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R. v. Kang

2021 BCSC 209

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2021 BCSC 209 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2021 BCSC 209

Date: 20210210

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 #4 Re: Kyle Latimer's s. 7 Charter Challenge to the Provisions of the Correction Act and Correction Act Regulations

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No other Appearances

Place and Date of Hearing:

Vancouver, B.C.

September 15-16, 2020

Place and Date of Ruling given to Parties with Reasons to follow:

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February 10, 2021

Table of Contents

INTRODUCTION. 4

FACTUAL BACKGROUND. 6

THE LEGISLATIVE SCHEME GOVERNING INMATE COMMUNICATIONS. 7

Correction Act, S.B.C. 2004, c. 46. 8

Correction Act Regulation, B.C. Reg. 58/2005. 8

ISSUES AND POSITIONS OF COUNSEL. 10

The position of Kyle Latimer 10

The position of the Crowns. 12

The position of the AGBC. 12

The position of the PPSC. 13

ANALYSIS. 13

Under which provision of the Charter should the constitutional analysis be conducted - s. 7 or s. 8?. 15

Mr. Latimer's s. 7 right to life, liberty and security of the person is not engaged by the impugned legislation. 20

Conclusion. 22

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] (the "impugned provisions") 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] On a previous application in these proceedings the applicants contended 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 ("CDRs") violated their s. 8 Charter right to be free from

unreasonable search and seizure. I dismissed that application and upheld the constitutionality of the provisions in issue in reasons indexed at neutral citation 2020 BCSC 919 ("Jail Calls Ruling"). In that ruling I concluded as follows:

- [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.
- [4] Shortly after the Jail Calls Ruling was issued, counsel for Kyle Latimer filed a further application - Application #13 - seeking to challenge the constitutionality of the same provisions of the CA and CAR, this time alleging violations of s. 7 of the Charter. On September 15 and 16, 2020, counsel for Kyle Latimer as well as counsel for the Attorney General of British Columbia ("AGBC") and counsel for the Public Prosecution Service of Canada ("PPSC") appeared before the Court on Application #13 and argued the points of law raised by counsel for Mr. Latimer. None of the other accused on this joint hearing file participated in the conduct of this application.
- [5] On October 19, 2020, by way of a Memorandum to Counsel, I advised of the result of this application with reasons to follow. I advised that Application #13 was dismissed. Having considered the totality of the circumstances, including the Jail Calls Ruling, I concluded that s. 8 of the Charter was the appropriate provision under which to assess the constitutionality of the legislation and that s. 7 of the Charter did not afford any greater protection than s. 8 in the circumstances of this case. Moreover, Mr. Latimer's s. 7 liberty interests were not engaged by the impugned provisions. Quite simply, Mr. Latimer is not threatened with conviction for an offence contrary to the impugned provisions, nor does he risk imprisonment because of the provisions.
- [6] These are my reasons.
- [7] Before addressing the substance of my reasons, however, I note the following. Mr. Latimer's application was filed well past the deadline for filing applications as provided in the Court's Practice Direction for Complex Criminal Cases [CPD-3]. Although s. 7 of the Charter was alluded to in the applications filed in the Jail Calls hearing it was not specifically raised as a further basis to challenge the constitutionality of the impugned provisions.
- [8] Counsel for the PPSC asserted that the Court ought to exercise its trial management powers and summarily dismiss the application based on the unexplained late filing of the application and the fact that it was meritless. There is authority to do so: *R. v. Cody*, 2017 SCC 31 (para. 38); *R. v. Perkins*, 2018 BCSC 311; *R. v. Joseph*, 2018 BCCA 284 (paras. 19-25); *R. v. Greer*, 2020 ONCA 795 (paras. 107-108).

- [9] While there was merit to the PPSC's position, I declined to summarily dismiss the application given that counsel had conducted the hearing efficiently and had already provided their full arguments on the substance of the application.

