

CANADA / JUDGMENT

## R. v. Monteith

2023 BCSC 78

### COURT

Supreme Court of British Columbia

### DECIDED

18 January 2023

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2023 BCSC 78 R. v. Monteith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Monteith,

2023 BCSC 78

Date: 20230118

Docket: X083817

Registry: New Westminster

Rex

v.

Carlos Nathaniel Monteith

Corrected Judgment: This judgment has been redacted for publication purposes on March 20, 2025

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Re: Voir Dires 2 and 3 - Standing - s. 8 re CDRs and List

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Place and Dates of Hearing:

New Westminster, B.C.

November 21-25 and 30; and

December 1, 12-15, 2022

Place and Date of Judgment:

New Westminster, B.C.

January 18, 2023

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## I. Introduction

- [1] The accused, Carlos Nathaniel Monteith, is charged with the first-degree murder of Kristijan Coric occurring on or about September 28, 2019, at or near Surrey, BC. A trial with judge and jury is scheduled to commence April 3, 2023.
- [2] Mr. Monteith brings two applications, seeking exclusion of evidence pursuant to section 24(2) of the Canadian Charter of Rights and Freedoms:
1. An application filed October 26, 2022 seeks exclusion of evidence of:
    - i. audio recordings of telephone calls alleged to be made by Carlos Monteith from North Fraser Pretrial Centre ("NFPC"); and
    - ii. items obtained from a search of the Squamish Budget Inn.
  2. An application filed November 8, 2022 seeks exclusion of evidence of a list document seized by officials at Surrey Pretrial Services Centre ("SPSC") on or about August 16, 2019.
- [3] Both applications allege breaches of Mr. Monteith's right to be free from unreasonable search and seizure, under s. 8 of the Charter.
- [4] The applicant challenges:
1. a search warrant obtained by the Integrated Homicide Investigation Team ("IHIT") to search room 304 at the Squamish Budget Inn, issued December 6, 2019 (the "Squamish search warrant");

2. a production order obtained by the New Westminster Police Department ("NWPD"), issued January 16, 2020 for "all audio recordings of completed institutional calls made by inmate Carlos Monteith between November 27, 2019 and January 15, 2020" from NFPC (the "NWPD production order"); and
3. a production order obtained by IHIT and issued January 22, 2020 for:
  - a) audio recordings of telephone calls made by the applicant from NFPC from December 30, 2019 through to January 22, 2020; and
  - b) documentation surrounding the above-noted telephone calls (the "NFPC production order").
- [5] The Squamish search warrant was granted December 6, 2019 on the basis of an Information To Obtain (the "Squamish ITO") sworn the same day by Constable M. Carey, an RCMP Constable working with IHIT, investigating the homicide of Mr. Coric.
- [6] As a basis for obtaining the search warrant, Constable Carey relied, in part, on a list document, referred to in the ITO as the "Blood Bath Hit List" (the "List").
- [7] The Squamish ITO disclosed that the List was a photograph of a list that had been found in Mr. Monteith's possession by officials with BC Corrections on August 16, 2019, when Mr. Monteith was transferred from Kent institution (a federal correctional facility) to SPSC. Constable Carey stated that the list set out 52 names, including nicknames and initials. One set of initials was "K-C". One of the items Constable Carey sought to obtain in the search of the hotel room was the original version of the List. She also sought other items thought to be associated to the Coric homicide.
- [8] The NWPD production order related to its investigation of separate offences of which Mr. Monteith was suspected, an attempted murder and related offences occurring November 17, 2019, at New Westminster. In the Information To Obtain in support of the production order (the "NW ITO"), Cpl. Chung of the NWPD stated that Monteith was the target of an investigation relating to the shooting of DD (these are not the witness' actual initials) on November 17, 2019.
- [9] NWPD arrested Mr. Monteith on November 23, 2019, for the shooting of DD. He was held in custody in relation to that matter. At the time of the relevant ITOs, search warrant and production orders, Mr. Monteith was in custody at NFPC.
- [10] In the NW ITO, Cpl. Chung relied in part on records of telephone calls made by Mr. Monteith while he was in custody at NFPC between November 27, 2019 and December 6, 2019 ("Call Detail Records" or "CDRs"). The CDRs relied upon had been provided to the NWPD by NFPC on December 6, 2019, without a production order.
- [11] Constable Carey swore an ITO on January 22, 2020 (the "NFPC ITO") in support of the NFPC production order, for the production of audio recordings of telephone calls made by Mr. Monteith from NFPC, and associated documentation, for the period December 30, 2019 through January 22, 2020. In the NFPC ITO, Constable Carey relied upon information about

the List. She also relied upon Call Detail Records relating to Mr. Monteith's telephone calls from NFPC. NFPC had provided CDRs to Constable Carey on January 20, 2020, for the period December 4, 2019 to January 6, 2020, without a production order.

- [12] For purposes of challenging the search warrant and production orders, the defence contends that the police breached Mr. Monteith's s. 8 Charter rights by: (1) obtaining call detail records from NFPC, without obtaining production orders, and (2) obtaining a copy of the List from BC Corrections officials at SPSC. He also alleges that BC Corrections officials breached Mr. Monteith's s. 8 rights by seizing the List when they found it in Mr. Monteith's effects on August 16, 2019.
- [13] The Crown's position is that Mr. Monteith had no reasonable expectation of privacy in the CDRs or in the List, and therefore does not have standing to challenge to allege that his s. 8 Charter rights were infringed.
- [14] The applications are proceeding in stages. The voir dires are organized as follows:
1. Voir Dire #2 - application alleging Charter breach relating to provision of the CDRs;
  2. Voir Dire #3 - application to exclude List evidence;
  3. Voir Dire #4 - facial and sub-facial challenges to the three judicial authorizations (the Squamish search warrant and the two production orders);
  4. Voir Dire #5 - application for exclusion of evidence under s. 24(2).
- [15] This ruling deals only with the preliminary question as to whether the applicant had a reasonable expectation of privacy in the CDRs and in the List. The question of potential excision of evidence from the ITOs and exclusion from evidence may follow.

## II. Background - General

- [16] Shortly after 6:00 p.m. on September 28, 2019, Kristijan Coric and his girlfriend, Megan Lao, stopped to get gas at the Mobil gas station at 18699 Fraser Highway, Surrey, BC. They were driving a black Mercedes G-Wagon. Ms. Lao was the driver and Mr. Coric was sitting in the front passenger seat.
- [17] Ms. Lao exited the driver side of the vehicle to go into the gas station shop. As she was returning to the vehicle, a person dressed in black and wearing a black mask ran up to the vehicle and shot Mr. Coric several times using a black handgun, before fleeing on foot. The Crown alleges that the shooter was Mr. Monteith. The police found a GPS tracking device attached to the rear undercarriage of the vehicle. CCTV from the surrounding area of the gas station revealed a Toyota Corolla that had been following the G-Wagon prior to the shooting, and leaving the scene after the shooting. The Toyota was found burning later that evening in the parking lot of a Burnaby apartment building.

- [18] On August 16, 2019, Mr. Monteith was transferred as an inmate from Kent Institution in Agassiz, BC to SPSC. He remained as an inmate at SPSC until September 4, 2019, when he was released.
- [19] The Crown alleges that Mr. Monteith was staying with DD at DD's home in New Westminster in the fall of 2019, and that he was brought to her house by her then boyfriend, LW.
- [20] DD was shot at DD's home on November 17, 2019. DD identified Mr. Monteith as the shooter. The shooting was investigated by the NWPD.
- [21] The theory of the Crown is that Mr. Monteith killed Mr. Coric on September 28, 2019, for money. He was driven to the scene of the shooting by an accomplice, Trion Castello, in the Toyota. The Toyota followed the Mercedes G-Wagon as it pulled into the gas station, then it was parked nearby, across Fraser Highway from the gas station. Mr. Monteith got out of the Toyota, went across Fraser Highway to the gas station, shot Mr. Coric, then returned to the Toyota, which by then was in another nearby location. Mr. Costello and Mr. Monteith fled the scene in the Toyota.

### III. Legal Principles

- [22] The general legal principles were reviewed by the Supreme Court of Canada in *R. v. Mills*, 2019 SCC 22. In *Mills*, the police conducted an undercover operation with the intent of catching internet child lurers. To do so they posed online as a 14-year-old girl. Over the course of two months, Mills sent several messages, using Facebook and Hotmail. Eventually he was arrested in a public park where he had arranged to meet with the "child" who was in fact a fictional character created by police. He was charged with child luring. The operation occurred without prior judicial authorization. At trial, the Crown relied upon a record of emails and messages involving Mills, recorded using screen capture software.
- [23] The Court held that Mr. Mills had no reasonable expectation of privacy in the emails and messages. Section 8 of the Charter was not engaged, and therefore no prior judicial authorization was required.
- [24] In reaching those conclusions, R. Brown J. summarized the legal principles as follows:
- [12] In *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, this Court reiterated that, to claim s. 8's protection, an accused must show a subjectively held, and objectively reasonable, expectation of privacy in the subject matter of the putative search: para. 10; see also *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 34; *Spencer*, at para. 16; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18; *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60. I say "putative search", since there is no "search and seizure" within the meaning of s. 8 if the claimant cannot demonstrate a reasonable expectation of privacy: *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 426; see also *S. Penney, V. Rondinelli and J. Stribopoulos*, *Criminal Procedure in Canada* (2nd ed. 2018), at pp. 151-52; H. Stewart, "Normative Foundations for Reasonable Expectations of

Privacy" (2011), 54 S.C.L.R. (2d) 335, at p. 335.

