
CANADA / JUDGMENT

R. v. Mastop

2012 BCSC 2085

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 2085 R. v. Mastop

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Mastop,

2012 BCSC 2085

Date: 20121102

Docket: 25279

Registry: Vancouver

Regina

v.

William Jacob Mastop

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Before: The Honourable Madam Justice Dickson

Oral Ruling on Wiretap Voir Dire

Counsel for the Crown:

P.L. Johnstone, Q.C., D.A. Jardine

Julie M. Robinson, Mary M. Salasay

Counsel for the Accused:

R. Fernyhough

Place of Hearing:

Vancouver, B.C.

Place and Date of Judgment:

Vancouver, B.C.

November 2, 2012

- [1] THE COURT: The applicant accused, William Mastop, is a non-practicing lawyer. He is charged with contributing to the activity of a criminal organization known as the "Greeks" between August 1, 2004 and December 14, 2005, in Vernon, British Columbia, contrary to s. 467.11(1) of the Criminal Code, R.S.C. 1985, c. C-46. The Crown intends to lead evidence at his trial of several telephone conversations intercepted between June 5, 2005 and April 7, 2006 pursuant to a series of authorizations issued under s. 186 of the Code. The applicant challenges the admissibility of the intercepted calls on the basis that he was a "known" person, as contemplated by s. 185(1)(e) and s. 186(4)(c) of the Code, and should have been identified as such but was not. Accordingly, in his submission the calls were intercepted unlawfully and in violation of his s. 8 Charter rights.
- [2] On April 10, 2012 I granted leave to enter into a voir dire to determine the admissibility of the calls at issue. I also granted leave to cross-examine Sgt. Rigby, the affiant for the first two authorizations, and Cpl. Tvergyak and Sgt. Wicentowich, the sub-affiants. Those officers were cross-examined by counsel for the applicant. In addition, several documents were filed as exhibits for consideration on the voir dire.

ISSUE

- [3] The issue for determination is whether the applicant was a known person, but not named as such, when any of the Part VI authorizations were issued.

FACTUAL BACKGROUND

- [4] In my reasons for judgment on the application for leave to enter into a voir dire and cross-examine the affiant and sub-affiants, I summarized some of the background facts as follows:
- [5] In August 2005, the RCMP commenced a complex investigative project called Project E-Peccant, as a result of several murders which occurred in the Vernon area. The first of these murders occurred in July 2004. Members of Project E-Peccant came to believe that at least one of the persons responsible in each of the murders belonged to the Greeks, a Vernon-based criminal organization. One of the murders under investigation was of Ronald Thom, which allegedly occurred on May 31, 2005.

- [6] On June 5, 2005, shortly after the Thom murder, then Constable now Sgt. Rigby swore an affidavit in support of an application pursuant to s. 185 of Part VI of the Criminal Code (the "First Affidavit"). The same day, Authorization P01/05 was issued pursuant to s. 186 of the Code by Mr. Justice Metzger (the "First Authorization"). Eight further authorizations to intercept private communications were applied for and issued thereafter in connection with the ongoing investigation (the "Subsequent Authorizations").
- [7] The named offences and named persons increased with each successive affidavit and authorization. In the First Affidavit and the First Authorization, for example, there were 4 named offences (murder, unlawful confinement, uttering threats, and conspiracy to commit those 3 offences), 4 named primary targets, and 5 named secondary targets. By Authorization P15/05, however, there were 37 named offences, including several murders and criminal organization offences, 10 named primary targets, and 49 named secondary targets. As noted, the applicant was not named as a "known" person in the First Authorization or in any of the Subsequent Authorizations.
- [8] In the First Affidavit, Sgt. Rigby deposed that Mr. Thom was a drug runner for the Greeks before he was murdered. He also deposed that Messrs. Brownell, Sipes, O'Donnell [Content Redacted], all primary targets and Greeks members, were responsible for murdering Mr. Thom. He went on to depose that the Greeks had Belinda Scott, were planning to kill her, and those involved with the Greeks were fully aware of police investigative techniques. He further deposed that the primary targets would deal only with people they had known for a long time, and it was important to track their movements.
- [9] Sgt. Rigby also deposed that police intended, amongst other things, to "stimulate relevant communications between any or all of the targets of the investigation by one or more of the following: conducting strategic inquiries and interviews with them and their associates; conducting media releases concerning the murder; conducting search warrants; and carrying out other investigative procedures".
- [5] The applicant was a practicing lawyer in Vernon during the period covered by the authorizations. He was widely known by police to act in that capacity for several members of the Greeks. He was also known to socialize frequently with Peter Manolakos, who was a close and long-time friend of the applicant, and the person believed to be the Greeks' leader. The applicant was also known to spend a great deal of time at Matina's restaurant, a meeting place for members of the Greeks.
- [6] Mr. Manolakos was named as a secondary target in the First Authorization and as a primary target in Subsequent Authorizations. As discussed below, several E-Peccant investigators harboured considerable and well-founded concerns about the applicant's conduct in connection with Mr. Manolakos and, more generally, with members of the Greeks.
- [7] The applicant was not named in any of the authorizations granted with respect to the offences under investigation. However, the evidence adduced on the voir dire reveals that a body of information of significant concern regarding several of his activities in connection

with the Greeks was then known to police. Indeed, in July 2005 an investigation was conducted and information of concern was assembled in a focused police report presented to Crown counsel. The officer who produced the report was involved in the Thom/Scott investigation, although the report's existence was not known to all members of the investigative team.