FACTUAL BACKGROUND

- [10] This application deals with the same provisions as the Jail Calls Ruling and so that ruling informs my assessment and analysis of the issues raised here. I incorporate the entirety of Jail Calls Ruling into this ruling without the need to repeat what I have already reviewed and assessed.
- [11] More specifically, in so far as the factual background is concerned, it is largely undisputed. It is set out at paras. 22-86 of the Jail Calls Ruling and is incorporated into this ruling without the need to repeat it. As for the legislative scheme of the CA and the CAR, the Jail Calls Ruling addresses that at paras. 87-104 and it is incorporated into this ruling without the need to repeat it.
- [12] Since the Jail Calls Ruling several of the accused covered by this joint hearing file have entered guilty pleas to some of the charges:
- July 2, 2020 - Anduele Pikientio entered guilty pleas to counts #5 and #7 on indictment VA 27798;
 - July 27, 2020 - Jacob Pereira entered a guilty plea to count #5 on indictment VA 27798;
 - December 15, 2020 - Kyle Latimer entered guilty pleas to counts #1, #3, #5 and #9 on indictment VA 27798;
 - December 15, 2020 - Sameet Kang entered guilty pleas to counts #1 and #3 on indictment VA 27786; and,
 - December 15, 2020 - Gary Kang entered a guilty plea to count #3 on indictment VA 27786.
- [13] On December 16, 2020, the Crown entered a stay of proceedings against Gurcharn Singh Kang and Mohanbir Kaur Kang (the parents of Sameet and Gary Kang) on indictment VA 27787.
- [14] On January 11, 2021, the federal Crown abated the proceedings against Gary Kang as he had been murdered on January 6, 2021. His homicide is under investigation.
- [15] Critical to the context of this application is the fact that the impugned provisions in the CA and the CAR are not offence provisions. Collectively, the impugned provisions are part of a suite of provisions dealing with security measures in the correctional centres. They 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. Thus, 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: Jail Calls Ruling (paras. 96, 103-104).

[16] Mr. Latimer, and all accused across the four joined indictments, are charged with a variety of criminal offences under the Controlled Drugs and Substances Act, S.C. 1996 c. 19 [CDSA], as well as offences under the Criminal Code, R.S.C., 1985, c. C-46 [Code], including criminal organization, conspiracy and weapons offences.

THE LEGISLATIVE SCHEME GOVERNING INMATE COMMUNICATIONS

[17] The provisions of the CA and the CAR in issue on this application are the same as those that were in issue on the Jail Call Ruling. For ease of reference, I reproduce them below.

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

[18] 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[1]:

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.

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

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

[20] 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.

ISSUES AND POSITIONS OF COUNSEL

[21] The overarching issue raised on this application is this: notwithstanding the Jail Calls Ruling that found the impugned provisions of the CA and the CAR to be compliant with s. 8 of the Charter, do those same provisions violate Mr. Latimer's s. 7 Charter right to life, liberty and security of the person on the basis of overbreadth and arbitrariness.

The position of Kyle Latimer

[22] Kyle Latimer was the only accused in these proceedings to file this application and advance the argument. Although none of the other accused who are joined on file VA 29411 participated in the hearing or provided a position on Mr. Latimer's application, counsel for the PPSC fairly noted that if Mr. Latimer was successful on this application then all accused in the Project Territory prosecutions would be entitled to benefit from the Court's ruling.

[23] Counsel for Mr. Latimer contends that the impugned provisions are overbroad and in that context s. 8 of the Charter does not oust or overtake the s. 7 analysis needed in this case; rather, the overbreadth argument under s. 7 is independent of the s. 8 reasonableness analysis that was conducted in the Jail Calls Ruling.

[24] More specifically, counsel contends that the issues of overbreadth and arbitrariness were not addressed in the Jail Calls Ruling and so the result in that ruling does not dictate the resolution of the s. 7 issue in this application. The crux of the s. 7 overbreadth argument advanced by counsel for Mr. Latimer, and the companion arbitrariness argument, is that

because the ICCS automatically records all inmate calls (save privileged calls) pursuant to the provisions of the CA and CAR, innocent and innocuous conversations that bear no relation to the object of the provisions are captured. By so doing, contends the defence, the legislation goes too far and is both overbroad and arbitrary in that respect. In essence, there is a lack of connection between the object of the impugned provisions and those calls that constitute innocent, innocuous, legitimate, legal and non-criminal communications.

