correctional centre, and by telephone. Section 19 of the CA and s. 14 of the CAR must be read with that expansive definition in mind. Together they constitute a comprehensive framework governing the recording and reviewing of all types of inmate communications.
- [234] Section 19 of the CA creates a ladder approach as to how all types of inmate communications may be acquired and reviewed.
- [235] The base of the ladder is the starting point, being s. 19(1) which constitutes the broad grant of authority that permits or authorizes Corrections to "restrict, intercept, monitor or record inmate communications in accordance with this section and the regulations."
- [236] The first rung on the ladder is s. 19(2) which provides that an authorized person (a defined term) may, without individualized suspicion "intercept or record inmate communication." I have already determined that intercept in this context refers to the process of interrupting or seizing a written communication. Record relates to the seizure of oral communications be they in-person visits or telephone communications. The purpose and effect of s. 19(2) is to confirm that all inmate communications can be captured - seized - by Corrections without any prerequisite grounds. This provision does not permit Corrections to review the content of the captured communication, it merely authorizes the seizure of inmate communications.
- [237] The second rung of the ladder is s. 19(3) which permits authorized persons to "restrict, intercept or monitor inmate communication" if there are reasonable grounds relating to one of three enumerated concerns in s. 19(3)(a)(i)-(ii). The purpose and effect of s. 19(3) is to permit authorized persons to review "inmate communications" acquired or seized in accordance with s. 19(2). To put it another way, s. 19(3) authorizes the restriction of communications, the interception and review of written communications or the monitoring (listening to) of oral communications only where there are reasonable grounds to do so. Thus, in order to learn the content of the seized inmate communications, the authorized person - a designated Corrections official - must have reasonable grounds that one of the enumerated concerns exists.

- [238] The term "monitor" used in s. 19(3) of the CA is defined in s. 14(1) of the CAR. Monitor means to listen to an oral communication or to read a written communication. The inclusion of the definition for "monitor" in the CAR instead of the CA serves to reinforce the conclusion that the two pieces of legislation - the Act and the Regulations - must be read together. Indeed, s. 19(1) specifically directs that the acquisition and review of inmate communications be done "in accordance with this section and the regulations".
- [239] The ladder approach in s. 19 of the CA is mirrored in s. 14 of the CAR, albeit with more specificity as to the different types of inmate communications. Collectively, s. 14 deals with inmate communications. At the base of the ladder is s. 14(1) which defines the term "monitor" - in this context it is to listen to an oral communication than has been recorded^[35] or to read a written communication.
- [240] The first rung of the ladder is found in s. 14(2) and s. 14(4) of the CAR. Section 14(2) authorizes the recording of inmate communications made by telephone. Section 14(4) authorizes the interception and examination of inmate communications by mail but only for the purpose of determining whether it contains contraband. Neither section requires grounds to exist for this preliminary seizure of the communication. The purpose of these two subsections is to confirm that all inmate communications can be captured - seized - by Corrections without any prerequisite grounds. This provision does not permit Corrections to access and review the content of the captured communication, it merely authorizes the acquisition or seizure of all types of inmate communications.
- [241] The second rung of the ladder is found in s. 14(3) of the CAR which authorizes the monitoring (listening to or reading, depending on the type of communication) on reasonable grounds. Thus, the content of communications, be they written or telephone communications can only be accessed if reasonable grounds in respect of the three enumerated concerns in s. 14(3)(a)(i)-(iii) of the CAR.
- [242] Thus, the plain language of the impugned provisions specifically authorizes the recording of all telephone communications made by inmates. Corrections has made a policy decision, properly so, to exempt the recording of all privileged telephone calls. Moreover, privileged communications are specifically exempted from the definition of "inmate communications" in s. 1 of the CA. And, on the evidence of Mr. Buckham, BC Corrections has established a regime for inmate calls to their lawyers; the lawyer's telephone number is registered in the ICCS system and calls to that number are automatically diverted from the automatic recording stream and not recorded.
- [243] As noted above, the applicants rely upon the decisions in Caslake and Shoker to support their contention that the passive recording of all non-privileged inmate telephone calls is not authorized by law
- [244] In my view, Caslake simply states an obvious and uncontroversial principle and does not otherwise assist the applicants. There, the Supreme Court examined the common law power of search incidental to arrest. The Court stated that for a search to be authorized by

law the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search (at para. 12). In the circumstances of this application, the Crowns points to the CA and the CAR as the specific legislative provisions that authorize the seizure through the automatic recording of all non-privileged inmate calls.