[8] As noted, the First Authorization was granted on June 5, 2005. Thereafter, subsequent authorizations were granted, the final of which was dated February 10, 2006.

[9] The evidence elicited on the voir dire reveals that from January 2004 to the date of the final authorization, amongst other things, police investigators were aware of the following:

- In January, 2004 a confidential source of unknown reliability advised that the applicant received stolen goods from a known associate of the Greeks and purchased stolen liquor at a drug house for users.

- On April 15, 2004, a confidential source of known and proven reliability advised that the applicant parties with the Greeks, is suspected of using cocaine, sometimes goes with the Greeks to Calgary, and is paid by Peter Manolakos to defend everyone in the organization. This source said that the Greeks, along with the applicant, were making a trip to Calgary soon and would meet members of the Hells Angels. The source also said the applicant provides legal advice to members of the Greeks on how to avoid apprehension by police and criminal prosecution while selling drugs.

- On April 28, 2004, the same source advised that the applicant, Mr. Manolakos, and three other members of the Greeks would be travelling to Calgary to pick up cocaine on May 2, 2004. The source said that Mr. Manolakos and the applicant would fly and that the other Greeks members would drive.

- On May 28, 2004, Sgt. Wicentowich was advised by the same source of known and proven reliability that the Greeks were meeting at the "Office", a known Greeks' meeting place. The source said that the applicant and Mr. Manolakos would be attending to discuss a rule Mr. Manolakos was imposing on all members: that no one is allowed to use drugs and be part of the Greeks.

- In [Content Redacted] 2004, investigative team members were investigating the [Content Redacted]. In so doing, they interviewed [Content Redacted]. Investigators believed the applicant was a "dirty lawyer" who allegedly engaged in activity in connection with the Greeks that was, if not criminal, then plainly improper for a lawyer. [Content Redacted] expressed mistrust of the applicant, told police the applicant brought him money in prison donated by members of the Greeks, and said the applicant was a member of the Greeks.

- On October 25, 2004, Sgt. Tvergyak received information from a confidential source of known and proven reliability that the applicant was at Mr. Manolakos's residence the previous Friday night when there was a meeting of various members of the Greeks. After the meeting, he gave a ride home to one of the organization's street traffickers.
- On November 11, 2004, Sgt. Percy and Cst. Tribes received information from a confidential source of unknown reliability that the applicant had been involved in transporting drugs from Calgary to Vernon as part of the Greeks' cocaine distribution organization.
- On April 6, 2005, a confidential source of known and proven reliability advised Sgt. Wicentowich that the applicant is a crooked lawyer who advises the Greeks on how to avoid being caught for breaking the law.
- On June 2, 2005, the police applied for an emergency authorization which was in place from June 2 to 5, 2005. During the course of that authorization, 10 calls deemed to be privileged were intercepted, most of which occurred between [Content Redacted] and the applicant. These intercepted calls were locked down by police in accordance with their prevailing policy.
- As noted, [Content Redacted] was a primary target. Police suspected he had Belinda Scott and intended to kill her. As a result, the tracking of his movements was a high priority for the police as an aspect of their investigation.
- On June 4, 2005, Sgt. Wicentowich observed several members of the Greeks, including Mr. Manolakos and the applicant, together at a local Vernon nightclub.
- On June 5, 2005, after intercepting a call between Douglas Brownell, also a primary target, and an unknown male, the police observed the applicant and Mr. Brownell meeting with one another in a mall parking lot. In the call, Mr. Brownell advised that the applicant was coming to talk to him and help him when he went to talk with the police. After the meeting, the applicant called police to say that if they needed to speak with Mr. Brownell, he (the applicant) knew how to locate him.
- During the period of the first authorization, 39 apparently privileged communications between primary targets and a lawyer were intercepted, recorded, and locked down. Most of these communications involved the applicant.
- On August 30, 2005, investigators searched Mr. Manolakos' residence and found there a number of court documents they suspected were furnished by the applicant. These included a copy of a warned statement of Tim Williams, a Greeks member, said to be forwarded from the applicant's office. They also included a letter from the Crown to the applicant with a disclosure package for an individual named Hodgins, as well as a letter dated April 13, 2005 from the applicant to the RCMP regarding the seizure of property from [Content Redacted]. When police attempted to interview Mr. Manolakos, he identified the applicant as his lawyer.