- [25] To support the position advanced, the defence proffered a series of hypotheticals to demonstrate the overbreadth and arbitrary nature of the legislation. They are conveniently summarized in the defence written argument on this application:
- [85] As previously stated, the impugned provisions impact all inmates, within 10 correctional centres, and all non-privileged telephone call. Simply put, the mere presence of an inmate within a correctional centre leads to the indiscriminate recording of his/her calls. Within this context, reasonable hypotheticals serve to reveal the constitutional flaw in the provisions.
- [86] Four examples may assist in this task:
- a. A is arrested for stealing food. He/she has previous convictions for failure to appear. He/she is detained pursuant to section 515(10)(a) of the Criminal Code. There is no allegation that A poses a risk to the safety of the community or the corrections centre. While in custody, he speaks with his/her spouse. This hypothetical is based on that referred to in *Safarzadeh-Markhali*.
 - b. B is arrested under section 95 of the Criminal Code because his/her firearms licence has expired. He/she has no previous convictions. At the request of the Crown, his judicial interim release is postponed pursuant to section 516 of the Criminal Code so the police can determine (sic). While in custody, he makes telephone calls to his/her spouse to locate a criminal lawyer for the next appearance. This hypothetical is based on that referred to in *Nur*.
 - c. C, an addict, is arrested for trafficking partly to support his/her addiction. While in custody, he/she makes telephone calls to various recovery houses, subsidized institutions, and medical offices to arrange for a release plan that includes treatment and stable housing.
 - d. D, from another province and unable to perfect cash bail, is accused of fraud. He calls his family members in his home province in order to enlist their financial assistance and secure his release.
- [87] In all four examples, none of the telephone calls bares any connection to concerns expressed in the object of the impugned provisions. They all constitutes (sic) innocent, innocuous, legitimate, legal, and non-criminal communications. Put differently, there is nothing in these examples that would invoke a sense of concern or the need for protection.

The position of the Crowns

- [26] The essence of the positions advanced by both Crowns is that the Jail Calls Ruling on the constitutionality of the legislation under s. 8 of the Charter addresses the s. 7 concerns now advanced by Mr. Latimer. Legislation that authorizes searches and seizures that is found to be reasonable under s. 8 of the Charter conforms to the principles of fundamental justice and s. 7 adds nothing further to the assessment.
- [27] In so far as the hypotheticals advanced by the defence are concerned, the Crowns contend they all relate to s. 8 search concerns, not s. 7 issues and the principles of fundamental justice. Moreover, the Crowns contend the hypotheticals advanced by the defence overlook an important and key feature of the ICCS under the enabling provisions of the CA and that CAR - while the calls are automatically recorded, they cannot be listened to in the absence of reasonable grounds and they cannot be provided to law enforcement in the absence of a production order. The hypothetical calls would not be reviewed in the absence of either of those features and they would be deleted after 30 days.

The position of the AGBC

- [28] The AGBC advances several points to support its assertion that the application ought to be dismissed:
- i. The arguments advanced by Mr. Latimer under s. 7 of the Charter are in substance the same as those advanced previously under s. 8 of the Charter. As such, s. 7 does not afford any greater protection than already granted by s. 8 in the circumstances of this case;
 - ii. While Mr. Latimer has standing to challenge the impugned provisions of the legislation because his telephone conversations with Sameet Kang were recorded in the ICCS, his s. 7 right to liberty is not limited by those provisions - he does not face imprisonment due to their operation;
 - iii. The substance of the challenge advanced on this application focuses on the operation of the ICCS and so, if s. 7 is violated by the operation of the ICCS (a point not conceded), the challenge should be to the administrative practices of BC Corrections and its implementation of the legislation; and
 - iv. The impugned provisions of the CA and the CAR are consistent with the s. 7 principles of fundamental justice. Their purpose, as found in the Jail Calls Ruling (para. 40), is "to protect victims of crime and to prevent threats to public safety or institutional security arising from inmate telephone calls." The argument advanced by Mr. Latimer singularly focuses upon the detection of misuses of the ICCS and ignores the preventative objective of the legislation. As the recording of all non-privileged inmate telephone communications is a prophylactic measure intended to prevent the misuse of the telephone system, it cannot be said that the recording of such inmate calls is irrational or bears no connection to the objective of the impugned provisions.

