

CANADA / JUDGMENT

R. v. Teixeira

2023 BCSC 340

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 340 R. v. Teixeira

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Teixeira,

2023 BCSC 340

Date: 20230308

Docket: 82939-14

Registry: New Westminster

Regina

v.

Brandon Nathan Teixeira

Restriction on publication: There are restrictions on publication of these reasons pursuant to s. 486.5(1), s. 486.5(9) and s. 684 of the Criminal Code of Canada and the Inherent Jurisdiction of this Court. The restrictions remain in place until further order of the Court.

Before: The Honourable Justice Duncan

Ruling on Application #14

Re: Overseizure

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Place and Date of Trial/Hearing:

New Westminster, B.C.

September 20, 2022;

December 5 - 8, 14 - 16, 2022;

January 9 - 11, 2023; and

February 8 - 10, 2023

Place and Date of Judgment:

New Westminster, B.C.

March 8, 2023

Introduction

[1] On November 3, 2017, members of the Integrated Homicide Investigation Team ("IHIT") executed a search warrant at 20255 98A Avenue in Langley (the "Langley residence"). IHIT was investigating the murder of Nicholas Khabra which had occurred in the early morning hours of October 23, 2017. By November 3, investigators had grounds to believe that the accused, Brandon Teixeira, lived at the Langley residence with Ryan Provencher. IHIT regarded Mr. Teixeira and Mr. Provencher as persons of interest or suspects in the homicide of Mr. Khabra.

[2] The search warrant authorized police to search for:

- i. Firearm;
- ii. Ammunition;
- iii. Knives;
- iv. Bloody clothing;
- v. Bloody footwear;

vi. Rental contract from Avis for a black Jeep Compass with the BC licence plate EV603L in the name of Ryan Provencher; and

vii. Documents proving occupancy of the Langley residence.

- [3] Sergeant Gerlind Spekat was the crime scene manager. She assigned other officers (the searchers) to search the Langley residence for things listed in the warrant. Sgt. Spekat was responsible for seizing those things and documenting their seizure, as well as seizing items not listed in the warrant if she had reasonable and probable grounds to do so under s. 489 of the Criminal Code, R.S. C. 1985, c. C-46 [Code].
- [4] In the course of executing the search, the searchers located very few things that fell within the list in the warrant, but drew Sgt. Spekat's attention to many other items, such as assorted electronic devices (cell phones, tablets, iPads, and a computer), brass knuckles, cash, and illegal substances.
- [5] In total, Sgt. Spekat seized 23 electronic devices in addition to miscellaneous other things not listed on the warrant. Specific to this application, she seized various documents, a composition book, and file folders of material from the southeast bedroom. One of the occupants of the house, Jocelyn Enright (a.k.a. Winmill), had identified Mr. Teixeira as the habitual occupant of that bedroom.
- [6] Sgt. Spekat listed everything she seized from the Langley residence on an exhibit flow chart which she later appended to a Form 5.2 Report to Justice.
- [7] During the evidentiary portion of this application, the Crown focussed almost exclusively on the seizure of the 23 electronic devices. In closing submissions, however, it became apparent that there was some sort of misunderstanding between Crown and defence about whether the defence challenged only the seizure of the electronic devices or everything police seized pursuant to s. 489 that was listed on the exhibit flow chart.
- [8] These reasons will focus almost entirely on the seizure of the electronic devices, because counsel require a ruling on the lawfulness of their seizure before March 17, when a subsequent application related to some of the electronic devices is set to commence. I will discuss other exhibits that were canvassed in evidence and whether or not a lawful reason was advanced for the seizure of each, in particular the documents and composition book seized from Mr. Teixeira's room. The Crown may have to apply to re-open this application to address the misunderstanding.
- [9] The evidentiary portion of this application occupied 11 days of court time. The Crown called a number of witnesses in addition to Sgt. Spekat. The direct and cross-examination of the witnesses was extremely wide-ranging into areas of the propriety of searches of Mr. Teixeira and Mr. Provencher pursuant to investigative detention and the thought processes of the various witnesses concerning cell phones. Despite the wide array of issues that presented themselves during the hearing and the subsequent three day argument, the focus of these reasons is narrow: did Sgt. Spekat have subjective reasonable grounds to seize items not

listed in the warrant and, if she did, were there also objective grounds for seizure?