- [13] Objective reasonableness is assessed in the "totality of the circumstances": Edwards, at paras. 31 and 45; Marakah, para. 10; Spencer, at paras. 16-18; Cole, at para. 39; R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 26; Tessling, at para. 19. And, this Court has also consistently maintained that examining the totality of the circumstances entails an evaluation of all aspects of privacy: Edwards, at para. 45; Patrick, at para. 26. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: Cole, at para. 40; Marakah, at para. 11; Spencer, at para. 18; Patrick, at para. 27; Tessling, at para. 32.
- [25] R. Brown J. added the following:
- [20] In order to challenge an alleged search under s. 8, Mills must demonstrate the objective reasonableness of his claim to privacy -- the assessment of which must have regard to the totality of the circumstances. This is not purely a descriptive question, but rather a normative question about when Canadians ought to expect privacy, given the applicable considerations. This appeal involves a particular set of circumstances -- the police created one of the communicants and controlled her every move -- and two considerations become decisive: the nature of the investigative technique used by police, and the nature of the relationship between the communicants. Specifically, here, the investigative technique did not significantly reduce the sphere of privacy enjoyed by Canadians because the technique permitted the state to know from the outset that the adult accused would be communicating with a child he did not know. As I will explain, in these circumstances, any subjective expectation of privacy the adult accused might have held would not be objectively reasonable.
- [21] Before turning to the normative question, as a preliminary matter, the nature of the privacy interest must be determined. Here, Mills asserts an informational privacy interest. As this Court held in Spencer, informational privacy includes at least three conceptually distinct although overlapping understandings of privacy: as secrecy, as control, and as anonymity: para. 38. Mills is asserting a "privacy as control" interest in the content of his communications, which represents the "assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit": Spencer, at para. 40. While this privacy interest protects what information we share with others, it in turn relies on the control that a person exercises by choosing, selectively, those particular persons who will receive this information. In effect, Mills argues that he chose his recipient (here, someone he believed to be a child who was a stranger to him), and the police's creation of a fake online profile prevented him being able to converse in secret with the person he chose.

- [26] For R. Brown J., the crucial circumstance was that Mills was communicating with someone he believed to be a child, who was a stranger to him: para. 22.
- [27] Justices Abella and Gascon agreed with Justice R. Brown. Chief Justice Wagner and Justice Karakatsanis concurred. In her concurring decision, Karakatsanis J. stated:
- [38] Section 8 protects the right to be secure against unreasonable searches and seizures. In interpreting s. 8, courts seek to strike an acceptable balance, in a free and democratic society, between sometimes conflicting interests in the privacy necessary for personal dignity and autonomy and the need for a secure and safe society: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60.
- [40] In my opinion, no "search or seizure" occurred when Constable Hobbs, posing as a young girl, conversed with Mr. Mills through Facebook messenger and email.
- [41] Not every investigatory technique used by the police constitutes a search or seizure for constitutional purposes -- s. 8 may be engaged only where the investigatory conduct intrudes upon a person's reasonable expectation of privacy: *R. v. Evans*, [1996] 1 S.C.R. 8, at para. 11; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 34. As Doherty J.A. recognized, "[w]hen deciding whether state conduct amounts to a search or seizure, the focus is not so much on the nature of the state conduct as it is on the impact of the state conduct on the privacy interests of the s. 8 claimant": *R. v. Orlandis-Habsburgo*, 2017 ONCA 649, 40 C.R. (7th) 379, at para. 39.
- [28] Moldaver J. concurred with the reasons of both R. Brown J. and Karakatsanis J. Martin J., alone, dissented as to the applicable legal principles. She would have found a breach of Mills' s. 8 Charter rights, but would not have excluded the evidence.
- [29] In *R. v. Spencer*, 2014 SCC 43, the Supreme Court of Canada held that when police requested subscriber information from an Internet service provider (Shaw) the request constituted a search within the meaning of s. 8 of the Charter.
- [30] The police became aware of the internet protocol ("IP") address for a computer that someone had been using to access and store child pornography. Without judicial authorization, the police obtained subscriber information from Shaw, disclosing the name, address and telephone number of the customer associated with the IP address. That person was Mr. Spencer's sister. Mr. Spencer lived with his sister, and had access to the internet via her computer and her subscriber account.
- [31] Cromwell J., on behalf of the Court, summarized the applicable legal principles as follows:
- [15] Under s. 8 of the Charter, "[e]veryone has the right to be secure against unreasonable search or seizure." This Court has long emphasized the need for a purposive approach to s. 8 that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 156-57; *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp.

427-28; R. v. Plant, [1993] 3 S.C.R. 281, at pp. 292-93; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 12-16; Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 22.

- [16] The first issue is whether this protection against unreasonable searches and seizures was engaged here. That depends on whether what the police did to obtain the subscriber information matching the IP address was a search or seizure within the meaning of s. 8 of the Charter. The answer to this question turns on whether, in the totality of the circumstances, Mr. Spencer had a reasonable expectation of privacy in the information provided to the police by Shaw. If he did, then obtaining that information was a search.
- [17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: see, e.g., Tessling, at para. 38; Ward, at para. 65. The fact that these considerations must be looked at in the "totality of the circumstances" underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.
- [18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: Tessling, at para. 32; R. v. Patrick, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; R. v. Cole, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: Tessling, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": Patrick, at para. 14; see also R. v. Gomboc, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, and Ward, at paras. 81-85.
- [32] With respect to the "subject matter of the search", after reviewing a number of authorities, Cromwell J. stated:
- [31] Thus, it is clear that the tendency of information sought to support inferences in relation to other personal information must be taken into account in characterizing the subject matter of the search. The correct approach was neatly summarized by Doherty J.A. in Ward, at para. 65. When identifying the subject matter of an alleged search, the court must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by

reference to the nature of the privacy interests potentially compromised by the state action": *ibid.*

- [33] The subject matter of the search must be defined functionally, not in terms of physical acts, physical space, or modalities of transmission. A "broad and functional approach" should be employed: Spencer, para. 26.
- [34] The court should examine the connection between the police investigative technique and the privacy interest at stake: Spencer, para. 26; *R. v. Marakah*, 2017 SCC 59, para. 15.

#### IV. Call Detail Records

##### A. Background - Call Detail Records

###### 1. The Investigation - Call Detail Records ("CDRs")

- [35] The lead investigator for the NWPDP was Detective J. Thom. Detective Thom requested that Detective J. Mula find out where Mr. Monteith was being held in custody, and obtain a list of his jail call records. Detective Mula called NFPC, where she spoke with an assistant deputy warden, Michael Fernquist. Mr. Fernquist confirmed that Mr. Monteith was an inmate at NFPC. He advised her that in order to provide call detail records, he would need an email message from her with certain information, such as the identity of the inmate, date of birth, and the active police file number. Detective Mula made the request via email. Pursuant to her request, Mr. Fernquist provided her with a "Lattice report". The Lattice report consisted of call detail records for the date range requested by Detective Mula which, after correcting an error, was November 23, 2019 to December 6, 2019.
- [36] The CDR report received by Detective Mula listed 25 completed calls made by Mr. Monteith to outside telephone numbers, for which NFPC would have associated recordings. Mr. Fernquist advised Detective Mula that audio files were kept for 30 days. He advised her that legal calls were not listed on the CDR, as they are not recorded.
- [37] Detective Mula examined the CDR. She queried the phone numbers shown on the CDR with open sources such as Google. She checked police databases such as PRIME. She was unable to find any information about the phone numbers that Mr. Monteith had been calling, from those sources. However she recognized one of the phone numbers that Mr. Monteith had called, twice, as being at the phone number for his mother. She passed along the information to Cpl. Chung.
- [38] Detective Mula testified that in 2019, her practice was to simply make a request for CDRs from a correctional facility. This accorded with the request made to her by Detective Thom, the primary investigator. She was not aware of NWPDP current practice in this respect, as she was on leave at the time she testified on the voir dire.
- [39] In the ITO in support of the NWPDP production order, Cpl. Chung stated that he reviewed the CDR, and he further stated:

1. the CDR report would exclude legal calls, and that legal calls have no recordings;
  2. the report showed that Mr. Monteith had made 25 phone calls between November 27, 2019 and December 6, 2019. 21 of the calls were made to a single phone number. Two phone calls were made to a Toronto, Ontario area code. That phone number belonged to Mr. Monteith's mother; and
  3. other searches by Detective Mula had not revealed the identity of a person associated with the other phone numbers in the report.
- [40] As noted, on the basis of Cpl. Chung's ITO, a production order was obtained on January 16, 2020, authorizing production to NWPD of the audio recordings of Mr. Monteith's completed institutional calls for the period November 27, 2019 to January 15, 2020, in connection with the offences relating to the shooting of DD.
- [41] In connection with the Coric homicide, Cst. Carey sent a preservation demand to NFPC on January 6, 2020, regarding audio recordings and associated documentation for Mr. Monteith's telephone calls for the period December 4 to January 6, 2020. The request was made via email to Ms. Montee Dunbar, who at the time was acting as backup for Mr. Fernquist at NFPC. On January 20, 2020, Constable Carey sent a request for the CDRs for Mr. Monteith. Ms. Dunbar provided the CDRs covering the period from December 4, 2019 to January 6, 2020.
- [42] Constable Carey testified that, at the time, she assumed that she would need a production order to obtain the CDRs. However, another person on the investigative team, whose name she could not recall, told her that she could obtain the CDRs without a production order, so she made the request to NFPC, and obtained the CDRs. Constable Carey testified that she recently learned, about a week before testifying, that the police can no longer obtain CDRs without a production order.
- [43] Mr. Fernquist testified that it was standard practice for NFPC to provide CDRs to police without requiring a production order, in relation to an active police investigation.
- [44] Ms. Dunbar testified that at the time her usual process would have been to provide CDRs to police in advance of a production order, if the police made a request and provided an active file number. She testified that her understanding was that NFPC's practice had since changed, and that it was no longer NFPC's practice to provide CDRs without a production order.
- [45] Constable Carey received a total of 26 pages of call detail records. In the NFPC ITO, she stated that the records indicated that Mr. Monteith had been making multiple outgoing phone calls from December 4, 2019 to January 6, 2020. She did not personally conduct any searches on the CDRs, initially. Later she was provided with telephone numbers for an aunt of Mr. Monteith. She reviewed the CDRs and noted that Mr. Monteith had called or attempted to call his aunt twice on December 25, 2019 (Christmas day). In the ITO, she noted that Mr. Monteith's aunt had been authorized on Mr. Monteith's behalf to clean out the hotel

room at the Squamish Budget Inn where Mr. Monteith had been staying.