The position of the PPSC

[29] The PPSC advances three points:

- i. the application should be summarily dismissed as it is frivolous, has no merit, is brought too late in the proceedings and raises the same issues as already addressed by the Jail Calls Ruling;
- ii. the legislative provisions in issue do not engage the applicant's s. 7 Charter interests of the right to life, liberty or security of the person; and
- iii. if the Court finds that Mr. Latimer's s. 7 right to liberty is engaged by the provisions of the CA and CAR, the legislation is not overbroad when the purpose and scope of the provisions is properly considered in the appropriate context.

[30] On the second and third points above, counsel for the PPSC adopts the submissions of the AGBC.

ANALYSIS

[31] While I have considered all of the submissions advanced on this application, in my view it must be dismissed on the first two bases articulated by the AGBC and supported by the PPSC. It is unnecessary to decide the remainder of the issues advanced by Mr. Latimer as the first two conclusions are determinative of his application.

[32] Before addressing the two questions that determine this application, the purpose of the impugned provisions bears repeating. In the Jail Calls Ruling I outlined the purpose of the impugned provisions in the following manner:

[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 (footnote omitted). 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.

- [33] Additionally, it is critical to the assessment of the issues raised on this application to understand that while the CA and the CAR authorize the passive recording of all non-privileged inmate calls through the ICCS, strict parameters are in place as to when the recorded calls may be listened to and how long recorded calls that are not listened to may be retained.
- [34] Specifically, s. 19(3) of the CA and s. 14(3) of the CAR outline the circumstances in which the ICCS recorded calls may be listened to - an authorized person must have reasonable grounds to believe the inmate is involved in illegal activities, harassing or causing harm to others, or participating in any activity that may jeopardize the safety, security or operation of the correctional centre.
- [35] Section 15 of the CAR directs that recorded calls may only be retained for 30 days unless the reasonable grounds outlined immediately above exist.
- [36] Situating the reasonable hypotheticals advanced by the applicant into the regulatory scheme established by the CA and the CAR, it is clear the calls would never be listened to and would be deleted within 30 days. Moreover, the factual matrix of the applicant's hypotheticals are all grounded in s. 8 Charter concerns.

Under which provision of the Charter should the constitutional analysis be conducted - s. 7 or s. 8?

- [37] A challenge to a law that authorizes a search or seizure on the basis of overbreadth or arbitrariness is, in substance, a challenge to the reasonableness of the provision, something captured by the reasonableness branch of the analytical framework established in *R. v. Collins*, [1987] 1 S.C.R. 265. Moreover, the jurisprudence makes it clear that ss. 8-14 of the Charter are specific instances of the basic tenets of fairness that s. 7 protects. Where the subject matter is covered by a specific guarantee in the Charter it should be addressed on that basis, e.g., the presumption of innocence is clearly a principle of fundamental justice, nevertheless it has its own guarantee under s. 11 of the Charter.
- [38] In the development of the jurisprudence on the architecture of the rights and guarantees contained in the Charter, the Supreme Court of Canada has made it clear that s. 7 of the Charter, an undoubtedly broad guarantee of the right to life liberty and security of the person, overlaps with the specific rights guaranteed in ss. 8 through 14 of the Charter. Thus, the specific legal guarantees contained in ss. 8 through 14 are examples of some of the parameters of the "right" to life, liberty and security of the person. They are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice: Reference re s. 94(2) of Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486 (paras. 27-29) (QL) ["B.C. Motor Vehicle Act Reference"].

[39] In order to avoid distortion of the rights and guarantees of the Charter, the Supreme Court of Canada has made it clear that where the subject matter of a constitutional challenge is guaranteed by a specific provision in the Charter (ss. 8-14), the challenge should be assessed on the basis of the more specific guarantee. Chief Justice Lamer explained it this way in *R. v. G  n  reux*, [1992] 1 S.C.R. 259 at 310:

The appellant places reliance upon both s. 11(d) and s. 7 of the Charter. However, the s. 7 submission can be dealt with very briefly. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, this Court decided that ss. 8 to 14 of the Charter, the "legal rights", are specific instances of the basic tenets of fairness upon which our legal system is based, and which are now entrenched as a constitutional minimum standard by s. 7. Consequently, in the context of the appellant's challenge to the independence of the General Court Martial before which he was tried, s. 7 does not offer greater protection than the highly specific guarantee under s. 11(d). I do not wish to be understood to suggest by this that the rights guaranteed by ss. 8 to 14 of the Charter are exhaustive of the content of s. 7, or that there will not be circumstances where s. 7 provides a more compendious protection than these sections combined. However, in this case, the appellant has complained of a specific infringement which falls squarely within s. 11(d), and consequently his argument is not strengthened by pleading the more open language of s. 7.