- On [Content Redacted] 2005 the applicant and [Content Redacted], yet another primary target, were observed by police meeting at [Content Redacted]. The meeting took place after police had made it known to the Greeks that Ms. Scott's body had been located and foul play was suspected. At one point, police saw [Content Redacted] give his phone to the applicant and the applicant's voice was identified by the intercept monitor.
- In September 2005, police received a video taken at Ron Thom's funeral. The applicant gave the eulogy at the funeral, which was viewed by investigators on the video.
- At some point [Content Redacted] with Mr. Manolakos. He began thereafter to cooperate with police investigators. On [Content Redacted] 2005, [Content Redacted] told police that the applicant would come to Matina's restaurant and to Mr. Manolakos' residence for meetings. He was asked if the applicant was just a lawyer or a friend, and responded, "He's a lawyer and that's about it". [Content Redacted] also said that the applicant is on a weekly retainer from the Greeks. He was asked to paint a picture of the organization, and in so doing did not specifically mention the applicant.
- [Content Redacted] told the police that the Greeks killed Ron Thom because they believed he was involved with John Thom's arrest. They came to this belief because they read court documents which gave information about sources regarding the search of John Thom's residence.
- In his [Content Redacted] 2005, statement [Content Redacted] told police that the Greeks purchase drugs from a variety of suppliers on the Coast.
- On [Content Redacted] [Content Redacted] told police the applicant supplies the Greeks with various police documents which he gets from the court clerks or female registry staff that he dates. In particular, he said the applicant provided the Greeks with the police report on the John Thom case. He also said the applicant was present when the Greeks discussed their drug business, but he would not sit in the back room when everyone spoke in private. He said further that the applicant provides them with legal advice and comes to Matina's as a friend, as a legal adviser, and as a customer.
- In the [Content Redacted] 2005 statement, [Content Redacted] again spoke about Mr. Manolakos getting drugs from Vancouver.
- On [Content Redacted] 2005, [Content Redacted] told police that the applicant brought the Greeks information about the confidential informant in the John Thom matter, which information was used to determine who the informant was.
- On September 26, 2005, Norman McDonnell told police the applicant is the Greeks' lawyer, that he runs with the Greeks to Calgary, and that he attended a meeting with the Greeks at which their drug business was discussed. It should be noted in this regard that Mr. McDonnell worked with the Greeks from January to August of 2004.
- On [Content Redacted] 2005, [Content Redacted] told police the applicant advised Mr. Manolakos that they now had an RCMP officer from Kelowna in their pocket.

- On October 20, 2005, police observed the applicant spend over one hour at Matina's, proceed to the Manolakos residence, and leave from there with two members of the Greeks.
 - [Content Redacted]
 - On [Content Redacted] 2005, [Content Redacted] spoke with investigators specifically about the applicant and the Greeks' business. Amongst other things, he told them that the applicant would give legal advice and tell Mr. Manolakos how to do things not to get caught. He also said the applicant would provide court documents to Mr. Manolakos.
 - On December 17, 2005, the police learned from an employee of the Vernon District Credit Union that the applicant had attempted unsuccessfully to take over Matina's business account. He then opened a new account for Matina's under his own name.
- [10] Sgt. Rigby swore the First Affidavit in the context of the investigation into the Ron Thom killing and the unlawful confinement of Belinda Scott. He was brought in from Kelowna to assist with the investigation, which had become chaotic as police tried frantically to locate Ms. Scott, whose life they knew to be in jeopardy. The attempt to save her life was the focus of the investigation when the First Affidavit was sworn.
- [11] Sgt. Rigby put in many hours in the process of producing the First Affidavit. In so doing, he relied upon information brought to him by team investigators. Although Sgt. Rigby was aware of many background aspects of the Greeks organization and he knew generally that the applicant was a lawyer for some of the people under investigation, he was not informed of team members' concerns regarding the applicant's apparent misconduct. This was because the knowledgeable investigators did not believe that the applicant was implicated in the crimes then being investigated. That being so, they did not think it necessary or helpful to advise Sgt. Rigby about their concerns in connection with his apparent misconduct relating to the Greeks.
- [12] In general terms, what emerges from the evidence, including the cross-examinations, is that at the time of the First Authorization investigators believed members or associates of the Greeks were responsible for the Thom murder and Scott abduction. They also believed that the primary targets would only deal with people they had known for a long time and would be unlikely to trust an outsider with knowledge of the alleged crime. For this reason, as noted in the First Affidavit, police believed it important to attempt to stimulate relevant communications between targets and to track their movements. The authorized interception of targeted private communications was, for police, an important investigative tool.
- [13] It also emerged that Sgt. Rigby, who is legally trained but was not then experienced in applying for Part VI authorizations, was operating under a misconception with respect to the legal test for naming secondary targets. When testifying, he candidly acknowledged that in June 2005 he believed secondary targets were those who would be intercepted at the addresses and phones of primary targets. His directness in acknowledging this error was

appropriate and impressive. He now appreciates that the test for naming a secondary target is whether intercepting their communications may assist the investigation.

- [14] Intercepted calls believed to be privileged were locked down in the monitor room during the currency of the authorizations. Sgt. Rigby was, however, unaware of precisely how privileged calls were being handled. He testified generally that, as he understood RCMP policy, privileged calls are locked down so that investigators are not privy to their contents and can make no use of them. His understanding at the time was that communications between a lawyer and anyone else were not to be intercepted at all.
- [15] Sgt. Rigby also testified that he was unsure that any knowledge of locked-down privileged calls would have changed how he approached his affidavits. In the course of his testimony, he noted that paragraph 14 contained in the Terms and Conditions section of both affidavits essentially replicates s. 186(2) of the Code.
- [16] Like Sgt. Rigby, Sgts. Tvergyak and Wicentowich were impressively candid in their testimony on the voir dire.
- [17] Sgt. Tvergyak was the primary investigator in the Thom homicide and the Scott abduction. Amongst many other things, he testified that he provided information to Sgt. Rigby for his affidavit. He also testified, and I accept, that it was globally known if investigators had any information that would assist the investigation they were expected to tell Sgt. Rigby about that information.
- [18] Sgt. Tvergyak acknowledged that violence goes hand in hand with the drug business. He also acknowledged that he would not expect a lawyer to be involved in attending a criminal organization meeting, and he had information that the applicant was acting beyond the solicitor-client relationship in his dealings with the Greeks. Sgt. Tvergyak said further that he thought the applicant's conduct in socializing with members of the Greeks was unusual. He did not, however, personally believe the applicant to be a member of the Greeks. He was unaware of the report that was produced in July 2005 regarding the applicant's conduct of concern.
- [19] Like Sgt. Rigby, Sgt. Tvergyak understood that intercepted calls deemed to be privileged were unavailable to members of the investigative team.
- [20] For his part, Sgt. Wicentowich acknowledged the general consensus within the investigative team at the time of the authorizations was that the applicant acted beyond his capacity as a lawyer in some of his dealings with the Greeks. Nevertheless, the consensus was also that the applicant was not integrated in the Greeks organization to the point of being involved in the running of the day-to-day operations. As police were aware, the Greeks were an organization that had very defined roles from street-level dealers to upper-level management to those who directed the organization.