2. ICCS and CDRs

- [46] Relevant information concerning the Inmate Call Control System ("ICCS") and the CDRs is set out in Admissions of Fact No. 1 on these voir dires. That evidence, with some editorial amendments, is as follows.
- [47] A CDR is a report consisting of a table of information regarding an inmate's telephone calls. The CDR report is generated by the ICCS. The report can be printed. For the purposes of these reasons, a reference to the CDRs is a reference to the report or reports.
- [48] ICCS was a system that BC Corrections obtained from Telus to facilitate inmate telephone communication. It was employed in all BC correction centres in the province, including NFPC, until October 2020, when it was replaced with another system.
- [49] Telus contracted with Lattice Incorporated, an American company, for the ICCS software and program. Hence, the CDRs were sometimes referred to as "Lattice reports."
- [50] The telephone calls of all inmates detained in provincial correctional centres are automatically recorded and stored for a period of 30 days - with the exception of privileged calls to legal counsel or others designated in the Correction Act Regulation, B.C. Reg. 58/2005 [the "CAR" or the "Regulation"], and where those numbers are registered as privileged with ICCS.
- [51] All of the recorded calls are automatically deleted after 30 days, unless certain criteria are met. Calls are not monitored, unless certain criteria are met. The criteria are contained in the Correction Act, S.B.C. 2004., c. 46 [the "CA" or the "Act"] and the Regulation.
- [52] The ICCS also captured 16 points of data relating to an inmate's telephone calls. This data could be made into a CDR. The points of data captured by ICCS were as follows:
1. Date and time the call was placed;
  2. Time the call was terminated;
  3. Duration of the call;
  4. Number called by the inmate;
  5. Number of the telephone used by the inmate to make the call;
  6. Correctional centre where the telephone is located;
  7. The inmate's CS (correctional service) number and name;
  8. The type of call (debit, collect, subsidized, privileged);
  9. The termination reason (e.g., hang up, call blocked by the recipient at connection, fraud event such as a detected three-way call);

10. Number of times an inmate has attempted to call a number;
11. Number of times an inmate has tried to call a blocked number;
12. Cost of the call;
13. Block code details;
14. Region;
15. Doc-ID - a unique number associated to each call made; and
16. Card-ID.

[53] Items 13 through 16 were not commonly used pieces of data. The first 12 enumerated pieces of data were those useful to BC Corrections and the operation of the ICCS.

[54] The ICCS captured these data points for all telephone calls made by inmates, including privileged calls. However the CDRs provided to the police in this case were filtered to exclude information relating to privileged telephone calls.

### 3. ICCS-Inmate Notification, Signage, and Recorded Messages

[55] When Mr. Monteith was admitted to NFPC on November 25, 2019, he attended the admissions section of NFPC and was "booked in". Inmates are advised that they are permitted to use only those telephones specifically designated for their use. As part of the admitting process an intake officer provided Mr. Monteith with a one-page document entitled "Inmate Call Control System (ICCS) Notification to Inmates". The intake officer would have read the document to Mr. Monteith.

[56] The document notified Mr. Monteith of various aspects of the ICCS, and rules as to use of the telephones.

[57] The notification document also states:

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

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

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

[Emphasis in original]

[58] Prominent signage regarding inmate telecommunications are displayed at the telephone banks located at NFPC. The signs state:

ALL

TELECOMMUNICATIONS

OTHER THAN THOSE TO

PRIVILEGED PARTIES

ARE

RECORDED

AND MAY BE

**LISTENED TO**

[59] During Mr. Monteith's stay in custody at NFPC, when an inmate placed a telephone call through the ICCS, once the call was connected and before the recipient and inmate could speak, a recording was played warning the recipient of the origins of the call and that the call was being recorded, and gave the recipient the opportunity to accept or reject the call. The content of this recording varied depending on the type of call being placed by the inmate - debit, collect, subsidized and voicemail messages. Privileged calls had a different form of notification. The content of these recordings was contained in the BC Corrections Adult Custody Policy at section 7.8.10, which was in force at the time.

4. BC Corrections Adult Custody Policy

[60] The BC Corrections Branch Adult Custody Policy document sets out detailed policies concerning the ICCS, including exemption for privileged communications, inmate notification, retention and destruction of recordings, and disclosure of ICCS recordings. The policy references the CA and the CAR.

[61] The policy makes no specific reference to CDRs, as distinct from the ICCS, and the call recordings.

5. Correction Act and Correction Act Regulation

[62] Some relevant portions of the CA and CAR pertaining to CDRs include the following.

[63] The Act:

1 In this Act:

"inmate" means a person who is sentenced to imprisonment, lawfully detained or confined for treatment, at a correctional centre, and includes a prisoner;

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

### **Inmate communication**

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

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

(3) An authorized person may restrict, intercept or monitor inmate communication if one or more of the following apply:

(a) the authorized person has reasonable grounds to believe that the inmate is

(i) involved in illegal activities,

(ii) harassing or causing harm to others, or

(iii) participating in an activity that may jeopardize the safety, security or operation of the correctional centre;

(b) a court order restricts or prohibits communication or contact between the inmate and the other person;

(c) the other person has indicated to the authorized person that he or she does not wish to communicate with the inmate.

(4) If inmate communication has been restricted, an authorized person must as soon as practicable inform the inmate in writing and give the reasons under subsection (3) for the restriction.

[64] Some relevant portions of the Regulation are:

#### **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 the lawyer 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

- (a) to listen to an inmate communication that is made by electronic means or to an inmate communication that was made by electronic means and recorded, or
- (b) to read inmate communication delivered to the correctional centre or sent from within the correctional centre.
- (2) Inmate communication by telephone or other electronic means may be recorded.
- (3) Inmate communication may be monitored or recorded by an authorized person if the authorized person has reasonable grounds to believe that
  - (a) the inmate is
    - (i) involved in illegal activities,
    - (ii) harassing or causing harm to others, or
    - (iii) participating in an activity that may jeopardize the management, operation or security of the correctional centre, or
  - (b) the monitoring is necessary to maintain or repair the recording system and the monitoring is performed only for the length of time and to the extent that is necessary to effect the maintenance or repair.
- (4) Inmate communication by mail may be intercepted and examined by an authorized person to determine if the mail contains contraband.

### **Retention of inmate communication**

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

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

### **B. Analysis - Call Detail Records**

1. Whether R. v. Kang is Dispositive

- [65] The applicant contends that the decision of Justice Ker in *R. v. Kang*, 2020 BCSC 919 is controlling, and dispositive of the issue of whether Mr. Monteith had a reasonable expectation of privacy in the CDRs. The applicant argues that there is no basis for this Court to come to a different conclusion than Justice Ker in *Kang*.
- [66] In response to this point, the Crown contends that determining whether a reasonable expectation of privacy exists in the subject matter of a search is a fact specific exercise which must be undertaken in the circumstances of each case. The Crown argues that *Kang* is distinguishable, and that the comments of Ker J. in *Kang* ought to be confined to the facts of that case.
- [67] In *Kang*, the court addressed defence challenges to the constitutionality of s. 19 of the CA and s. 14 of the CAR as they relate to the practice of automatically recording all non-privileged telephone calls made by inmates detained in BC provincial correction centres. The applicants were 13 accused persons involved in four indictments. Their applications were heard together.
- [68] The court carefully considered the ICCS, noting that it was, at the time, the telephone system used by BC Corrections and all 10 provincial correctional centres for inmates to make telephone calls to the community.
- [69] Justice Ker explained the nature of the proceedings before her as follows:
- [17] The applicants argue they have a reasonable expectation of privacy in their telephone communications and as such have standing to challenge the seizure of their telephone communications by the ICCS practice of passively recording all of their non-privileged calls. They bear the onus of establishing a reasonable expectation of privacy on a balance of probabilities.
- [18] Should the applicants establish they have a reasonable expectation of privacy in their telephone calls, they assert that the passive recording of their calls is not authorized by law and rely on the analytical framework established in *R. v. Collins*, [1987] 1 S.C.R. 265 for this aspect of their argument.
- [19] If the Court finds that the passive recording of all inmate telephone calls is authorized by law, the applicants rely on the second branch of the *Collins* framework to argue the law is not reasonable. If the applicants are successful in their argument that the law is not reasonable, then a s. 1 justification hearing will be necessary to determine if the impugned law is a reasonable limit.
- [21] The third stage of the *Collins* analysis - whether the search or seizure was carried out in a reasonable manner - is not in issue at this stage of the proceedings. Resort to the third stage will only be necessary if I conclude that the applicants have established that they have a reasonable expectation of privacy in their telephone calls recorded by the ICCS and that the Crown has satisfied the first two branches of the *Collins* test.

[70] The court held:

1. Applying *R. v. Siniscalchi*, 2010 BCCA 354, inmates have a reasonable expectation of privacy in their recorded telephone calls, albeit significantly reduced, given the custodial setting and the repeated warnings that calls are recorded. Inmates have a sufficient privacy interest in their recorded calls to found a right under s. 8 of the Charter: para. 153, paras. 171 through 177;
2. The recordings are not "interceptions" within the meaning of s. 184 of the Criminal Code, R.S.C. 1985, c. C-46: paras. 183 to 192;
3. Some issues raised (such as the potential for recording of solicitor/client privileged telephone calls) did not need to be addressed. They related to implementation of the legislation, not its constitutional validity: paras. 193 to 201;
4. Passive recording of all non-privileged inmate telephone calls on the ICCS is authorized by law: paras. 224 through 260; and
5. The law is reasonable: paras. 261 through 295.