- [245] Shoker is distinguishable and also does not assist the applicants. In Shoker, the Supreme Court addressed whether an enforcement condition in a probation order that required the offender to provide, on demand, samples of breath, urine or blood to determine compliance with an abstention term of the probation order was permitted by the statutory language of the Code. The Court found that the enforcement a condition could not be implied as part of the language of the abstention term in s. 732.1(3)(c) of the Code (para. 20).
- [246] Madam Justice Charron, writing for the plurality in Shoker, went on to analyse whether the enforcement condition of the probation order could be authorized through the residual conditions provision of s. 732.1(3)(h) of the Code. She opined that on its face the provision might be sufficiently wide to permit an enforcement condition. However, it was the fact that the enforcement condition was not simply for the purpose of monitoring an offender's behaviour on probation but was also an evidence gathering technique for enforcement purposes that made resort to s. 732.1(3)(h) unavailable. It was the fact that the enforcement condition authorized the seizure of bodily substances, a highly intrusive technique that warranted stringent standards and safeguards, that caused the Court to conclude that such a statutory authorization could not be read into the general language of s. 732.1(3)(h) (paras. 22-23).
- [247] In Shoker the language of s. 732.1(3)(h) of the Code, being "comply with such other reasonable conditions as the court considers desirable" was exceedingly general. It contained no mention of seizing bodily substances. In the case at bar the impugned provisions specifically address the recording of inmate communications, including electronic communications which is what telephone communications are in the 21st century. In so far as the CA and CAR are concerned, and in contradistinction to the circumstances in Shoker, there is nothing to be implied from a residual, general statutory authorization. Rather, there is direct and specific statutory authorization in the impugned provisions.
- [248] The argument of the applicants that the passive recording of all non-privileged telephone calls is not authorized by the CA or the CAR appears to rest upon three pillars:
- i. The CA does not specifically refer to telephones in s. 19(2) whereas telephones are specifically referred to in s. 14(2) of the CAR;

ii. The impugned provisions simply use the word "may" in s. 14(2) of the CAR and this is insufficient to authorize such a broad grant of authority to automatically or passively record all telephone calls; and,

iii. The use of the phrase "without individualized suspicion" in s. 19(2) of the CA is unclear and appears to import a standard that must be met before non-privileged inmate telephone calls can be recorded.

[249] I will deal with each of these assertions in turn.

[250] While it is true that s. 19(2) of the CA does not include the word "telephone", in my view that mode of communication is obviously captured in the definition of "inmate communication." Indeed, the reference to oral and electronic communications is arguably explicitly about telephone communications. Moreover, s. 19(2) cannot be read alone; it must be read with all the provisions governing inmate communications both in the CA and CAR. When read with s. 14(2) of the CAR it is clear that telephone communications are but one mode of inmate communications. Section 19(2) of the CA permits the seizure of written and oral communications. Section 14 of the CAR provides further specificity on how the different modes of communication may be seized without accessing the content of the communication.

[251] In so far as the use of the word "may" in s. 14(2) of the CAR is concerned, there are two things to note. First, while the term "may" is generally permissive, as opposed to "shall" which is mandatory, it takes its meaning from the Act as a whole - its purpose, scheme and context. While "may" implies discretion, it does not preclude obligation: Sullivan on the Construction of Statutes, 5th edition (Markham: LexisNexis Canada Inc., 2008), pp. 70-71.

[252] Second, the word "may" is also used in s. 19(1) and (2) of the CA.

[253] Accordingly, when the modern approach to statutory interpretation is applied to the provisions, the word "may" in s. 14(2) of the CA does not create any ambiguity or confusion at all. On this point, I agree with the submissions of the AGBC (paras. 102-103:

102. In the context of this Act, the word "may" does not create any ambiguity about the authority of an authorized person to record inmate communications... The word "may" simply means that an authorized person is permitted, but does not have to, record inmate communications. In this particular context, "may" confers an institutional, or system-level, authority to record all inmate phone calls. "May" in this context does not require a case-by-case exercise of discretion with respect to each individual inmate phone call.