- [21] Sgt. Wicentowich also candidly acknowledged that when the authorizations were granted his understanding of the boundaries of a lawyer's ethical duties was inaccurate. In particular, when asked if he believed it was outside the proper scope of a retainer for a lawyer to go to Calgary on drug runs Sgt. Wicentowich answered frankly that he knows that now, but did not appreciate it at the time. Rather, he then believed the applicant could properly go along on such an expedition to provide on-the-spot legal advice if the car was stopped by police. His understanding of what is and is not permissible for a lawyer has since been revised.
- [22] Sgt. Wicentowich's candour in acknowledging his earlier misunderstanding on this point was refreshing. The same is true of his acknowledgment that the general consensus within the investigative team was the applicant was a part of the Greeks organization. I accept this acknowledgement as accurate and find as a fact it correctly represents the consensus that prevailed within the investigative team at the time.
- [23] On October 20, 2005, Cpl. Fred McAndie swore an affidavit in support of Authorization P13. By that time, the offences under investigation had expanded to include, amongst many others, drug trafficking. Cpl. McAndie summarized a large body of evidence obtained up to that point, including the many statements made by [Content Redacted]. In so doing, in paragraph 62 he included a heading entitled "Police Corruption - Lawyer William Mastop Implicated". In it, he noted that the applicant told Mr. Manolakos they now had an RCMP officer from Kelowna in their pocket. He also noted an individual by the name of Wally Khadikin, an apparently corrupt guard who worked at the Vernon RCMP detachment, had provided documents to the Greeks. Mr. Khadikin was named as a secondary target in the authorization; as noted, the applicant was not.
- [24] During the period covered by the authorizations, approximately 677 communications deemed to be privileged were intercepted, recorded, and locked down pursuant to the prevailing RCMP procedure. Investigators were not then privy to the contents of those conversations.

LAW

Known Person

- [25] A Part VI authorization may be granted by a judge of the superior court of criminal jurisdiction based on an ex parte application and supportive affidavit. The affidavit serves as the evidentiary foundation for the authorization sought. The interception of private communications pursuant to the authorization constitutes a search and seizure for the purposes of s. 8 of the Charter: *R. v. Mahal*, 2012 ONCA 673.
- [26] The question of whether a person must be named in an authorization is governed by the combined effect of ss. 185(1)(e) and 186(4)(c) of the Code. Those sections provide, in relevant part:

185. (1) An application for an authorization to be given under section 186 shall be made ex parte and in writing to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 and shall be signed by the Attorney General of the province in which the application is made or the Minister of Public Safety and Emergency Preparedness or an agent specially designated in writing for the purposes of this section by

...

and shall be accompanied by an affidavit, which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters:

...

(e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used . . .

...

186. (4) An authorization shall

...

(c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used . . .

[27] The threshold for naming a person as known is a low one: *R. v. Schreinert* (2002), 165 C.C.C. (3d) 295. Investigators must know the identity of the person and have reasonable and probable grounds to believe that the interception of the person's private communications may assist in their investigation of the offence. In this context, the requisite grounds are a credibly based probability that interception of the person's private communications may assist the investigation: *R. v. Sipes* 2010 BCSC 1256.

[28] The identity and investigative assistance requirements are cumulative in nature. If a person meets both criteria when the authorization is sought, he or she is a "known person" and must be described as such. A person is considered "unknown" if he or she does not meet the requirements of s. 185(1)(e): Mahal.

[29] In *R. v. Chesson*, [1988] 2 S.C.R. 148, the Supreme Court of Canada explained the test for determining whether an individual is a known person. At paragraph 20, the court stated:

20. How is it to be decided whether a particular person is known or unknown for the purposes of Part IV.1 of the Code? In my opinion, the answer to this question is to be found in Part IV.1 itself. The starting point is s. 178.12(1)(e) of the Code, which sets out the two pre-conditions

to be met before a person may be lawfully identified and named in an authorization and thus be a known person. The first and most obvious condition is that the existence of that person must be known to the police. Second, and equally important, however, is the additional requirement that the person satisfy the standard of being one "the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence". If at the time the police apply for a judicial authorization a person meets both these criteria, he will be a known person and therefore, if the interceptions of his communications are to be admitted against him, he must be named in the authorization as a target for interception. If he is not named his interceptions are not receivable since there is no authority to make them. A "known" person, then, for the purposes of Part IV.1 of the Code is one who satisfies the two criteria in s. 178.12(1)(e).