[71] The third stage of the Collins analysis - whether the search or seizure was carried out in a reasonable manner - was not at issue on the application: paras. 21, 113, and 160.

[72] The applicant relies, in particular, on this paragraph in Kang:

[176] What has not been addressed in the jurisprudence, or in detail in the submissions on this application, is the level of privacy that can be expected with respect to the CDRs that are part of the information captured in ICCS recorded calls. In my view, given the breadth of information they capture there could well be a higher expectation of privacy around the CDRs in some cases than the actual recorded calls. The information contained in the CDRs can be fairly personal, such as the amount of time an inmate spends talking to a lawyer or a doctor or how frequently an inmate contacts particular friends or family members. This information, in my view, is not simply general data or information metrics; rather, the CDRs, depending on what analytical reports are generated by Corrections officials, could reveal details of the lifestyle and personal choices of the inmate or information of a biographical nature: Marakah, para. 24. However, the CDRs on their own are relatively meaningless. It is only when an action, such as the preparation of an analytics report specific to an inmate's CS number and the numbers called by that inmate, is undertaken that the information collected has a more personal meaning. In my view, that issue relates more to implementation or a specific search than to the constitutionality of the legislation. Suffice to say, there is a reasonable expectation of privacy in the CDRs.

[Emphasis in original]

- [73] However, Ker J. determined that, with reference to constitutionality of the CA and CAR provisions in question, she did not need to consider, separately, the issue relating to the CDRs. She stated:
- [259] I pause to note that little was provided in the way of comprehensive submissions on the issue of the CDRs apart from an assertion that they are not mentioned in the legislation and regulations. This is not surprising as they are part of the software program embedded in the ICCS platform. In my view, they are ancillary features that form part of the ICCS record when inmate telephone calls are recorded. I agree with the AGBC's observation that the CDR issue relates to whether a particular search is authorized by law pursuant to Collins, and is essentially an implementation issue. It does not relate to the constitutionality of the CA and the CAR per se and so it is not necessary to consider it further.
- [74] In Kang, Ker J. decided that the relevant provisions of the CA and CAR were constitutionally valid legislation. That is not the issue before me. The applicant does not challenge the constitutionality of the legislative provisions. He challenges the disclosure of the CDRs, without judicial pre-authorization. As the case law amply demonstrates, the analysis is highly fact-dependant. Therefore I am required to assess whether the applicant has established a reasonable expectation of privacy, in the specific circumstances of this case.
- [75] Even if the Ker J. had been addressing, specifically, an application focused upon disclosure of CDRs, I would be required to conduct an independent analysis in the circumstances of the case before me: *R. v. Ali, Boparai & Malonga-Massamba*, 2021 BCSC 74, at paras. 78 through 81; *R. v. Abo Zead*, 2020 BCSC 2145, at para. 47. However a court may decide that the "totality of the circumstances" do not materially differ from those in a previous decision of the court: *R. v. Kim*, 2020 BCSC 1064, at para. 59.
- [76] In summary, Ker J.'s comments in Kang are not binding upon me. The CDRs were only tangentially relevant to the constitutional issues that the court dealt with in Kang, as Ker J. made very clear. In relation to CDRs, Ker J.'s comments were obiter dictum. In Kang, the court was not dealing with what Ker J. referred to as "implementation" of a specific search, whereas that is what is now before me.
- [77] However, I do not disagree with Ker J.'s comments in para. 176 of Kang, which I consider persuasive, in the context of the circumstances before me.

## 2. Analysis - Reasonable Expectation of Privacy

- [78] To reiterate, there is no "search or seizure" within the meaning of s. 8 of the Charter if the applicant cannot demonstrate a reasonable expectation of privacy: *Mills*, para. 12. Whether what the police did in obtaining the CDRs was a search or seizure within the meaning of s. 8 of the Charter depends upon whether, in the totality of the circumstances, the applicant had a reasonable expectation of privacy in the information provided to the police. If he did, then obtaining that information was a search: *Spencer*, at para. 16.

- [79] Although the "totality of the circumstances" must be considered, a large number of interrelated factors must be considered. The factors must be adapted to the circumstances of the particular case, and must be looked at as a whole: Spencer, para. 17.
- [80] However for analytical convenience, the courts have generally assessed the totality of the circumstances under four main headings: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether the subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: Spencer, para. 18; Mills, para. 13.
- [81] I turn to consideration of the four primary lines of inquiry referred to in the authorities.
- a) The Subject Matter of the Alleged Search
- [82] The subject matter of the alleged search must be looked at from a broad and functional perspective. The court looks not only at the nature of the precise information sought, but also at the nature of the information that it reveals. The tendency of information sought to support inferences in relation to other personal information must be taken into account in characterizing the subject matter of the search. What is at issue is the nature of the privacy interests potentially compromised by the state action: Spencer, paras. 26 through 31. To put it another way, the court's task is to determine "what the police were really after": Marakah, at para. 15, citing R. v. Ward, 2012 ONCA 660, at para. 67.
- [83] What the police were "really after" in this case is not difficult to discern. They wanted to know who Mr. Monteith had communicated with, or was communicating with, or who he was associated with, for the purpose of investigating the offences he was suspected of committing. They wanted to potentially connect that information to other information they were aware of or might later discover.
- [84] So for example in the circumstances of this case, in relation to the Coric homicide, I can infer that the police, early on, were working on a theory that aligns with the Crown's present theory of the case: that Mr. Monteith was hired and paid by others to kill Mr. Coric. That would have made information as to Mr. Monteith's communications and as to his associates particularly important. Naturally, when the police received the CDRs, in respect of both investigations, they attempted to discern who the recipient telephone numbers were associated with. Other information potentially revealed by the CDRs, such as the frequency, duration, and timing of the telephone calls may also have been of interest to the police, as they could be used to make various inferences, or could be connected to other information that the police had or might obtain.
- [85] Broadly, then, the primary subject matter of the search was information about Mr. Monteith's telephone calls, insofar as that information could lead to inferences about his communications with or associations with persons who might directly or indirectly be involved with the offences that the police were investigating.

b) The Applicant's Direct Interest in the Subject Matter

[86] The Crown does not argue that Mr. Monteith did not have an interest in the subject matter of the search. Clearly, he did. The Crown argues that his interest in the subject matter is significantly attenuated due to his lack of exclusive control over the information, based upon the custodial context, and the applicable legislation, policies, and advisories. In my view those factors are better assessed within the context of the objective reasonableness of Mr. Monteith's expectation of privacy.

c) Did the Claimant Have a Subjective Expectation of Privacy in the Subject Matter

[87] The applicant did not provide evidence about his subjective expectation of privacy on these voir dres.

[88] The requirement that the claimant establish a subjective expectation of privacy is not a high hurdle: Marakah, para. 22; Abo Zead, at para. 33. The Crown does not take the position that Mr. Monteith has not established a subjective expectation of privacy in the CDRs, notwithstanding the lack of direct evidence from him.

[89] In Siniscalchi, the Court of Appeal determined that the claimant's subjective expectation of privacy could be inferred from the circumstances: at para. 87. At issue were transcripts of the applicant's telephone calls from NFPC.

[90] The court considered the relevant legislation, as well as BC Corrections Branch policy relating to ICCS, including notifications to inmates regarding use of the telephones.

[91] For the court, Groberman J.A .stated:

[84] The comprehensive policies that are in place represent a considered compromise between inmate privacy and prison security. Inmates cannot be under any illusion that their conversations are absolutely private. They are warned on coming into the institution, on attending to make a phone call, and on the call being connected, that their calls are recorded, and may be listened to in limited circumstances. They are also told (and s. 15(2) of the Regulation establishes) that the recordings will not be accessed by persons outside the correctional service without lawful authority.

[85] In the circumstances, it is my view that inmates have a diminished (but not extinguished) expectation of privacy in their telephone conversations. They must expect that their calls will be recorded, and are on notice that they may be listened to by authorized officials in limited circumstances. They are also entitled to expect that the contents of their conversations will be kept confidential by those authorized officials except in very limited circumstances - situations detailed in the regulations, including situations where the conversations evidence a threat to persons or to the security of the prison.

[92] I make a similar inference here. Mr. Monteith would have subjectively understood that the CDR information, including what numbers he was calling, when, and so on, would remain private, in the absence of any specific applicable law or legally authorized policy.

d) Was the Claimant's Subjective Expectation of Privacy Objectively Reasonable?

[93] As noted in *Marakah*, at para. 24, over the years, courts have referred to a number of factors that may assist in determining whether it was reasonable to expect privacy in different circumstances: *R. v. Cole*, 2012 SCC 53, para. 45, *R. v. Tessling*, 2004 SCC 67, para. 32; *R. v. Edwards*, [1996] 1 S.C.R. 128, 1996 CanLII 255, at para. 45.

[94] In *Cole*, the accused, a high school teacher, was charged with possession of child pornography and unauthorized use of a computer. He was permitted to use his work issued laptop computer for incidental personal purposes. While performing maintenance activities, a technician found a hidden folder containing nude and partially nude photographs of an underage female student on the laptop. The technician notified the principal. The laptop and copies of the relevant files were handed over to the police without warrant. The Court held that the "totality of the circumstances" consisted of many strands, and they pulled in competing directions, in the case before the Court. On balance, they supported the objective reasonableness of Mr. Cole's subjective expectation of privacy: para. 57.

[95] In coming to that conclusion, Justice Fish, for the majority, stated:

45 There is no definitive list of factors that must be considered in answering this question, though some guidance may be derived from the relevant case law. As Sopinka J. explained in *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

46 The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. Put another way, the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest.

[96] The court noted the importance of the context for the personal information in question: para. 52. In that case, the fact that the information was on an employer owned computer was significant, as were the policies, practices and customs of the workplace concerning the use of computers by employees.

[97] The Court added:

53 Even as modified by practice, however, written policies are not determinative of a person's reasonable expectation of privacy. Whatever the policies state, one must consider the totality of the circumstances in order to determine whether privacy is a reasonable expectation in the particular situation (R. v. Gomboc, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, per Deschamps J.).