103. As for the alleged lack of any provision that specifically authorizes the passive recording of all inmate phone calls ... Section 19(2) unequivocally states that inmate communications may be recorded without the need for any individualized suspicion. Section 14(2) of the Regulation provides the same power.

- [254] The AGBC properly concedes that when ss. 14(2) and (3) of the CAR are read in isolation from the rest of the scheme and legislative provisions, they do not provide perfect models of legislative draftsmanship. Indeed, in *Pickford*, Truscott J. noted (at para. 30) the inherent inconsistency between ss. 14(2) and 14(3) of the CAR with respect to the authorization for the recording of inmate communications. The inconsistency was resolved in *Pickford* as follows:
- [31] It is a principle of statutory interpretation that the words of the statute themselves are paramount over the words of the regulations to that statute so that any inconsistency between the two must be resolved in favour of the wording in the statute.
- [255] Like Truscott J. in *Pickford* (at para. 32), in my view, when the provisions are read together as a whole it is clear that s. 19(2) of the CA and s. 14(2) of the CAR authorize the recording of all non-privileged inmate telephone calls. If the Corrections authorities want to listen to those telephone calls they must have reasonable grounds as required by s. 19(3) of the CA and s. 14(3) of the CAR.
- [256] In so far as the third pillar of the applicants' argument is concerned, that individualized suspicion imposes a standard that must be met before the recording of non-privileged calls can be permitted, I respectfully disagree. The thrust of this argument focuses on the Solicitor General's debate with Ms. Kwan at the clause by clause analysis of the legislation on May 17, 2004. As noted previously the focus of Ms. Kwan's concerns was the power to strip search inmates without individualized suspicion. No time was devoted to s. 19 of the CA apart from a general question about whether its purpose was to catch up with technology.
- [257] Moreover, when the recording of the Solicitor General's comments (Ex. #7) are considered (outlined at paras. 211-213 above) it is clear that the provisions of the CA were intended to authorize the passive recording of all non-privileged inmate telephone calls, something Corrections had been doing since first installing the ICCS platform in 2000 or 2001, prior to the modernization of the CA under Bill C-44 in 2004.
- [258] Accordingly, s. 19(2) of the CA and s. 14(2) of the CAR authorize BC Corrections to passively record all non-privileged inmate telephone calls. The adjoining provisions permit the Corrections authorities to monitor, i.e. listen to, these recorded calls where the statutory prerequisite of reasonable grounds is established in respect of one of three enumerated concerns outlined in s. 19(3) of the CA and s. 14(3) of the CAR.
- [259] I pause to note that little was provided in the way of comprehensive submissions on the issue of the CDRs apart from an assertion that they are not mentioned in the legislation and regulations. This is not surprising as they are part of the software program embedded in the ICCS platform. In my view, they are ancillary features that form part of the ICCS record when inmate telephone calls are recorded. I agree with the AGBC's observation that the CDR issue relates to whether a particular search is authorized by law pursuant to *Collins*, and is essentially an implementation issue. It does not relate to the constitutionality of the

CA and the CAR per se and so it is not necessary to consider it further.

[260] In conclusion, I find that the passive recording of all non-privileged inmate telephone calls on the ICCS is authorized by law and that the first branch of the Collins test has been satisfied.

3. Collins Step Two - Is the law reasonable?

[261] The next step in the Collins analysis is to determine whether the law itself is reasonable. The applicants contend that the law is not reasonable and ought to be struck down. Not surprisingly the Crowns contend that the law is reasonable and that the second step in the Collins analytical framework has also been satisfied.

[262] The applicants contend that as the impugned provisions in the CA and the CAR contain no standard whatsoever to justify the recording of all non-privileged inmate telephone calls - essentially employing a standardless sweep to vacuum up all such calls - the provisions fall short of the constitutional minimums required by *Hunter v. Southam*, [1984] 2 S.C.R. 145.

[263] Under the principles established in *Hunter v. Southam*, where a search or seizure has been conducted without prior authorization and such prior authorization was feasible - usually in the form of a search warrant, production order or wiretap authorization - then it is *prima facie* unreasonable under s. 8 of the Charter. The party seeking to justify a warrantless search or seizure bears the onus of rebutting the presumption of unreasonableness.