- [30] Pursuant to a drafting convention that has evolved in wiretap practice, a known person is typically identified as either a "primary" or a "secondary" target. A primary target is a person directly implicated in the offences under investigation. A secondary target is a person known to police, though not directly implicated, whose intercepted communications may advance the investigation.
- [31] Crown counsel submits, and I agree, that private communications of secondary targets are not necessarily intercepted only in situations where they are likely to be communicating with primary targets, although that is the most common situation. For example, depending on the circumstances, the private communications of a secondary target may also be intercepted when they are located at one of the places associated with a primary target, such as a family residence.
- [32] It is important to note that the division of known persons into the foregoing subcategories is not required by the Code. As is clear from the jurisprudence, the practice of differentiating between the two lacks any legal significance, although there may well be practical consequences that flow from the label attached. The standard of proof required to name either a primary or secondary target is identical. In the case of a secondary target, however, that standard may, in many circumstances, be easier to reach: *R. v. Lee*, 2002 BCSC 471; *R. v. Riley*, [2009] O.J. No. 738.
- [33] The purpose of naming those not directly implicated in the offences under investigation is to ensure that their privacy rights are minimally affected by court-ordered electronic surveillance. As stated in *R. v. Ahmad*, 2010 ONSC 123:

The naming requirement also assists in drawing the authorizing judge's attention to whether special conditions are warranted in order to minimize interference with the privacy rights of those whose private communications may be permanently captured by the state.

- [34] It is unnecessary for investigators to identify precisely how a known person's communications may assist in the investigation, so long as the statutory criteria are established. It is, however, necessary to connect the targeted person to the investigation of the offences for which the authorization is sought. In *R. v. Chow*, 2005 SCC 24, the Supreme

Court of Canada held that although police may know of a person's existence and suspect his or her involvement in criminal activity, they must have reasonable and probable grounds to believe interception of the person's private communications may assist in the investigation of the particular offences being investigated: *Chow; Mahal*.

- [35] When investigators apply for an authorization, the application must be based on information that is both accurate and current. In some circumstances, information in the possession of police may become stale-dated to the point that it is no longer relevant or helpful in providing the requisite grounds. That being said, the mere fact that information is dated does not necessarily mean it is stale for purposes of a probable cause analysis. In all cases, the determination must be made based on a practical, non-technical and common-sense assessment of the totality of the circumstances of the case: *R. v. Ballendine*, 2011 BCCA 221; *R. v. Russell*, [1999] B.C.J. 2260.
- [36] In *Mahal*, the Ontario Court of Appeal considered whether there is a difference between a known person for purposes of a s. 185(1)(e) affidavit and a known person for purposes of inclusion in the authorization granted under s. 186(4)(c). The answer arrived at by the court was no. Although this issue has been the subject of controversy, I find the analysis in *Mahal* persuasive and am inclined to agree for the reasons so clearly expressed by Watt J.A. In explaining this conclusion, Watt J.A. emphasized that the test for including any named person in both the supportive affidavit and the consequent authorization is the threshold that is described in *Chesson*.
- [37] Crown counsel submits, however, that the *Chesson* test uniquely does not apply when the target is a practicing solicitor. Rather, she says the *Chesson* test is entirely displaced statutorily by s. 186(2) of the Code. Sections 186(2) and (3) of the Code provide:
186. (2) No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.
- (3) Where an authorization is given in relation to the interception of private communications at a place described in subsection (2), the judge by whom the authorization is given shall include therein such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients.
- [38] Crown counsel described s. 186(2) of the Code as a marked departure from the *Schreinert* approach, which holds that police do not require reasonable and probable grounds to believe a person is involved in the commission of an offence in order to be named as a known person. In her submission, given its terms a practicing lawyer cannot be treated like others for purposes of authorizing the interception of his or her private communications

pursuant to Part VI. This is so, she says, because of the clear intent of the section: to balance the competing interests of law enforcement with the need to protect bona fide solicitor-client communications.

- [39] According to Crown counsel, the intent of s. 186(2) cannot be bypassed by the expedient of naming a practicing lawyer as a secondary target where there are no grounds to name him or her as a primary target. Rather, she says, a practicing lawyer can be named as a known person in a Part VI authorization only if there are reasonable and probable grounds to believe that he or she has been or is about to become a party to the offences being investigated, the communications between the lawyer and the lawyer's client were in furtherance of a crime, or the communications were the actus reus of the crime itself. In her submission, the strictures of s. 186(2) and the overarching need to protect solicitor-client privilege requires no less.
- [40] In support of this position, Crown counsel emphasizes that the underlying purpose of s. 186(2) is to protect communications that are prima facie privileged. The privilege attaches to the communication itself and not to the place at which that communication occurs. She also emphasizes the words of R.W. Hubbard in *Wiretapping Law and Other Electronic Surveillance* with respect to s. 186(2) and its extraordinary nature within the statutory scheme established in Part VI. At page 5-25, Mr. Hubbard writes:

Section 186(2) of the Code is the only provision of Part VI that requires specific reasonable grounds be made out in connection with a party before he or she can be named in an authorization. Section 186(2), however, applies to solicitors, members of their family or persons working for solicitors. It is, therefore, understandable why a higher threshold must be made out in order to ensure solicitor-client privilege is maintained. Section 186(2) of the Code states:

186 (2) No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.

By specifically requiring grounds to believe that solicitors, their staff or members of their household are parties to an offence before an authorization can be issued at a place used by them, s. 186(2) of the Code underscores that this requirement is exceptional. Generally, therefore, there is no need to expressly make out reasonable grounds that a person is involved in an offence before they can be named as targets of a wiretap authorization.