- [10] In summary, I have found that Sgt. Spekat had the subjective reasonable grounds to seize only the following items under s. 489 of the Code:
- a) The Samsung S5 phone from the duffle bag in Mr. Teixeira's room;
 - b) The Aquaris X phone on the laundry hamper in Mr. Teixeira's room; and
 - c) The black Samsung phone located on the bed in Mr. Teixeira's room.
- [11] The seizure of those items was accompanied by the requisite objective reasonable grounds.
- [12] Sgt. Spekat did not have subjective reasonable grounds to seize any of the other items from the Langley residence, with the exception of those items which were clearly illegal to possess.
- [13] I will set out an overview of the investigation up to the execution of the search warrant at the Langley residence and the evidence of the searchers, before embarking on a detailed examination of Sgt. Spekat's evidence.

The Khabra Investigation by November 3, 2017

- [14] Cpl. Dulude submitted the Information to Obtain ("ITO") a search warrant for the Langley residence to a Judicial Justice early on the morning of November 3, 2017. By that day, IHIT's investigation had progressed to the point that Mr. Provencher and Mr. Teixeira were at least persons of interest, if not actual suspects, in the homicide of Mr. Khabra.
- [15] Investigators believed that Mr. Khabra was lured to the scene of his death by several phone calls from a number ending in 6005. They knew, from Mr. Khabra's father and girlfriend, that he had planned to meet up with someone named Kobe or Colby on the night he was murdered. They had information that Mr. Provencher had rented a black Jeep Compass from Avis, which was suspected to have been the vehicle used in the course of the homicide.
- [16] A civilian analyst linked the name Kobe to Mr. Teixeira. Mr. Teixeira and Mr. Provencher both provided the same address to their respective bail or probation officers. Surveillance revealed that both men had and used cell phones, but investigators were unable to link either of them to the 6005 number. It did not "ping" when police activated a cell phone tracking device.
- [17] In the days leading up to November 3, members of the investigation team met to discuss what should be included as items to be searched for in the warrant application. Differing views emerged.

- [18] S/Sgt. Fox, the team commander, was firmly of the view that cell phones should be included in the request for the search warrant. The homicide of Mr. Khabra appeared to be a targeted hit and, in his experience, individuals engaged in that type of activity use cell phones to communicate their plans.
- [19] Sgt. Froese, the team leader, took a much narrower view of the team's grounds to seek a warrant to search for cell phones in the Langley residence. He did not believe they could be confident that the phone associated to the homicide (the 6005 phone) would be located in the residence at the time of the warrant execution, but if officers found phones and computers while lawfully executing their duties they could be seized.
- [20] Sgt. Froese explained that the operational plan was to have the Emergency Response Team (the "ERT") enter the residence and escort Mr. Teixeira and Mr. Provencher out. At that point, the men would be detained and searched. Sgt. Froese thought that in all likelihood they would have their cell phones on their person and police could seize them upon detention to prevent the destruction of evidence.
- [21] Det. Marshall, the primary investigator responsible for the speed, flow, and direction of the investigation, shared a similar view as Sgt. Froese about the lack of grounds to seek a warrant for cell phones in the Langley residence.
- [22] Cpl. Dulude, the affiant, did not believe he had grounds to swear that the 6005 phone would be found in the Langley residence. He had obtained a tracking warrant for that number and it had not "pinged" at all, let alone in the Langley residence. He recalled that S/Sgt. Fox disagreed with the decision not to include a request for cell phones in the ITO.
- [23] Cpl. Dulude believed that if a phone associated to the 6005 number was found in the Langley residence, there were grounds to seize it because it was used in the commission of the offence they were investigating. If he came across any cell phones in the target residence, they could be seized, but a warrant would be required to search their contents.
- [24] While Sgt. Spekat was present at one or more of the command triangle meetings in which cell phones were discussed, she has no notes of any conversation and did not participate in the drafting of the ITO or the search terms.