[98] In coming to its decision, the court emphasized the nature of the information in issue. The court stated:

58 The nature of the information in issue heavily favours recognition of a constitutionally protected privacy interest. Mr. Cole's personal use of his work-issued laptop generated information that is meaningful, intimate, and organically connected to his biographical core. Pulling in the other direction, of course, are the ownership of the laptop by the school board, the workplace policies and practices, and the technology in place at the school. These considerations diminished Mr. Cole's privacy interest in his laptop, at least in comparison to the personal computer at issue in Morelli, but they did not eliminate it entirely.

[99] Although the circumstances are very different, I come to similar conclusions in this case.

[100] The subject matter of the search was not merely a list of telephone numbers. It was a complete record of all calls made by Mr. Monteith over, in total, about five weeks, a considerable period of time. The CDRs aggregated the data by indicating all phone calls made through the only means available to Mr. Monteith for outbound telephone communications. Thus, they had a strong tendency to disclose important personal information directly or which could form the basis of inferences about personal matters. As Ker J. noted in Kang, the CDRs could potentially reveal personal information such as lifestyle and personal choices of a biographical nature. Specifically, the CDRs could be expected to reveal the phone numbers of the persons with whom Mr. Monteith chose to communicate with, outside the institution. The timing, frequency and duration of the calls might lead to other inferences, such as the relative importance of the person or persons to whom the phone numbers are associated. The information could allow police to conclude that Mr. Monteith associated with known criminals, or more mundane information, such as that he has an aunt who he called or attempted to call twice on Christmas Day.

[101] The Crown relies heavily on the context of the personal information. The Crown argues that the provisions of the CA and CAR, the inmate notification, and the signage, meant that Mr. Monteith had no reasonable expectation of privacy in the data about his telephone calls. In my view, these circumstances, and others (such as the custodial setting, with attendant much reduced expectations of privacy generally) would lead to a reduced expectation of privacy, but would not eliminate Mr. Monteith's expectation of privacy. Specifically, he could not claim a reasonable expectation of privacy, where disclosure is specifically authorized by legislation. However, the applicable legislation does not authorize aggregating the data concerning Mr. Monteith's phone calls into a database, such as the CDRs, nor disclosing that information to police on request, as occurred here.

- [102] As Ker J. noted in *Kang*, the legislation is silent as to CDRs as distinct from the call recordings. However s. 15(2) of the CAR restricts disclosure of telephone call recordings without lawful authority. This shows that the governing legislation seeks to protect inmate privacy concerns regarding the content of their telephone calls. There is no question that an inmate has a reasonable expectation of privacy in the recordings. In my view the clear legislative concern for protecting inmate privacy as it relates to the recordings, within carefully defined limits, supports concluding that inmates also have a reasonable expectation of privacy in the CDRs, in view of the tendency of the CDRs to reveal personal information.
- [103] The Crown argues that the information the police obtained was in the hands of a third party, BC Corrections, which had no obligation of confidentiality in respect of the CDRs.
- [104] I have already noted that neither the CA nor CAR specifically authorize disclosure of the CDRs to the police, and that the legislation does not refer to CDRs at all.
- [105] The Crown argues that, pursuant to sections 26(a) and (b) of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 [FIPPA], public bodies may collect personal information, and pursuant to section 33(3)(d), may disclose personal information to assist a specific law enforcement investigation.
- [106] Although the privacy legislation was somewhat different, in *Spencer*, the Court rejected the argument that a similar provision of the privacy legislation being considered there nullified the claimant's reasonable expectation of privacy: at paras. 55 and 61 to 62.
- [107] While the legislation in *Spencer* differs somewhat from section 33 of FIPPA, a major overall purpose of FIPPA is the same, that is, protection of personal information, within specified limits.
- [108] The effect of section 33 of FIPPA is to permit a public body to disclose personal information without contravening the statute, in certain defined circumstances.
- [109] As noted by Fish J. in *Cole*, the totality of the circumstances consists of many strands, and they may pull in competing directions: para. 57.
- [110] It is not necessary for me to decide whether s. 33(3)(d) would authorize disclosure of the CDRs in the circumstances of this case. In my view, even if it did, the fact that BC Corrections may voluntarily release information without contravening FIPPA would not eliminate Mr. Monteith's reasonable expectation of privacy in the circumstances of this case, in view of the other relevant considerations, including in particular the subject matter of the search and the privacy interests of the applicant in the information.
- [111] The Crown relies on a recent Alberta decision, *R. v. Orubor*, [2022] A.J. No. 1192.
- [112] In *Orubor*, the Calgary police asked for information from prison officials concerning inmates who identified themselves as members of a certain criminal organization. The prison officials gave the police a list of 15 inmates who identified themselves as members of

the organization. They also disclosed that a certain telephone number had been called numerous times from inmates at the institution, and from other institutions around the province. Through a freedom of information request, the police requested and received call records relating to the phone number.

[113] Using the information provided, the police obtained warrants and production orders for audio recordings between inmates and the target phone. Later they obtained a wiretap authorization. They executed search warrants and arrested the applicant, the owner of the target telephone, in relation to narcotics and other offences. The applicant contended that the police action in obtaining information from prison authorities without judicial authorization breached section 8.

[114] The court held that the applicant had no reasonable expectation of privacy in the information, because in each case he had accepted the phone call in question, as required by the inmate call system in use. The court stated:

74 As such, while any privacy interest in the Target Number was not "abandoned" by the Applicant in the traditional sense, I find he willingly "waived" his privacy interest by accepting calls from the CRC, in light of the fact that he was informed, on each occasion, that any calls from inmates at the CRC were "subject to recording and monitoring". It does not lie in the mouth of the Applicant to state, although he was clearly aware that telephone calls to the Target Number originating from the CRC were subject to being recorded or monitored, that he nonetheless held an objectively reasonable expectation of privacy in the Target Number. The Applicant had to press "1" to consent to these conditions and accept the call.

76 I find the fact that individuals receiving calls from CRC are expressly notified through the Telmate Alert that each such call may not be private negates any objective privacy interest.

80 In my view, the Canadian population is aware of and accepts a reduced expectation of privacy in institutional incarceration settings. Persons communicating with inmates are made aware of a reduced privacy expectation in those communications. Indeed, this intrusion into such communications is expressly warned of each and every time a telephone conversation is initiated. Visitors or others who communicate with inmates in prison settings are aware that their interactions and communications may be monitored.

[115] In my view, Orubor is distinguishable. There, the court concluded that the applicant had waived his privacy interest by accepting the calls, and that he had a choice to do so, or not. In the case of Mr. Monteith, no notion of waiver is applicable. He could only make telephone calls subject to the ICCS. Unlike Orubor, as an inmate, Mr. Monteith's reasonable expectation of privacy is influenced by the governing legislation, which is designed to protect a limited measure of privacy in inmate communications.

## C. Conclusion - Call Detail Records

[116] In summary, I conclude that the applicant has established that he had a reasonable expectation of privacy in the CDRs. The Crown does not argue that the search of the CDRs was lawful pursuant to Collins. Thus, in obtaining the CDRs without a production order, the police breached his section 8 Charter right to be secure against unreasonable search or seizure.

## V. The List

### A. Background - The List

[117] As noted, on August 16, 2019, Mr. Monteith was transferred as an inmate from Kent Institution in Agassiz, BC to SPSC. He remained an inmate at SPSC until September 4, 2019, when he was released.

[118] In accordance with standard procedures, Mr. Monteith was searched by intake security personnel at SPSC. The search is mandatory under section 13 of the CA. The search includes a strip search, wherein the incoming inmate is required to remove all clothing. Inmates are verbally advised that they will be searched, and signs also indicate that every individual will be searched. Inmates are advised about camera locations, so that they can be out of camera view when the strip search occurs.

[119] The incoming inmate's effects are also searched. On the search of Mr. Monteith's effects, a letter and List were found.

[120] The letter states:

When you get to Surrey go to P-Unit. There is a black guy  
on third floor Should be in Cell 310 or 311. His name is Fraser  
introduce yourself let bros know your from Kent  
Find my lil bro Matt Pelletier Should be in Cell 303  
Send him my love bro let him know you met here in Kent Seg.  
You can ask him to figure out Whatever you need  
Send my love to P, H, White Power, Sham, K and the rest of the bros

### Please let them know Im in Kent Seg the Pigs are fucking

[121] The List that accompanied the letter has four neat columns, separated by dark lines. The second column states "Blood Bath" and "HIT LIST" and contains some small drawings: an eye, a teardrop, three apparent religious crosses, and two letters X. The other three columns on the List set out 52 names, nicknames, or initials.

- [122] The effects officer on duty, Mr. Narain, noted that the List included the names of several high-risk individuals with known gang affiliations, that he was familiar with, from briefings he had. He drew the list to the attention of his supervisor, Mr. Sedlmair who, in turn, advised a more senior correctional officer, Ms. Stacey.
- [123] Ms. Stacey was at the time Classification and Case Management Supervisor. As Classification and Case Management Supervisor, she supervised the classification officers, who make decisions about where an inmate is to be placed within the institution, and other decisions relating to safety and security of the inmates and staff at SPSC. That particular day, Ms. Stacey was acting as assistant deputy warden of classification and case management at SPSC. Ms. Stacey was also the gang intelligence officer for SPSC.
- [124] Ms. Stacey testified on the voir dire. Her concerns include safety and security for inmates and staff at SPSC. She explained that it is vital to keep members of gangs separate, or brutal violence can occur. She testified that on Friday, August 16, 2019, a classification officer, Mr. Sedlmair, apprised her of information that had raised concerns. He brought the letter and the List to her. She photographed the documents on her personal cell phone, then emailed the documents to herself at her work email address. She instructed Mr. Sedlmair to return the original documents to the sealed pouch used for Mr. Monteith's effects, which would be returned to him upon his release from the institution.
- [125] Ms. Stacey understood that a "hit" meant to murder someone. She recognized several names on the list, as being, in some cases, inmates at SPSC, or persons associated with various gangs, such as the UN gang, or the Red Scorpions. She noted that the list contained the letters "XX", which could represent eyes, a drawing of an eye, and a teardrop, which she thought could be indicative of a teardrop tattoo. She testified that she understood that in gang culture a teardrop tattoo placed under the eye signifies that the person has committed a murder.
- [126] Ms. Stacey immediately forwarded her email with the attached photos of the letter and the List to Mr. Sivcharn Vahra. She also copied the email to Ms. Dawne McNaughton, a senior official within SPSC.
- [127] Mr. Vahra was the threat assessment coordinator for BC Corrections. He worked in RCMP E Division headquarters in Surrey. He worked in the Real Time Intelligence Centre (known as "RTIC"), an integrated intelligence group which includes BC Corrections, Correctional Services Canada ("CSC"), BC Sheriffs, Canada Borders Services Agency, and the police. His primary role was to support ongoing investigations and real time intelligence for law enforcement. He was also the liaison officer between BC Corrections, which has ten correctional facilities in the province, and external agencies such as the police. Mr. Vahra regularly updated SPSC personnel about gang intelligence matters.