R.W. Hubbard et al., *Wiretapping Law and Other Electronic Surveillance* (Canada Law Book, 2012) at 5-25

- [41] Crown counsel accepts that calls to solicitors at their offices can be lawfully intercepted over a client telephone incidental to a valid authorization issued to intercept that person's private communications. This is so because in such circumstances the place of interception is the client's telephone and not the office of the solicitor. She goes on to say, however, that the statutory scheme does not contemplate permitting prior authorization to intercept a solicitor's private communications unless the higher threshold set out in s. 186(2) has been met.
- [42] In order to address this submission, it is necessary to consider several general principles of solicitor-client privilege. It is also helpful to review how some of those principles have been applied in the context of wiretap litigation.

Privileged Communications Between Solicitors and Clients

- [43] Confidential communications made by a client to counsel for the purpose of obtaining legal advice are protected by solicitor-client privilege. There is no privilege considered more important or guarded more carefully within our system of law. The only exceptions to this general rule of substantive law are if the confidential communications are made for the purpose of obtaining legal advice in order to facilitate the commission of a crime or if the communication itself is the actus reus of the crime: *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860.
- [44] The rationale for the privilege rests on three underlying propositions: first, for members of society to comply with the law the assistance of legal experts is required; second, that assistance can only be provided with full knowledge of an individual's situation; and third, individuals cannot be expected to share fully such knowledge with legal experts without assurance that their confidences will not be revealed against their will. The privilege will rise upon contact between the solicitor and the client. There is no need for a formal retainer. The client's contact with the solicitor's staff is also privileged, so long as its purpose is the seeking of legal advice: *McCormick on Evidence* (St. Paul, Minn: West Group, 1999) vol. 1; *The Law of Evidence*, Paciocco & Stuesser, 4th ed. (Toronto: Irwin Law, 2005).
- [45] While critically important to our system of justice, solicitor-client privilege is not absolute. In exceptional circumstances, other societal interests have been held to prevail. Those circumstances are where an accused person's innocence is at stake, where the solicitor-client communications are criminal or facilitate the commission of an offence, or where public safety requires protection. In these circumstances, solicitor-client privilege will be displaced or does not arise: *The Law of Privilege in Canada*, Hubbard, Magotiaux & Duncan (Aurora, Ont.: Canada Law Book, 2006).

[46] It is important to note for present purposes that not all communications that pass between a lawyer and a client are privileged. For example, solicitor-client privilege will only apply to a communication in which the client seeks lawful legal advice. In addition, solicitor-client privilege does not attach to advice that is given by lawyers on non-legal matters. For example, business advice that is given by lawyers to clients is not subject to solicitor-client privilege: *R. v. McClure*, 2001 SCC 14; *The Law of Evidence*.

[47] In *Maranda v. Richer*, 2003 SCC 67, Deschamps J. explained the scope of solicitor-client privilege and the importance of context in every privilege analysis. She stated:

Not all communications with a lawyer will be protected by privilege. In other words, it is not the capacity in which the person is party to the communication that gives rise to the privilege. It is the context in which the communication takes place that justifies characterizing it as privileged. Accordingly, a commercial lawyer who works in an advertising agency and whose time is spent exclusively on developing products for his or her client will not be able to claim privilege for promotional work done. Similarly, the mere fact that a client considers certain information to be confidential will not suffice for it to be protected by solicitor-client privilege. I mention these examples as a reminder that the three prerequisites for privilege to attach, as laid down by Dickson J. (as he then was) in *Solosky v. The Queen* . . . still apply:

. . . (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential [between] the parties.

[48] It is also important to note that a conversation is made up of at least two private communications, each of which is entitled to the protection of the Code's privacy provisions. In addition, in the case of private communications to which solicitor-client privilege attaches it must be remembered that the privilege is that of the client and not of the solicitor. For this reason, solicitor-client privilege can be waived by the client without regard to any privacy interests the solicitor might possess: *McClure*; *R. v. Stanton*, 2012 BCCA 208.

[49] As outlined above, s. 186(2) applies to authorizations to intercept private communications at the office or residence of a solicitor. This includes all places where a solicitor carries on business, which includes his or her mobile phone: *R. v. Blais* (2004), 182 C.C.C. (3d) 29 (CA).

[50] In *R. v. Taylor*, [1997] 86 BCAC 224 aff'd (1993), 121 C.C.C. (3d) 353, the Court of Appeal considered the admissibility of a telephone call between a solicitor and client intercepted pursuant to an authorization to intercept the client's private communications over his telephone. The court concluded that the interception was not located at the lawyer's office and rejected the proposition that s. 186 requires interception of all communications between solicitors and their clients to be pre-authorized in order to protect the needs of solicitor-client privilege. In consequence, the intercepted communication was admitted into evidence at a criminal prosecution that was conducted against the solicitor.

- [51] R. v. Doiron, 2007 NBCA 41, is another case in which a private communication involving a practicing solicitor was intercepted pursuant to an authorization in which the solicitor was not named as a target. Nevertheless, the Crown sought to introduce it as evidence against him in a criminal trial. On appeal from his conviction, the solicitor argued that he should have been named as a known person in the Part VI authorization. The court disagreed and concluded that, on the evidence, he was not known when the authorization was issued.
- [52] In the course of its analysis in Doiron, the court quoted extensively from Chesson and assumed that the Chesson test applied in the circumstances before it. That being said, it is apparent that the argument advanced by the Crown in this case to the effect that the Chesson test does not apply in cases involving practicing solicitors was not before the court.