The Pre-Search Briefing

- [25] On the morning of November 3, members of IHIT's Team 2 and members of the ERT held a joint briefing about how the warrant would be executed. ERT members were not in agreement with the operational plan that required them to detain Mr. Provencher and Mr. Teixeira and seize their cell phones. It appears that there was a healthy debate about the legal authority to search for and seize cell phones upon investigative detention. Ultimately, members of IHIT were tasked with detaining Mr. Provencher and Mr. Teixeira and searching them pursuant to detention for weapons and cell phones.

- [26] The task of searching the house was divided up between a number of searchers who were assigned to search various part of the house by Sgt. Spekat.

The Search of the Langley Residence

- [27] Sgt. Mark Hodson was a member of the RCMP Forensic Investigation Service ("FIS"). His primary role was to document the scene through photos and diagrams before the search began. Once he completed that task, Sgt. Spekat assigned him to search the bedroom associated to Mr. Teixeira. The warrant specified bloody clothing and footwear so he searched every article of clothing in the closet.
- [28] In the course of his search, Sgt. Hodson found a number of hoodies, some with cash in the pockets; cash in a pair of gray pants; drugs and drug paraphernalia; and body armour. He was not part of any pre-search discussion about cell phones but he pointed out cell phones he located in Mr. Teixeira's room during the course of his search, including some that he located in pockets of clothing. He looked in pockets as part of his search for bloody clothing. Sgt. Hodson was aware that cell phones were not listed on the warrant but he alerted Sgt. Spekat to them because the search team had expressed interest in the cell phones located in the kitchen.
- [29] On cross-examination, Sgt. Hodson said he used a flashlight and a hemastix test to aid in his search for blood. He used the hemastix test on a towel and a pillow, items not listed in the warrant. He agreed the hemastix test was a form of search and he did not turn his mind to the legal authority to use it on items not listed in the warrant, for which s. 489 provides authority to seize but not to search.
- [30] Sgt. Jason Lee was tasked with searching the master bedroom. He reviewed the warrant and noted the items to be searched for in his notebook. He looked for the items in places where they might reasonably be located. A firearm might be in a pocket, a drawer or a box or storage container. Ammunition could be in smaller areas, such as drawers or small containers.
- [31] Sgt. Lee located multiple cell phones in the master bedroom and brought them to Sgt. Spekat's attention to decide whether to seize them or not. They were not listed in the warrant but he knew he had authority to seize them under s. 489. From his brief knowledge of the investigation, the victim had been lured to a meeting by some form of telecommunication. He did not recall any discussion with Sgt. Spekat about the omission of cell phones from the list of items sought in the warrant.
- [32] Sgt. Lee located brass knuckles in the top drawer of a nightstand. They are prohibited items and could be seized under s. 489. He found cash and a baggie of drugs and showed those items to Sgt. Spekat. The drugs could be seized because they were illegal, but it was up to Sgt. Spekat to decide whether to seize the cash.

- [33] After searching the master bedroom, Sgt. Lee assisted other searchers in the garage. He located several cell phones and other items and brought them to Sgt. Spekat's attention.
- [34] Corporal Mouland's first assignment at the scene of the search was to detain and search Mr. Provencher, although he ended up detaining and searching Mr. Teixeira instead. Once he was finished dealing with Mr. Teixeira, Cpl. Mouland was assigned to search the main bathroom of the house. He went through the bathroom systematically, looking for items listed in the search warrant. It was a small area and the search went quickly. The only item of note was a box with red spots on it, which he thought could have been blood.
- [35] Cpl. Mouland next searched the hallway closet, but found nothing of note. From there he searched the office. He found a blue LG cell phone box, but no phone; two phones on a shelf above the desk; a white tablet on the desk with a cracked screen; a smashed iPhone in a plastic bag; a white box containing an apparently new black tablet; a SIM card; and an Apple laptop in a backpack on the couch.
- [36] Cpl. Mouland alerted Sgt. Spekat to the electronic devices, though they were not listed in the search warrant. In his experience, electronics can contain a lot of information. He knew that Mr. Teixeira was suspected of drug trafficking and cell phones are an integral part of that occupation.
- [37] In terms of the homicide of Mr. Khabra, Cpl. Mouland said there could have been communications between suspects and other unknown witnesses or with the victim. He said it was normal to find cell phones during a search and it was in his mind that they might be present in the house. He said they could not leave the phones because they had to preserve the evidence on them.
- [38] Cpl. Mouland located other items of interest in the office: a frequency jammer, which he said is an illegal device; baggies, a grinder, and pills; marijuana and resin which at the time was illegal to possess; Mr. Provencher's driver's licence, which could support occupancy; a rental agreement in Mr. Teixeira's name for an address in South Surrey; a large stack of documents including an Avis rental contract in Mr. Provencher's name, though he was not sure any of the documents were for the black Jeep Compass; and two rifle rounds and shotgun shells.
- [39] Cpl. Mouland did not make a detailed inventory of the documents, because that was Sgt. Spekat's job. He was not in charge of seizing exhibits and he did not share his grounds with Sgt. Spekat because it was her decision to seize and, in his view, she had the most file knowledge.
- [40] Sgt. Froese was assigned to detaining and searching Mr. Teixeira but ended up dealing with Mr. Provencher instead. Once that task was complete, he was assigned to searching the garage. Little turns on what he found and I will not spend any more time on his evidence.