[264] While *Hunter v. Southam* obviously remains binding authority, the context of the decision is important: investigative steps taken by state authorities investigating an individual or corporate entity. Recall that in that case, the Director of Investigation and Research of the Combines Investigation Branch (Mr. Hunter) exercised his authority under s. 10 of the Combines Investigation Act, R.S.C. 1970, c. C-23, and authorized a number of Combines Investigations officers to enter the premises of the Edmonton Journal, a division of Southam Inc, and examine documents and other items at the premises. A member of the Restricted Trade Practices Commission certified his authorization of the Director's exercise of his powers under the Act, as required by s. 10(3) of the Act. The authorization had a "breathhtaking sweep" as it granted the investigators "licence to roam at large on the premises of Southam Inc. at the stated address and elsewhere in Canada" (p. 150).

[265] The context of *Hunter* was evidence gathering for investigative purposes including potential prosecution under the Combines Investigation Act, a quasi-criminal statute. As Mr. Justice Dickson, as then was, noted in *Hunter* (pp. 167-168):

The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search

threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s.8 of the Charter, for authorizing search and seizure.

[Emphasis added.]

[266] As the foregoing passage from Hunter notes, the standard may well be different where the state's interest is "not simply law enforcement." Accordingly, a strict application of the principles from Hunter v. Southam in a non-law enforcement context would not be appropriate.

[267] Indeed, in R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, Madam Justice Wilson noted as much when she urged a flexible approach to the interpretation of Charter provisions that may well arise in a variety of legislative contexts - criminal, quasi- criminal, regulatory or civil (at paras. 24-26). Moreover, Wilson J. cautioned that such flexibility was necessary as these different contexts may well also engage different expectations of privacy (para. 27). At para. 24 Wilson J. reiterated her comments from Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425 (released the same day as McKinlay) and made clear that the criteria from Hunter v. Southam are not hard and fast rules which must be adhered to in all cases under all forms of legislation.

[268] In my view of critical importance to this application is the following passage from McKinlay (at para. 24) "What may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified by Dickson J. in Hunter." The import of Wilson J's decision in McKinlay is that it is context, the nature of the legislation and the expectation of privacy, that governs what is necessary to be reasonable from a s. 8 perspective.

[269] The applicants rely upon the decisions in R. v. Simmons, [1988] 2 S.C.R. 495 and R. v. Chehil, 2013 SCC 49 to support their contention that some standard must be embedded in the impugned legislation before non-privileged inmate telephone calls can be recorded by the ICCS. To this end they acknowledge, albeit in the alternative, that the Hunter v. Southam criteria may not apply to the context of recording inmate telephone calls. Nevertheless, they contend, some standard is necessary and the absence of any standard must be fatal to the CA and the CAR provisions in issue in this application.

[270] Respectfully, I disagree with the contention advanced by the applicants for the following reasons.

- [271] First, the personal searches authorized by the Customs Act, R.S.C. 1970, c. C-40 that were in issue in *Simmons* related to significantly more invasive searches, being skin or strip searches (in the sense that the accused had to remove her clothing and undergarments) while endeavouring to enter the country. The reasonable cause to suppose standard (that contraband is being secreted on the traveller's person) at issue in *Simmons* was found to be sufficient for the purposes of that search - a search done without prior authorization but which had a significant incursion upon the expectation of privacy an individual might expect, even at a border crossing.
- [272] Second, the type of search in issue in *Simmons* was placed at the second level of border search. But the first level of search, questioning, hand luggage searches and body pat or frisk searches, engaged no level of constitutional protection. As Chief Justice Dickson wrote in *Simmons* (para. 30):
- [30] It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning, which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada, and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is "detained" in a constitutional sense, and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin-search, of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the "body cavity search", in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.
- [273] The first level of search outlined in *Simmons* does not involve a search of the integrity of the traveller's body. In my view, this is analogous to the first stage of acquiring or seizing the non-privileged telephone calls. The content of the calls remains cloaked from view. They are simply acquired and held in a database. The content of the calls cannot be accessed in the absence of reasonable grounds: s. 19(3) CA and s. 14(3) CAR. Accordingly, there is in fact a standard within the impugned legislation.
- [274] Third, in so far as *Chehil* is concerned, that case is distinguishable on the basis that a sniff search of the accused's luggage by a drug detection dog at the Halifax airport was conducted in the context of a criminal investigation where the officers had a reasonable suspicion that the accused was transporting drugs in his luggage. The reasonable suspicion standard was sufficient in that context and prior judicial authorization was not required.