Can a practicing solicitor ever be named as a known person pursuant to the Chesson test?

- [53] Taking into account the foregoing, I conclude that in principle a practicing solicitor can be named in a Part VI authorization as a known person in limited circumstances even though the requirements of s. 186(2) of the Code have not been established. In other words, I do not accept the Crown submission that the Chesson test has been statutorily displaced whenever a potential secondary target is a practising solicitor. This is so largely because the subcategories of primary and secondary targets are simply a drafting convention without legal significance. The critical issue in each and every case is whether, on the available evidence, there is a credibly based probability that interception of a person's private communications may assist an investigation. The provisions of s. 186(2) are a relevant aspect of that analysis when communications of a practicing solicitor are under consideration, but they are not its beginning and end.
- [54] In most cases, when the potentially-targeted person is a practicing solicitor who is not directly implicated it will be apparent that interception of his or her private communications will not likely assist an investigation. This is so because in most cases, at least prima facie, when a solicitor communicates with a client those communications will not be available for investigative assistance, given the existence of solicitor-client privilege and the provisions of s. 186(2). Most cases, however, is not all cases. The exception sometimes helps to clarify the rule.
- [55] Parliament has chosen to protect solicitor-client privilege in the manner outlined in s. 186(2) when such communications are located at the solicitor's office or residence. It has not gone further, however, and provided that regardless of where any communications between a solicitor and client or others take place no authorization may be given to intercept them unless the higher threshold has been met. This is perhaps unsurprising, given the importance of context in a solicitor-client privilege analysis, and the reality that not all communications between lawyers and others, including their clients, necessarily attract privilege. For example, a communication between a lawyer and client that occurs at a social event is unlikely to involve the provision of legal advice, and thus unlikely to be protected by solicitor-client privilege.

- [56] Solicitors are persons who communicate with others in a variety of contexts and capacities for a variety of purposes. An important, but not determinative, aspect of the relevant context will always be the location at which the communications take place. What matters in principle, however, is the essential nature of the communication in question. As discussed in *Maranda*, *McClure*, and elsewhere persons who are solicitors communicate with others, including their clients, about matters other than legal advice. When they do so, privilege does not attach. Accordingly, such communications do not merit extra protection by the law and they are not immune from use by police in an ongoing investigation.
- [57] When part of the context of a private communication, whether with a solicitor or someone else, is its location in a solicitor's office or home Parliament has chosen as a matter of policy to be cautious in its efforts to protect solicitor-client privilege. It has done so by imposing the higher threshold represented by s. 186(2) in the statutory scheme. When the relevant context of a communication is otherwise, however, the same concerns may not arise and Parliament has not made the same choice.
- [58] Mr. Hubbard's comments referenced by Crown counsel must also be considered in their proper context. It will surely be exceptional for interception of a practicing solicitor's communications to be of potential assistance to an ongoing investigation, taking into account the strictures of solicitor-client privilege. In context, however, his statement that "generally, therefore, there is no need to expressly make out reasonable grounds that a person is involved in an offence before they can be named as targets of a wiretap authorization" does not imply that a solicitor or a member of a solicitor's household can only be named if the evidence establishes their involvement in the offence being investigated. On the contrary, Mr. Hubbard's remarks are carefully confined to circumstances in which an authorization is issued with respect to a place used by such persons. The specific reasonable grounds to which he refers at the outset of the quoted passage includes the place as an essential element.
- [59] In my view, where there is a credibly based probability that a non-privileged communication of potential investigative assistance will occur between a practicing solicitor and another at a location other than the solicitor's home or office, there is no good reason in policy or principle to prohibit its interception pursuant to Part VI because the solicitor is not directly implicated in the offence being investigated. The appropriate balance of society's interest in the investigation of crime and the protection of solicitor-client privilege can best be achieved by means of judicial oversight in circumstances of this kind. In such circumstances, the authorizing judge will be able to impose the conditions for, amongst other things, a process of determining whether a particular communication attracts privilege and the effect of any waiver that might be given as the investigation unfolds.
- [60] This is the most principled means by which protection of solicitor-client privilege and the privacy rights of all parties to a communication, as well as others, can be extended taking into account the statutory scheme's parameters. The persons whose rights may be affected include the solicitor himself or herself, as well as clients of the solicitor. It is also most

consistent with recent jurisprudence that confirms the absence of legal significance between primary and secondary targets for the purposes of Part VI. Bearing in mind that absence, in my view it is not a matter of bypassing the intent of s. 186(2) or potentially compromising privileged communications by an expedient, as suggested by Crown counsel. Rather, it is a matter of accurately identifying the rare circumstances in which there is a credibly based probability that intercepting a practicing solicitor's non-privileged communications at a permissible location may assist an investigation. Put another way, it is a matter of how, not whether, the Chesson test applies.