See also *R. v. Pearson*, [1992] 3 S.C.R. 665 (paras. 44-45); *Whaling v. Canada (Attorney General)*, 2014 SCC 20 (para. 76).

- [40] To put it another way, the jurisprudence has shown a preference for dealing with the specific guarantee when both s. 7 and a specific guarantee under the Charter are pleaded: *R. v. Harrer*, [1995] 3 S.C.R. 562, para. 13.
- [41] More specifically, resort to the "highly specific guarantee" of s. 8 instead of s. 7 of the Charter has been adopted when laws authorizing searches and seizures have been the subject of constitutional challenge. Three cases from the Supreme Court of Canada illustrate the point.
- [42] In *R. v. Mills*, [1999] 3 S.C.R. 668, the Supreme Court had to assess the constitutional validity of the third party records regime in ss. 278.1 to 278.91 of the Code. The majority judgment of McLachlin J. (as she then was) and Iacobucci J. addressed the relationship between s. 7 and s. 8 of the Charter:
- [87] The present appeal asks how to define the privacy rights of third parties in light of the accused's right to gain access to evidence in order to make full answer and defence. As the right to make full answer and defence is a principle of fundamental justice protected by s. 7 of the Charter, it is helpful to explore the connection between ss. 7 and 8 of the Charter. In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, supra, at p. 502, Lamer J. stated for the majority:

Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s.7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s.7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14.

Of course, later cases have held that the text of the Charter supports some differences between ss. 7 and 8. For example, s. 8 applies to corporations whereas s. 7 does not: *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, *supra*; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, (S.C.C.). In *C.I.P. Inc.*, *supra*, at p. 854, this Court held that the concern that there be no incongruity between ss. 7 and 8-14 related to the principles of fundamental justice and not to the scope of life, liberty and security of the person.

[88] Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice. Moreover, as we have already discussed, the principles of fundamental justice include the right to make full answer and defence. Therefore a reasonable search and seizure will be one that accommodates both the accused's ability to make full answer and defence and the complainant's privacy right.

[Emphasis added.]

[43] Later, in *R. v. Rodgers*, 2006 SCC 15, the Supreme Court again addressed the interplay of s. 7 and s. 8 of the Charter, this time in the context of a constitutional challenge to the DNA data bank provision in s. 487.055 of the Code, which permits a provincial court judge, on ex parte application, to authorize the collection of DNA samples from three classes of previously convicted and sentenced offenders. The s. 7 challenge was that the provision allowed for an ex parte proceeding in the absence of any justification for denying fundamental procedural fairness. The s. 8 challenge was that the provision permitted the seizure of a DNA sample from an individual without first establishing reasonable and probable grounds to link the individual to a particular unsolved crime.

[44] Writing for the majority, Madam Justice Charron adopted the approach from *Mills* and dismissed the dual s. 7 and s. 8 Charter challenge in the following manner:

[23] The Crown contends that the constitutional analysis on both grounds (a) and (b) should be conducted under s. 8, not because s. 7 is not triggered, but because s. 8 provides a more specific and complete illustration of the s. 7 right in this particular context, making any s. 7 analysis redundant. I agree. Mr. Rodgers' ex parte argument concerns the procedural fairness of the very process that authorizes the seizure. In these circumstances, the question is necessarily encompassed in the s. 8 assessment of reasonableness and is more properly considered in that context. As we shall see, what is fair depends entirely on the context. This Court described the rapport between s. 8 and principles of fundamental justice in *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), where the interests at play were the right to make full answer and

defence and the complainant's privacy right. This Court stated as follows (at para. 88):

Given that s. 8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s. 8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice. Moreover, as we have already discussed, the principles of fundamental justice include the right to make full answer and defence. Therefore, a reasonable search and seizure will be one that accommodates both the accused's ability to make full answer and defence and the complainant's privacy right.