- [275] The applicants' reliance on Chehil overlooks the context in which the search occurred - a criminal investigation relying upon an investigatory tool to gather evidence. In contradistinction, the passive recording of all non-privileged inmate calls by the ICCS is not an investigatory tool deployed to gather evidence for a criminal investigation. Rather, it is part of a regulatory scheme designed to maintain the safety and security of correctional centres and the public.
- [276] As the Supreme Court held in *McKinlay* and expanded upon in *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3 at paras. 49-64, the standard of reasonableness for a search or seizure varies with the context in which it takes place. To that end Justices Sopinka and Iacobucci held in *Branch* that:
- [52] Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: per La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thomson Newspapers*.
- [277] Both *McKinlay* and *Branch* demonstrate that regulatory searches or seizures can occur without prior authorization and even in the absence of a reasonable ground standard.
- [278] I return to the critical point that must ground the analysis of this issue - context.
- [279] While a seizure occurs every time the ICCS records a non-privileged inmate telephone call (including acquisition of the CDRs), and this is done in the absence of prior judicial authorization, it is important to recall three critical contextual facts.
- [280] The first contextual factor is that the initial seizure or acquisition by BC Corrections of conversations and accompanying CDRs by the ICCS through the recording of all non-privileged inmate calls is not undertaken for an investigative or law enforcement purpose. Rather the purpose of the seizure is to assist in maintaining the safety and security of the correctional centre.
- [281] The second contextual factor is that while the recording of the conversations and the related CDRs amounts to a "seizure," the content of the recordings are not openly available for listening purposes. They are saved in the correctional centre's database and archived in the Telus database. They are not presumptively accessible for searching by means of monitoring for any purpose. The statutory grounds embedded in the legislation that authorize monitoring must be satisfied before the recording can be accessed.
- [282] The third contextual factor is that where ICCS records (the recorded calls and the accompanying CDRs) are sought by law enforcement agencies for investigative purposes they must obtain prior authorization, usually in the form of a production order, to seize the

materials from BC Corrections and then search them for their content. A corollary to this point is that where Corrections seeks to have law enforcement investigate an incident related to a correctional centre, authorized persons must have reasonable grounds to listen to the recording before they are able to hand the recording over to law enforcement to initiate an investigation. Thus, where the recordings (the conversations and the related CDRs) are sought for law enforcement purposes, prior authorization to seize and then search them must be obtained. Similarly, where Corrections seeks to access the recordings, they too must have reasonable grounds to do so.

- [283] There is one further argument to be addressed. Relying upon the Supreme Court's decision in *R. v. Tse*, 2012 SCC 16, the applicants contend that the impugned legislation is fatally flawed because it does not contain adequate safeguards or accountability measures to compensate for the lack of prior judicial authorization in recording non-privileged inmate telephone calls. The applicants appear to contend that some sort of notice to the third-party recipients that they have been recorded is required in the legislation.
- [284] Tse concerned a law enforcement investigation and criminal prosecution that arose out of a kidnapping in Vancouver, BC, that appeared to have overtones of the involvement of a criminal organization and individuals tied to the drug trade. The police initiated an emergency wiretap under s. 184.4 of the Code. This provision permits such measures in the absence of prior judicial authorization where the officer believes on reasonable grounds that the interception is immediately necessary to prevent an unlawful act that would cause serious bodily harm and judicial authorization could not be obtained with reasonable diligence. Approximately 24 hours after the emergency wiretap was initiated, the police obtained a judicial authorization for continued interceptions, pursuant to s. 186 of the Code.
- [285] Before the Supreme Court, the respondent offenders advanced a number of arguments to suggest that s. 184.4 was constitutionally deficient and in violation of s. 8 of the Charter. They contended that for the legislation to be constitutionally sound, at least four accountability measures were required (paras. 79-80).
- [286] The Supreme Court recognized that in certain narrow instances prior judicial authorization will not be required for emergency wiretaps so long as a balance is struck between an individual's right to be free from unreasonable search or seizure and society's interest in preventing serious harm (paras. 8, 11, 18-19). The Court was clear that, for laws of like those in the emergency wiretap provisions, adequate safeguards that provide accountability must be included in the statute itself. The absence of such a feature was a fatal defect in the legislative regime (paras. 85-86). Specifically, in *Tse* it was the lack of after-the-fact notice to the intercepted parties on which s. 184.4 foundered constitutionally.