- [128] Mr. Vahra reviewed the List on receipt from Ms. Stacey. He spoke to Ms. Stacey who shared her concerns with him. He recognized a number of names on the List. Part of his work included keeping track of gang affiliations for inmates. He told Ms. Stacey that several of the persons on the list were known gang members. He said some of the names belonged to inmates at SPSC.
- [129] Mr. Vahra notified his federal counterpart, Ms. Jennifer Germain, an official with CSC about what had been found in Mr. Monteith's belongings. He provided her with a copy of the List. Some of the names on the List were federal inmates.
- [130] Ms. Germain sent Mr. Vahra an email two days later, Sunday, August 18, 2019. She requested permission to share the "two notes" (which I infer would be the List and the letter) with CSC intelligence staff for analysis. She noted that Mr. Vahra "will be reaching out to CFSEU" (an RCMP organized crime agency).
- [131] When Mr. Vahra testified on the voir dire, he had no notes or records of email communications, and could not recall whether he forwarded the List or letter to the police at the time. There is no evidence that he did so. The email from Ms. Germain was not available until after Mr. Vahra testified, so he was not asked about this.
- [132] Mr. Vahra informed the deputy warden of SPSC, Ken Bush, about the matter. Several other senior officials were informed via email, including Joyce Oates, an assistant deputy warden, and Jashir Natt, another deputy warden of SPSC.
- [133] According to agreed facts on this voir dire, Ms. Germain spoke to Mr. Monteith about the List over the telephone while he remained in custody at SPSC. Mr. Monteith laughed and "provided little explanation" about the List. He challenged her to identify the persons on the list. He told her he had written the List while he was in segregation at Kent Institution. He said the List consisted of people he did not like or get along with, but he denied any intention to harm anyone on the List.
- [134] It is also agreed that Mr. Monteith spoke with his parole officer about the List on September 5, 2019, the day after he was released from custody at SPSC. The contents of the discussion are not in evidence.
- [135] On November 18, 2019, a member of the NWPD contacted Ms. Germain regarding the NWPD investigation of the DD shooting that had occurred November 17, 2019.
- [136] Ms. Germain told the investigator about the List found in Mr. Monteith's effects when he was searched at SPSC, and asked whether it could have any relevance to the NWPD investigation. To her recollection, she did not provide the NWPD or IHIT with a copy of the List.
- [137] On November 20, 2019, Detective Justine Thom of the NWPD contacted Corporal (now Sergeant) Matthew Robson, an NWPD member who at the time was seconded to IHIT. Cpl. Robson was IHIT's primary investigator for the Coric homicide. Cpl. Robson advised

Detective Thom that Mr. Monteith could be a suspect in the Coric homicide. Detective Thom told Cpl. Robson that Mr. Monteith had been in possession of a "hit list" while in custody at SPSC. Cpl. Robson informed the other members of the IHIT investigative team about this information. The team met on November 21. The team decided to obtain the List.

- [138] Cpl. Robson called Ms. Germain on November 21, 2019 and asked questions about the List. Cpl. Robson followed up on November 25 about the List with Mr. Vahra. Mr. Vahra directed him to Ms. Joyce Oates, who at the time was Acting Deputy Warden, Operations, at SPSC. Cpl. Robson contacted Ms. Oates the same day. She told Cpl. Robson that the List and the letter had been located in Mr. Monteith's effects on August 16, 2019. She told him that she had photographs of the documents.
- [139] Ms. Oates informed Cpl. Robson that the List included the words "Blood Bath HIT LIST" and that it had various names and initials on it. She described numerous names and initials to Cpl. Robson. He made notes of some of the names (10 or more). One of the persons was identified by initials, "KC". That name or those initials stood out to Cpl. Robson because they were the same initials as the homicide victim, Kristijan Coric. He recognized other names and initials on the list from other investigations. Ms. Oates told Cpl. Robson that a production order would be required to release the List to the police.
- [140] The List was discussed at another meeting of the IHIT investigation team the same day, November 25. The team leader for the IHIT Coric homicide investigation was RCMP Sgt. (now Staff Sergeant) Rajkamal Grewal. The team discussed whether the police had a duty to warn the individuals on the list about potential threats to their life. They took into account that Mr. Monteith was a suspect in two investigations of serious violent crimes. They were aware that Mr. Monteith had been arrested on November 23, 2019 for the attempted murder of DD.
- [141] During the meeting Sgt. Grewal made notes of some of the names on the List. He was told during the meeting that Mr. Monteith's effects were searched on his transfer from Kent institution to SPSC on August 16, 2019, and that Ms. Oates had said she was not aware where the original list was, but that she had a photograph of the List. Sgt. Grewal also recognized a number of names that he was given, as being persons with known gang affiliations. He recognized some of the nicknames. He called the BC corrections liaison officer, Mr. Vahra, later the same day, after the meeting. He informed Mr. Vahra that IHIT wanted SPSC to contact Surrey RCMP, the police force having jurisdiction over SPSC, concerning risks to public safety and the potential duty to warn persons on the list.
- [142] Ms. Oates was in the process of transferring her duties to her successor, Ms. Dawne McNaughton, who took over as acting Deputy Warden, Operations, for SPSC from Ms. Oates on November 25, 2019. On November 26, Ms. Oates advised Ms. McNaughton, in an email, that Cpl. Robson from IHIT was interested in the items and that IHIT was working on obtaining a production order. She also stated that Mr. Vahra suggested the information be forwarded to the Surrey RCMP.

[143] On November 26, Sgt. Grewal had sent an email to Mr. Vahra which included the text of section 487.0195 of the Code. The section is as follows:

487.0195 (1) For greater certainty, no preservation demand, preservation order or production order is necessary for a peace officer or public officer to ask a person to voluntarily preserve data that the person is not prohibited by law from preserving or to voluntarily provide a document to the officer that the person is not prohibited by law from disclosing.

(2) A person who preserves data or provides a document in those circumstances does not incur any criminal or civil liability for doing so.

[144] Sgt. Grewal spoke by telephone with Ms. Oates on November 27. IHIT wanted to know where the original List document was. She told him that the document had been returned to Mr. Monteith's personal effects. Sgt. Grewal asked for the copy of List. Ms. Oates told him that a production order would be required in order to release the List to IHIT. Sgt. Grewal told Ms. Oates that BC Corrections could provide the List to IHIT without a production order. He verbally advised her about s. 487.0195. Ms. Oates testified that what Sgt. Grewal said sounded right, but she got no legal advice about the matter.

[145] Later that day, following their telephone conversation, Sgt. Grewal sent Ms. Oates an email message attaching his email of November 26 to Mr. Vahra, which included section 487.0195, and asked her to let IHIT know when BC Corrections had made a report to Surrey RCMP about the List. He said in relation to the IHIT investigation, IHIT would wait to hear from her about her final decision about providing IHIT with a copy of the List.

[146] Ms. Stacey of SPSC notified Surrey RCMP about the List on November 27, 2019. Surrey RCMP began an investigation. An officer attended at SPSC on the same day, November 27, and spoke to Ms. Stacey. She provided the officer with a copy of the List.

[147] On November 28 Ms. Oates' successor, Dawne McNaughton, sent the List to Sgt. Grewal, as an attachment to an email.

[148] Surrey RCMP took various steps to assess whether the RCMP were under a duty to warn anyone about risks to their safety. Surrey RCMP interviewed Ms. Germain, of CSC, re-attended SPSC for further investigations and interviews, and attended NFPC on December 5, 2019. They showed Mr. Monteith the List and asked him a number of questions about it. They developed a list of possible identifications of individuals on the List, and conducted police database queries of the names on the List. Ultimately, the RCMP did not issue any warnings as a result of their investigation into the List. Their investigation was closed June 21, 2020.

## B. Analysis - The List

- [149] The applicant does not challenge the legality of the search of Mr. Monteith's effects by BC Corrections on August 16, 2019 when he was transferred to SPSC. He concedes that the search was lawful. Section 13(1) of the CA mandates a search of the incoming inmate's personal possessions. There are no preconditions or limitations on the search, which may include a strip search.
- [150] However he contends that photographing and retaining a copy of the List and the letter was an illegal seizure. He challenges the disclosure of a copy of the List to IHIT. From a practical point of view, this is the search or seizure that matters, since IHIT relied on the List in the Squamish ITO and the NFPC ITO.
- [151] Although the issue was not argued on the voir dire, I can infer that the applicant would also challenge the provision of the List to the Surrey RCMP on November 27, 2019, since that entailed disclosure of the List seized by SPSC on August 16.
- [152] The Crown submits that the applicant had no reasonable expectation of privacy in the List, and therefore the applicant has no standing to challenge the seizure of the List by BC Corrections or the police.
- [153] As I will explain, the applicant had no reasonable expectation of privacy in the List, either in relation to the circumstances of BC Corrections seizing a copy of it, or in the circumstances of IHIT obtaining a copy of it.
- [154] An inspection is a search, and a taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access: *Cole*, para. 34; *R. v. Evans*, [1996] 1 S.C.R. 8, 1996 CanLII 248, at para. 11; *Tessling*, para. 18. The power to make copies of documents is analogous to a requirement for production of documents and constitutes a seizure within section 8: *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406 at 439, 1994 CanLII 92. Accordingly, whether examination of the List and making a copy of it constitutes a search or seizure depends once again on whether the applicant can establish a reasonable expectation of privacy in the subject matter of the search or seizure.