[24] In my view, the same reasoning applies here. I will therefore deal with grounds (a) and (b) under the s. 8 analysis and then consider s. 11.

[45] More recently, in *Wakeling v. United States of America*, 2014 SCC 72, the Supreme Court addressed the interplay between s. 7 and s. 8 Charter challenges to the constitutionality of s. 193(2)(e) of the Code - a provision that authorizes the disclosure of lawfully intercepted communications to a foreign state for the investigation or prosecution of offences. Writing for three members of the majority, Mr. Justice Moldaver succinctly concluded that the appellant's arguments were more properly dealt with under s. 8:

(a) Overview of the Parties' Charter Challenges

[48] Mr. Wakeling and the BCCLA raise a host of Charter arguments challenging the constitutionality of s. 193(2)(e). For the sake of clarity, these arguments can be broken down into three distinct (though somewhat overlapping) categories: (1) s. 193(2)(e) is unconstitutionally overbroad; (2) s. 193(2)(e) is unconstitutionally vague; and (3) s. 193(2)(e) is unconstitutional because it lacks accountability mechanisms. Viewed individually and collectively, these arguments challenge the reasonableness of the law authorizing the Impugned Disclosure. As such, they are properly considered under the second step of the s. 8 framework.

(i) Overbreadth

[49] The BCCLA's main line of attack on s. 193(2)(e) is that it creates an almost "limitless" scope for disclosure of private intercepted communications. In failing to place reasonable, or indeed any limits on disclosure, the provision effectively grants police untrammelled discretion and is ripe for abuse by both domestic and foreign authorities. This argument strikes me as very similar to Mr. Wakeling's submission that s. 193(2)(e) is unconstitutionally overbroad and thus contravenes the principles of fundamental justice in violation of s. 7 of the Charter. I am of the view that both of these arguments can be dealt with together under the reasonableness framework of s. 8. To put it simply, a law that suffers from overbreadth will necessarily be unreasonable.

(ii) Vagueness

[50] Mr. Wakeling argues that the language of s. 193(2)(e) is so vague as to be unworkable. He makes this argument under s. 7 of the Charter, asserting that the phrase "in the interests of the administration of justice" does not have a constant and settled meaning. Like the argument on overbreadth, I believe that this argument can be disposed of under s. 8. A provision that is unconstitutionally vague will necessarily be unreasonable.

[Emphasis added.]

[46] Justice Moldaver went on to find that s. 193(2)(e) of the Code, while broad in scope, did not suffer from overbreadth and did not grant "near-limitless" disclosure of lawfully intercepted communications. In effect, the provision limited the type of information that may be disclosed, the purpose for which it may be disclosed, and the persons to whom it may be disclosed: Wakeling, para. 55.

[47] The corollary to the observation in Wakeling that a law that suffers from overbreadth will necessarily be unreasonable is that a law having been found to be reasonable under the analytical framework from Collins, and therefore not contrary to s. 8 of the Charter, cannot be said to suffer from overbreadth under s. 7 of the Charter. This is because s. 8 provides a more specific and complete illustration of the s. 7 right in this particular context, making any s. 7 analysis redundant: Rodgers, para. 23.

[48] Collectively these three cases demonstrate that the proper analytical framework to be applied in this case is s. 8 of the Charter, not s. 7. Where a party contends that a law that authorizes a search or seizure - as the provisions of the CA and CAR do - is overbroad or arbitrary, such assertions are merely iterations of the contention that the law is "unreasonable" within the meaning of the Collins test.

[49] In my view, s. 8 offers a "highly specific guarantee" that covers precisely the complaints now advanced by Mr. Latimer and that were addressed in the Jail Calls Ruling. Respectfully, s. 7 of the Charter adds nothing to the analysis. The provisions were found to be reasonable pursuant to s. 8, and it follows that a law that is reasonable cannot be said to operate in an arbitrary or overbroad manner.

Mr. Latimer's s. 7 right to life, liberty and security of the person is not engaged by the impugned legislation

[50] Section 7 of the Charter guarantees that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[51] There is no dispute that a s. 7 challenge therefore entails a two-stage analysis:

Stage one - s. 7 interests must be engaged: Has the applicant suffered a real or imminent deprivation of life, liberty, or security of the person, or a combination of these interests? Is the deprivation sufficiently serious to attract Charter protection?