- [287] The Supreme Court noted that the absence of after-the-fact notice was troubling given the fact that wiretaps, which invade the privacy of those whose private communications have been intercepted, are by their nature "undetectable, unknown and undiscoverable by those targeted" unless a prosecution is initiated (para. 81).
- [288] Although the Supreme Court found the lack of after-the-fact notice in the emergency wiretap provisions to be a fatal defect that rendered s. 184.4 unconstitutional, two observations are critical. First, there were no other measures in the Code that provided oversight in the resort to s. 184.4, an investigative tool secretly implemented by the police during an urgent criminal investigation of a serious offence. And, second, while after-the-fact notice might be one means of curing the defect, other means could be open to Parliament as well (paras. 85-86).
- [289] The circumstances of the case at bar are completely different than those in Tse.
- [290] First, the public vs secret nature of the two systems must be considered. Under the ICCS system there is notice to the inmate and an acknowledgement by the inmate that non-privileged calls are recorded. Further notification occurs with the signage around the telephones on the living units of the correctional centres and the audio notification before the inmate and call recipient are connected. In contrast, wiretaps are obtained through ex parte procedures and are surreptitiously implemented.
- [291] The fact that an inmate caller and call recipient may abuse the telephone system and involve others in conversations who are unaware they are being recorded does not untether the process from the audio notification up front. There is no secrecy about the recording. It is the action of the inmate and the call recipient bringing others into the conversation that obstructs the third party recipients from receiving the notification, not state action.
- [292] Second, the context in which these measures occur and what occurs must ground the analysis of this application. Again, these measures are implemented in the context of a highly regulated custodial environment where privacy for inmates is significantly diminished in a variety of ways. And, what occurs in the recording of inmate telephone calls on the ICCS is a seizure not a search in the first instance. Thus, the privacy interests attached to the information are not displaced by the seizure. It is only where an authorized person has reasonable grounds for one of the three enumerated concerns in respect of the inmate that the content of the call can be searched by means of listening to it.
- [293] Finally, there is some accountability embedded within the legislative provisions and the policy implementing them. These include the reasonable grounds standard and the practice of the warden or designate completing documentation signing off on the monitoring of the call. The system has an audit feature built into it to ensure there are no abuses of the ICCS system by Corrections personnel. Finally, s. 15(2) of the CAR prohibits disclosure of the information to outside agencies in the absence of lawful authority.

- [294] In my view, the applicants' analogy to the circumstances of Tse to suggest the lack of after-the-fact notification is a fatal defect in the CA and CAR is not persuasive.
- [295] It follows that I am satisfied that the second branch of the Collins test has been met in this case - the law is reasonable.
- [296] Before concluding on this point, I will note that while the Crowns relied upon Siniscalchi to support their position that the law is reasonable under the Collins analysis, that issue was not strictly before the court in that case. While Siniscalchi includes a conclusory statement that the passive recording of non-privileged inmate telephone calls does not constitute a violation of s. 8 of the Charter (para. 98), it also contains an acknowledgement that the appellant in that case did not contend that the recording of the telephone conversations was improper (para. 100). Siniscalchi does not squarely address the application of Collins to the legislative regime governing the recording of inmate calls in BC correctional centres. While I agree with the conclusory statement in Siniscalchi about there being no s. 8 breach in the practice of passively recording inmate telephone calls, it is, in my view merely obiter dicta of the variety that is not binding on this Court: R. v. Henry, 2006 SCC 76, paras. 57-58. Accordingly, the view expressed in Siniscalchi about the practice of recording all inmate telephone calls not constituting a violation of s. 8 of the Charter has played no role in my determination that s. 19 of the CA and s. 14 of the CAR authorize the practice and that the law is reasonable.

VIII. Conclusion

- [297] For the foregoing reasons, it follows that the application to have the provisions in s. 19 of the CA and s. 14 of the CAR declared unconstitutional and in violation of s. 8 of the Charter is dismissed. While the applicants have a reasonable expectation of privacy in their recorded telephone calls as established in Siniscalchi, I have found that s. 19 of the CA and s. 14 of the CAR both authorize the recording of all non-privileged inmate telephone calls and the law in so authorizing this seizure is reasonable.