### 1. The Legislation

[155] Some relevant provisions of the CA are as follows:

1 In this Act:

"contraband" means any of the following:

- (a) an intoxicant;

- (b) if possessed without prior authorization, a weapon, any component of a weapon or ammunition for a weapon, or anything that is designed to kill, injure or disable or is altered so as to be capable of killing, injuring or disabling;
- (c) an explosive or bomb, or any component of an explosive or bomb;
- (d) if possessed without prior authorization, any currency;
- (e) if possessed without prior authorization, tobacco leaves or any products produced from tobacco in any form or for any use;
- (f) if possessed without prior authorization, any other object or substance that, in the opinion of an authorized person, may threaten the management, operation, discipline or security of, or safety of persons in, the correctional centre;

### Search of inmates

13 (1) On admission, entry or return of an inmate to a correctional centre, an authorized person must conduct a search of the inmate and any personal possessions, including clothing, that the inmate may be carrying or wearing.

- (2) For the purpose of detecting contraband, an authorized person may without individualized suspicion conduct periodic searches of
  - (a) an inmate and any personal possessions, including clothing, that the inmate may be carrying or wearing, and
  - (b) the inmate's cell and its contents.
- (3) If an authorized person believes on reasonable grounds that an inmate may be in possession of contraband or evidence relating to an offence under section 17 (1), the authorized person may conduct a search of any of the following, as necessary in the circumstances:
  - (a) the inmate and any personal possessions, including clothing, that the inmate may be carrying or wearing;
  - (b) the inmate's cell and its contents.
- (4) A search under subsection (1), (2) or (3) may include a strip search conducted in accordance with the regulations.
- (5) A strip search of an inmate must be conducted by an authorized person of the same sex as the inmate unless the delay that would be caused by complying with this requirement would result in danger to human life or safety.

## Contraband and trespassing offences

17 (1) A person commits an offence if at a correctional centre the person possesses, delivers or sends to or receives from an inmate anything that is referred to in paragraph (a), (b) or (c) of the definition of "contraband" in section 1.

## Powers of seizure and disposition of things seized

18 (1) A staff member may seize an object or substance if the staff member believes on reasonable grounds that the object or substance is contraband or evidence relating to an offence under section 17 (1).

[156] Relevant provisions of the CAR include:

### Inmate communication

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

- (b) to read inmate communication delivered to the correctional centre or sent from within the correctional centre.
- (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,
  - (4) Inmate communication by mail may be intercepted and examined by an authorized person to determine if the mail contains contraband.

[157] The relevant provisions of the Adult Custody Policy are consistent with these provisions.

## 2. BC Corrections Search and Seizure

[158] The main issue in this case relates to the disclosure of the List to IHIT. As the applicant also challenges the copying and retention of the List by BC Corrections as an unlawful seizure, I will address this issue, as well. It is also relevant to the subsequent disclosure of the List to IHIT.

[159] As noted previously, whether there is a reasonable expectation of privacy is assessed in the "totality of the circumstances" by means of considering and weighing a large number of interrelated factors. The "totality of the circumstances" must be adapted to the circumstances of the particular case, and they must be looked at as a whole: Spencer, para. 17.

- [160] The four "lines of inquiry" (Cole, para. 40; Spencer, para. 18; Marakah, para. 11) are "main headings for analytical convenience": Spencer, para. 18.
- [161] With these comments in mind, I will now review the four conventional "lines of inquiry". For convenience I will repeat them. They are (Mills, para. 13):
1. an examination of the subject matter of the alleged search;
  2. a determination as to whether the claimant had a direct interest in the subject matter;
  3. an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and
  4. an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.
- [162] The applicant argues that the legislation and policies do not authorize seizure, since the List was not contraband, as defined.
- [163] As I see it, the legislation and policies regarding seizure of inmate possessions primarily reflect competing concerns about institutional safety and security, and protecting the inmate's residual property interests, rather than privacy concerns. The interests reflected in the authority to seize objects and substances from inmates in s. 18 of the CA are quite different than the interests with which s. 8 of the Charter is concerned, and therefore it provides no guidance. The focus of section 8 is the protection of privacy interests, not property rights: *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, at para. 52; *British Columbia (Attorney General) v. BridgeMark Financial Corp.*, 2021 BCSC 1459, at para. 35.
- [164] SPSC respected Mr. Monteith's property interests in the documents by returning them to his sealed pouch. They retained copies for investigative and informational purposes.
- [165] In any event, the issue before me is whether the applicant has established a reasonable expectation of privacy, not specifically whether the List comes within the definition of contraband.
- [166] As the BC Corrections search is not in issue, the first line of inquiry must be adapted somewhat. The question becomes, what was the subject matter of the seizure? In other words, what did BC Corrections choose to retain, and why?
- a) The Subject Matter of the Seizure by BC Corrections
- [167] There is some ambiguity about the subject matter of the seizure. Mr. Monteith did not testify or provide affidavit evidence on the voir dire, so there is no direct evidence from him about this.
- [168] When the documents were discovered, the correctional officials had no way of knowing whether Mr. Monteith was the author of the "Blood Bath - HIT LIST" or whether the List was prepared by someone else, perhaps as an instruction, or part of a plan or plans in which

Mr. Monteith could be somehow involved. Christy Stacey thought the List was exactly what it purported to be, namely, a "HIT LIST", meaning a list of persons intended for murder. The email chain on August 19, 2019 among correctional officials contains speculation that the documents were instructions for Monteith.

- [169] The List was accompanied by the letter. The photographs suggest the documents were written on the same kind of paper. The handwriting is similar between the two documents. The correctional officers and officials obviously inferred that they were connected. The contents of the letter suggested that the List reflected instructions from or plans of another person or persons.
- [170] On a prima facie basis, then, the "hit list" was either Mr. Monteith's own personal memorandum to himself, or, and this seems more likely, a list given to him by someone else. As noted, later on, Mr. Monteith asserted that he was the author of the List, that it was merely a sort of "aide-memoire" of people he did not like or get along with, and that he had no real intention of harming anyone.
- [171] It is clear that the correctional officials were very concerned about the documents, and the List in particular. The List was viewed as, potentially, a threat to kill multiple people. They had no reason to dismiss the contents of the List as non-credible. They were familiar with several names or nicknames on the List, and their connection to criminal gangs, gang violence, and gang murders.
- [172] Ms. Stacey immediately discussed the information with Mr. Vahra. They discussed the names and nicknames on the List, including those who were inmates at SPSC. The information was shared with several senior SPSC officials. It seems clear that the most immediate concern of the BC Corrections officials was in assessing Mr. Monteith's possible gang affiliations and placement within SPSC. They were also concerned about safety and security of other inmates and persons within SPSC and federal correctional facilities. They also needed to gather and process information about gang affiliations.
- [173] Ms. Stacey testified that she expected Mr. Vahra to assess the threat, and inform relevant persons and agencies, including CFSEU, the RCMP gang investigation agency. Mr. Vahra shared the List and the circumstances with his CSC counterpart, Ms. Germain, who did some follow-up investigation, by speaking with Mr. Monteith. Broader public safety concerns seem to have been in mind as well, as consideration was given to sharing the information with police at that time, and in particular the CFSEU, although it appears the information was not shared with police until later.
- [174] In summary, BC Corrections made and retained a copy of the List as well as the letter for various purposes, including further investigation and consultation between responsible correctional officials, and for reasons having to do with safety and security of Mr. Monteith himself, as well as other persons within, at least, BC Corrections facilities and federal correctional facilities.

b) Direct Interest

[175] The List and letter were among the applicant's possessions. He was the owner of them, so he had a direct interest in the documents, and their contents, whether he was the author of the documents, or whether they were actually items of correspondence from another person.

c) Subjective Expectation of Privacy in the Subject Matter

[176] Since my analysis does not turn on this question, not much analysis is needed. As there is no evidence for Mr. Monteith directly, I must make inferences in this respect.

[177] The Crown notes that Mr. Monteith has a significant criminal record and has been incarcerated many times, therefore he ought to have understood that his possessions would be searched.

[178] I can only infer that Mr. Monteith must have subjectively expected that the List and the letter would remain private, or at least, would not be shared with the police. Otherwise, given the nature of the documents, his decision to bring them with him on transfer to SPSC is inexplicable.

d) Was the Applicant's Subjective Expectation of Privacy Objectively Reasonable?

[179] Mr. Monteith could not have had an objectively reasonable expectation of privacy in the List, in all of the circumstances.

[180] As noted, there is no definitive list of factors that must be considered: Cole, para. 45.

[181] This case deals with informational privacy. In Tessling, Binnie J. developed this list of factors, in a case dealing with Forward Looking Infra-Red ("FLIR") information. This information showed thermal energy or heat radiating from a building. The factors Binnie J. considered were as follows at para. 32:

4. If so, was the expectation objectively reasonable? In this respect, regard must be had to:

- a. the place where the alleged "search" occurred;
- b. whether the subject matter was in public view;
- c. whether the subject matter had been abandoned;
- d. whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
- e. whether the police technique was intrusive in relation to the privacy interest;
- f. whether the use of surveillance technology was itself objectively unreasonable;
- g. whether the FLIR heat profile exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.