Stage two - deprivation contrary to s. 7 principles: Is the deprivation in accordance with the principles of fundamental justice?

[52] Preliminary to any assessment of the foregoing questions is a threshold question - whether an applicant has standing to challenge the legislation.

[53] The decision in *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 established the presumptive rule for standing to challenge legislation:

4. I start with the proposition that, as a general rule, it is not open to a person simply because he is a citizen and a taxpayer or is either the one or the other to invoke the jurisdiction of a competent court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person either is not directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a court. Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society. This is especially true of the criminal law. For example, however passionately a person may believe that it is wrong to provide for compulsory breathalyzer tests or wrong to make mere possession of marihuana an offence against the criminal law, the courts are not open to such a believer, not himself or herself charged or even threatened with a charge, to seek a declaration against the enforcement of such criminal laws.

[Emphasis added.]

[54] As Mr. Latimer's telephone conversations with Sameet Kang were recorded by the ICCS he is directly affected by the operation of the impugned provisions. Accordingly, under the *Borowski* formulation for standing, Mr. Latimer clearly has the right to challenge the recording of his telephone calls, including the right to challenge the legislative provisions that authorized the recording of his telephone calls.

[55] As both the AGBC and PPSC correctly point out, the question of standing is a threshold question to be distinguished from the subsequent and substantive question of whether there is a rights limitation wrought by the impugned provisions.

[56] The applicant contends that because he faces exposure to conviction and a sentence of imprisonment, he has satisfied the s. 7 "standing" hurdle citing the B.C. Motor Vehicle Act Reference decision (para. 76) to support his position. With respect, the applicant is conflating the threshold question of standing with the question of whether his s. 7 interests have been engaged by the impugned provisions.

- [57] The impugned legislation in issue in the B.C. Motor Vehicle Act Reference case had a direct causal link with exposure to imprisonment. There, s. 94 of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, (as amended by the Motor Vehicle Amendment Act, 1982, 1982 (B.C.), c. 36), created an absolute liability offence for driving while prohibited with the potential for a sentence of imprisonment.
- [58] In contradistinction to the circumstances of the B.C. Motor Vehicle Act Reference case, as well as the cases used to ground the hypotheticals cited by the applicant[2], the impugned provisions of the CA and the CAR do not expose the applicant, or anyone else whose telephone calls are recorded, to risk of a criminal conviction or a sentence of imprisonment. Mr. Latimer is not charged under the CA or the CAR. He is charged with offences under the Code and the CDSA and it is those legislative provisions that expose him to the potential for conviction and imprisonment.
- [59] It is clear from a plain reading of the CA and the CAR that they do not constitute criminal offence legislation. Rather, the impugned provisions are administrative and regulatory in nature and are part of a panoply of provisions that govern the operations of, among other things, correctional centres throughout the province.
- [60] The only real or imminent consequence created by operation of the ICCS is that for Mr. Latimer, or any one else engaged in conversations with inmates in a correctional centre, his telephone conversations were simply recorded. Thus, the consequence of the operation of the impugned provisions impacts on s. 8 Charter right considerations, a matter addressed in the Jail Calls Ruling.
- [61] Accordingly, while Mr. Latimer has standing to challenge the impugned provisions of the CA and CAR because he is directly affected by their operation, he has not established that his s. 7 right to liberty is engaged by the impugned provisions.
- [62] In light of my conclusions that (i) s. 8 of the Charter is the appropriate provision to assess the constitutionality of the impugned provisions and that s. 7 affords no further or greater protection and (ii) Mr. Latimer's s. 7 right to liberty is not engaged by the operation of the CA and the CAR as they do not threaten him with conviction or imprisonment, it is not necessary to address the remaining aspects of Mr. Latimer's argument.

Conclusion

- [63] For the foregoing reasons, the application is dismissed.

"Ker J."

- [1] "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.

[2] R. v. Heywood, [1994] 3 S.C.R. 761; R. v. Ruzic, 2001 SCC 24; R. v. Nur, 2015 SCC 15; R. v. Appulonappa, 2015 SCC 59; R. v. Lloyd, 2016 SCC 13; R. v. Safarzadeh-Markhali, 2016 SCC 14.

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