Application Of The Law To The Facts

- [61] The focus of Crown counsel's submissions was on the legal proposition that a practicing solicitor can only be named as a target in a Part VI authorization if he or she is directly implicated in the crime under investigation and on the factual proposition that in this case the applicant was not so implicated. In support of this position, and more generally, Crown counsel submitted that the information known to police concerning the applicant's apparent misconduct, particularly regarding his alleged involvement in the drug trade, was stale-dated, uncorroborated and did not rise above mere speculation. In addition, and importantly, at least for the most part, Crown counsel says it was unconnected to the crimes under investigation.
- [62] Taking into account the foregoing limits and realities of the information that was known to police, as well as the fact that the applicant was in a solicitor-client relationship with the primary targets and thus his legal advice to them was prima facie privileged and unavailable, Crown counsel submits the applicant could not have been named as a primary or, if legally permissible, secondary target. This is so, she says, because there was no credibly based probability that interception of his communications would be of investigative assistance.
- [63] I accept that the applicant was not directly implicated as a participant in the offences under investigation until those offences were expanded to include drug trafficking. At that point, however, the reliable information known to police provided reasonable and probable grounds to believe that he was a member of the Greeks who actively engaged with them in drug trafficking activity.
- [64] Although the specific information concerning the applicant's trips with the Greeks to Calgary to transport drugs involved incidents in 2004, there was nothing to suggest the organization's drug trafficking activities had changed in quality or that the applicant's ongoing relationship and participation with the Greeks had altered. On the contrary, from much of the evidence cited above it is clear there was every reason to believe the relationship remained substantially the same. For example: in April, 2005 a reliable informant stated the applicant was a crooked lawyer who advises the Greeks on how to avoid being caught for breaking the law; in June, 2005 he was observed socialising with several members of the Greeks; in [Content Redacted] 2005 [Content Redacted] described him as

both a friend and legal advisor of Mr. Manolakos, to whom he reported they had an RCMP officer in their pocket; and in December, 2005 he became directly involved in the running of Matina's.

[65] Most importantly, it was clear from the evidence referenced that the applicant's relationship with Mr. Manolakos and the Greeks extended far beyond the confines of a solicitor-and-client relationship. The applicant was Mr. Manolakos' long time friend and trusted confidante with whom he attended organization meetings and routinely socialised. In so far as he engaged with members of the Greeks in his capacity as a solicitor some of the advice he apparently gave was plainly not such as to attract solicitor-client privilege. For example, there was recent credible information that he provided the Greeks with advice and information on how to avoid being caught for breaking the law. This was precisely the kind of non-privileged communication which could predictably have been helpful to police in meeting their investigative goals.

[66] In *R. v. Riley*, [2009] O.J. No. 738, Dambrot J. considered the admissibility of wiretap evidence in a trial involving charges of murder, attempt murder, and committing murder and attempt murder for the benefit of a criminal organization. One of the issues for determination was whether there was a basis for the authorizing judge to be satisfied there were reasonable grounds to believe that evidence of a murder would be obtained by intercepting private communications. In addressing this issue he made the following relevant comment at para. 134:

It is no great leap in logic to conclude that a man who commits a murder in concert with others to further the interests of a gang that is engaged in a gang war, will discuss the murder, however covertly, with his confederates.

[67] Dambrot J. went on to quote from *R. v. Pangman*, [2000] 8 W.W.R. 536 (Man. Q.B.), in which Krindle J., faced with a similar issue, stated:

It is a reasonable inference that persons who are known to one another and who trust one another are likely to speak to one another about areas of mutual interest and concern. It is a reasonable inference that individuals finding themselves arrested and charged with the types and numbers of offences that these accused were charged with are likely to be concerned about what has just happened to them. It is a reasonable inference that learning that a formerly trusted, high-ranking member of the organization was now co-operating with the police about the activities of the organization and its members is likely to be of concern to those connected to the organization. It is a reasonable inference that such affected individuals are likely to talk about their common areas of concern. The very argument used by the defence itself to allege state manipulation of the accused in the previous section of this judgment - namely, that if they are put together, of course they are going to talk, notwithstanding their expressed choice not to speak to the state - serves to underpin just how very reasonable was the inference drawn by Hewak C.J.Q.B. In addition, it is a reasonable inference that observation of the dynamics of the interaction amongst 35 people connected to a structured organization and holding different

positions within that structure is likely to provide evidence of that structure, regardless of the specific topic of discussion amongst them.

- [68] In this case, the police knew the applicant was trusted by Mr. Manolakos and believed him to be a member of the Greeks criminal organization. They also believed he advised Greeks members on how to avoid apprehension and should have known that advice of this sort would not attract solicitor-client privilege. They planned to stimulate relevant communications between targets and track their movements as part of the overall investigative strategy. As in *Riley and Pangman*, it was reasonable to infer the applicant would communicate in non-privileged ways with members of the Greeks regarding matters of mutual interest and concern.
- [69] In these circumstances, there was a credibly based probability that matters relevant to the murder of Mr. Thom and kidnapping of Ms. Scott would be discussed by the primary targets with the applicant in order to further the interests of the Greeks organization. Such discussions might well include how to avoid apprehension or relate to relevant issues other than the provision of lawful legal advice. There was also a credibly based probability that such discussions would occur in places other than the home office of the applicant or on his mobile phone, in which case s. 186(2) would be inapplicable. In particular, there was a credibly based probability that non-privileged discussions would take place on the phones of Greeks members or at other permissible locations. If they were intercepted and determined not to be privileged, there was a credibly based probability that they may assist in the ongoing investigation.
- [70] Taking into account all of the foregoing, and given the low threshold for naming a known person, I am satisfied that the applicant met the Chesson test from the outset.

"DICKSON J."

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