- [182] In this case, the information had the potential to expose intimate details of Mr. Monteith's lifestyle, or information of a biographical nature. Potentially, it was evidence of gang associations, and of criminal intentions on his part and/or on the part of others with whom he was associated, or, on his evidence, a personal list of enemies.
- [183] However, other factors strongly outweigh that factor. Two strongly inter-related factors dominate: the subject matter of the search (or seizure) and the place and context of the search and seizure.
- [184] The information was discovered during a lawful, mandatory search of Mr. Monteith's effects upon his admission to SPSC on August 16, 2019.
- [185] A search of inmates upon entry to an institution is required pursuant to section 13(1) of the CA. Indeed, the search may include a strip search: section 13(4); section 12(1) CAR. Inmate communications by mail is also subject to interception and examination: section 14(4) CAR. Privacy expectations for an inmate are substantially diminished: *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 at 877, 1993 CanLII 112; *Siniscalchi*, para. 70.
- [186] There is no issue about intrusiveness of the search. It was legal, and mandatory.
- [187] The prison officials were obliged to accept the facial credibility of the document, and to investigate further, for various legitimate purposes. This included, necessarily, sharing the information with other prison officials, including federal prison officials.
- [188] As noted, many names on the List were known to corrections officials, and the police. This added to the seriousness and credibility of the apparent "hit list" nature of the document. The information raised obvious public safety concerns, not limited to the safety and security of persons within correctional institutions.
- [189] In *Siniscalchi*, the court noted that inmates cannot reasonably expect that telephone conversations evidencing a threat to persons or to the security of the prison would be kept confidential: para. 85. The same reasoning applies to contents of the List in the circumstances of this case.
- [190] The List was appropriately shared with several responsible officials within BC Corrections, and with CSC, for legitimate purposes.
- [191] For whatever reason, it appears that Mr. Vahra did not share the information with the RCMP, initially. However, he later directed that the information should be shared with the RCMP, Surrey detachment, possibly upon being prompted to do so by Sgt. Grewal. The information was disclosed to the RCMP on November 27, for follow-up regarding duty to warn concerns. This was reasonable and legitimate, in my view.
- [192] Mr. Monteith argues that the protection of section 8 is intended to be content neutral: *Mills* para. 25; *Spencer*, para. 36. However, the reasonable expectation of privacy standard is normative rather than simply descriptive, and is inevitably laden with value judgments which are made from the independent perspective of the reasonable and informed person

who is concerned about the long-term consequences of government action for the protection of privacy: Spencer, para. 18; Mills, para. 20; R. v. Pelucco, 2015 BCCA 370, at paras. 58 - 61; R. v. Hayer, 2022 BCSC 747, at para. 34, 70 - 72, 78.

[193] Content-neutrality has its limits. The fact that communications are threatening in nature may be a normative consideration. So in Pelucco, the court stated that a person who threatens another person via text messages has no right to expect that the recipient will keep the threatening text messages private: paras. 61, 65.

[194] A reasonably informed person who is concerned about the long-term consequences of government action for the protection of privacy would expect that prima facie credible information revealing threats to murder numerous persons having known criminal gang affiliations, in the context of the notorious and extremely violent gang wars in British Columbia, found in the course of a lawful, mandatory search of an inmate's effects upon transfer between institutions, would be disclosed, and would be acted upon by responsible agencies, including prison authorities, and the police.

[195] As a prison inmate, Mr. Monteith should have expected that his personal effects would be carefully searched. He ought to have expected that papers in his possession would also be searched, and their contents read. He should have expected that a document entitled "Blood Bath/HITLIST" and containing many names that would be known to prison officials would be taken very seriously, would cause alarm, and would be acted upon, including potentially, disclosure to the police.

[196] I conclude that the applicant has not established an objectively reasonable expectation of privacy in the List when a copy of it was obtained by BC Corrections.

### 3. Disclosure of the List to IHIT

[197] The next issue is whether Mr. Monteith has established a reasonable expectation of privacy in relation to IHIT obtaining a copy of the List. In my view, the analysis differs somewhat, but the result is the same. Mr. Monteith has not established that an expectation of privacy was objectively reasonable.

[198] The subject matter of the search is somewhat different as it relates to IHIT, as distinct from BC Corrections.

[199] Since the subject matter of the search depends, generally, on the information the police were seeking, whether the police received a form of copy of the document or the original document does not matter, in the circumstances of this case.

[200] The police were interested in evidence of a threat to "KC", possibly the homicide victim they were investigating, Kristijan Coric, as well as any connection between that homicide and Mr. Monteith, for purposes of their investigation into the homicide. The List could be evidence that Mr. Monteith was a contract killer of Mr. Coric. What the police were "really after" then, was evidence to support the theory that Mr. Monteith may have been a contract

killer of Mr. Coric. IHIT also wanted the List passed along to the local police force to assess public safety concerns, in particular concerns about the safety of the persons on the List.

- [201] The subject matter of the search was information tending to link Mr. Monteith to the homicide of Mr. Coric.
- [202] I have already discussed my analysis of Mr. Monteith's direct interest in the subject matter of the search, and his subjective expectation of privacy.
- [203] Largely for the reasons I have already expressed in relation to the search by BC Corrections, Mr. Monteith could not have had a reasonable expectation of privacy in the List. The List was the subject of a lawful search. Mr. Monteith had no reasonable expectation of privacy in it, in the hands of BC Corrections, nor, given its nature, that it would not be disclosed by prison officials to the police.
- [204] BC Corrections appropriately disclosed the List to Surrey RCMP for law enforcement purposes. When IHIT received the List, disclosure to the RCMP had already occurred. IHIT might have simply obtained the List from Surrey RCMP, but did not do so.
- [205] In addition to any common-law powers the correctional officials may have had as peace officers, disclosure by BC Corrections was permitted by section 33(3) of FIPPA.
- [206] IHIT could legitimately request the information: Criminal Code section 487.0195(1); *R. v. Telfer*, 2021 MBCA 38, at para. 42; *R. v. Chaudhry*, 2021 ONSC 394, at para. 114.
- [207] There was no intrusive police technique in this case. The police simply obtained information that Mr. Monteith had produced, or was carrying, when he was lawfully searched at a correctional facility. Mr. Monteith was aware that BC Corrections had taken copy of the List. Ms. Germain volunteered information about Mr. Monteith and the List to an investigator with NWPD on November 18, the day after the DD shooting. When IHIT obtained the List, it was already in possession of BC Corrections, and had been disclosed to the RCMP.
- [208] Every case must be decided on the basis of its own unique circumstances, but case-law can provide guidance: *Cole*, para. 45.
- [209] The case-law does not support the applicant's position.
- [210] In *R. v. Blais* (2004), 182 C.C.C. (3d) 39, 2004 CanLII 8466 (Ont. C.A.), the court held that there was no breach of s. 8 when jail authorities permitted a police detective to look at the inmate's property which had been placed in a sealed but transparent bag while he was in custody. The police compared a key linked to a residence where stolen goods were stored, with a key in the inmate's bag, and determined that the keys were the same. That information was used to obtain a search warrant to obtain the key. Thus, the court held that the inmate had no reasonable expectation of privacy in the information revealed by inspection of the inmate's belongings. The inspection of the bag by the police did not breach his s. 8 rights. This central part of the court's decision does not assist the applicant.

- [211] However, in obiter dictum, the court commented that the accused could reasonably expect that the police would obtain a search warrant, as they did, before actually taking his property, which the gaoler was obliged to safeguard. With respect, this part of the court's analysis seems to reflect a concern for the inmate's property interests rather than his informational privacy interests. This aspect of *Blais* was applied in another Ontario case, *R. v. Johnston*, 2014 ONSC 5789. These cases are distinguishable on their facts, of course. Both were concerned with routine police investigations. The information in question did not raise public safety concerns.
- [212] In *R. v. Lamirande*, 2002 MBCA 41, leave to appeal to SCC ref'd, 29205 (23 January 2003), the accused's belongings were lawfully searched upon her transfer to a new correctional facility. Some of the documents, in the nature of notes and poetry, were turned over to the police. The documents were introduced at her trial to support inferences that she was associated with a criminal gang and that she had knowledge about the robbery in question. The court affirmed the decision of the trial judge, holding that the accused had no reasonable expectation of privacy in the papers: para. 31.
- [213] In *R. v. Field*, 2014 BCSC 1203, the court held that the accused had no reasonable expectation of privacy in a letter he sent to his son, while the accused was an inmate. In the letter the accused sought to have his son discourage the complainant from testifying against him. The son was in care of child protection authorities. The letter was read by a social worker who turned it over to the Crown. The court held that the accused had no reasonable expectation of privacy in the letter, primarily due to the minimal expectations of privacy of inmates generally, the rules applicable to inmate communications in the custodial setting, and an inference that the accused ought to have known that the letter would be read by the social worker responsible for his son's child protection case.
- [214] I conclude that the applicant has not satisfied his onus of establishing a reasonable expectation of privacy in the List.
- [215] The Crown argues, in the alternative, that there was no section 8 breach with respect to the information obtained orally by Cpl. Robson and Sgt. Grewal on November 25 and 27, 2019, from discussions with Ms. Oates. The Crown argues that the IHIT officers were fulfilling their statutory and common law duties in asking about the List and its contents when it came to their attention. The information was voluntarily provided in oral form by officials at SPSC to IHIT.
- [216] As a result of my finding that Mr. Monteith has not established a reasonable expectation of privacy in the List, it is unnecessary that I address the Crown's alternative argument.

## VI. Conclusion

[217] The applicant has established a reasonable expectation of privacy in the contents of the CDRs. The information was obtained without judicial authorization. The Crown does not seek to demonstrate that the search was otherwise lawful pursuant to Collins. Accordingly, the applicant has established a breach of section 8 in relation to provision of the CDRs.

[218] The applicant has not established a breach of section 8 with respect to seizure of the List nor in provision of the List to IHIT.

"Verhoeven J."

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Prepared on 25 October 2026 · Esheria