"Ker J."

- [1] Counts #1-3 on Indictment VA 27786.
- [2] Ex. # 1 - Inmate Notification document provided to inmates and signed by them during the admission process.
- [3] Ex. #2 - Sample photographs of signage displayed adjacent to telephones on inmate living units.
- [4] Exs. #3 and 4 - Recordings and transcripts of audio notifications played when a non-privileged inmate call is connected with a call recipient.

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- [5] In November 2019 there were also 1,933 voice-mail messages left for inmates. No statistics for January 2020 were provided in respect of the number of voice-mail messages left for inmates.
- [6] The chapter addressing the ICCS policy was filed as Ex. #5 on this voir dire.
- [7] Exs. #3 and 4 contain the audio notifications that the ICCS provides at the point-of-call connection.
- [8] Ex. #1.
- [9] An Inmate Notification Form was marked Ex. #1 on this voir dire.
- [10] For debit, collect and subsidized calls the audio notification is identical, save for the identity of the type of call.
- [11] There are over 150 subsidized telephone numbers that inmates are permitted to call and not be charged for the call.
- [12] The prohibition on three-way calling is also outlined in BC Corrections' Policy Manual, Ex. #5, s. 7.8.11(1).
- [13] Ex. #5, s. 7.8.19(1).
- [14] Ibid, s. 7.8.19(3) and (4).
- [15] "Capture" in these circumstances means the interception of written communications, the recording of oral communications during in-person visits and the passive recording of inmates calls by the ICCS.
- [16] Essentially, the "count" is the daily practice of counting inmates in their cells four times a day and the "wind" is the practice of guards conducting periodic, random checks by looking into inmates' cells every hour or so.
- [17] Citations *infra*.
- [18] Siniscalchi deals with the same version of the legislative provisions that are engaged in the case at bar.
- [19] A revised version of the policy that now governs the ICCS is contained in Ex. #5 in this case. It was updated in July 2014.
- [20] Similar but not identical to the Inmate Notification document contained in Ex. #1 in this case
- [21] This sign is identical in content to one of the two signs near telephones that the inmates use to make calls on the ICCS that are included in Ex. #2 in the case at bar.
- [22] R. v. Tessling, 2004 SCC 67; R. v. Patrick, 2009 SCC 17; R. v. Cole, 2012 SCC 53; R. v. Spencer, 2014 SCC 43; R. v. Marakah, 2017 SCC 59; and R. v. Jones, 2017 SCC 60.

- [23] AGBC Submissions on Sam Kang's Challenge to the Constitutionality of the Correction Act and Regulation, filed January 15, 2020, para. 36; AGBC Submissions on Kyle Latimer's Challenge to the Constitutionality of the Correction Act and Regulation, filed February 4, 2020, para. 41. Federal Crown Respondent's Written Submissions: Constitutional Challenge to the Correction Act and Regulations, filed January 15, 2020, para. 1.
- [24] From the Oxford English Dictionary online edition: <https://www.oed.com/>
- [25] AGBC Response to Kyle Latimer's Challenge to the Constitutional Validity of the Correction Act and Regulation, filed February 4, 2020, para. 76.
- [26] Ex. #6, Tabs 5-7, British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 37th Parl., 5th Sess., Vol 25 (May 10, 12 and 17, 2004) (the "Hansard Debates").
- [27] Ex. #7.
- [28] Hansard Debates, May 10, 2004, p. 10958.
- [29] Ex. #7. The transcript of the Hansard Debates from May 12, 2004, p. 11065, actually states "approves accountability" but this is obviously a typo that makes no sense when the context is considered and the video clip listened to.
- [30] Hansard Debates from May 12, 2004, p. 11065.
- [31] Ibid.
- [32] Ibid., p. 11066.
- [33] Hansard Debates from May 17, 2004, p. 11175-11178.
- [34] Ibid., p. 11179.
- [35] While the definition of monitor in so far as oral communications are concerned encompasses listening by live-monitoring of inmate calls and listening to recorded calls, the evidence established that live-monitoring is not done by BC Corrections.

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