Sergeant Spekat

- [41] Sgt. Spekat was involved with the investigation of the homicide of Mr. Khabra from early on October 23, 2017. She carried out various duties, including searching a burned out Jeep Liberty which was believed to have been associated with the homicide and a Mazda belonging to Mr. Khabra's girlfriend, Person A, from which she seized three cell phones. On October 31, Sgt. Spekat documented production orders, tracking orders, and related non-disclosure orders received from Cpl. Dulude as exhibits. They related to two phone numbers: the 6005 number and the 9707 number.
- [42] Sgt. Spekat did not attend all of the briefings concerning the homicide of Mr. Khabra because of other duties, but was updated at subsequent briefings or by talking to Cpl. Toor, the file coordinator at the time. She was present at a briefing on November 1, 2017 for an update by Cpl. Dulude about the tracking warrant and the fact that the phone being tracked was off. She did not understand the significance of that update.
- [43] Later on November 1, Sgt. Spekat was in a meeting with other members of the team concerning the search warrant to be sought for the Langley residence. She has no recollection of what was discussed and had no input in crafting the terms of the search warrant.
- [44] On November 2, Sgt. Spekat was involved in another meeting about the search warrant, primarily concerning logistics, safety and the anticipated timeline for obtaining and executing the warrant. The others present were Sgt. Froese, Det. Marshall, Cpl. Dulude, and S/Sgt. Fox. Sgt. Spekat was sure there were discussions about cell phones or electronic devices at the meeting but could not recall anything specific. She has no recollection of discussing the proposed terms of the warrant prior to November 3 or reviewing any of the draft ITOs before November 3.
- [45] Sgt. Spekat attending the briefing on the morning of the search. Det. Marshall led the briefing to ensure that officers brought in as extra resources would know the objectives of the search and have an overview of the investigation. Sgt. Spekat said that Det. Marshall discussed the terms of the warrant. She noted "bloody clothing, weapon, DNA, cell phones" in her notebook, meaning those were the items they were looking for. She also noted "cellphones are important".
- [46] Sgt. Spekat said cell phones were always important because they store information, contacts, photographs, videos, finances, social media contacts - a veritable treasure trove of information. This was in her mind on November 3.
- [47] Sgt. Spekat noted that Cpl. Dulude was granted the search warrant at 8:37 a.m. She received the original from him at 9:45, reviewed the terms, signed it to acknowledge she had read it, and made a note of items to be searched for listed on the face of the warrant. She could not recall what her thoughts were about the absence of cell phones or electronic devices from the list in light of Det. Marshall's earlier reference to them being on the list. Her priority, on

entering the residence, was on the items listed in the search warrant. Overall, she hoped to find a firearm.

- [48] Sgt. Spekat did not recall thinking that she expected to find cell phones in the residence. She had to keep an open mind. She does not recall if she formulated a plan for cell phones before going in, although she noted that "Phones to be put in Faraday bag to ERT from Jason".
- [49] Faraday bags prevent the remote deletion of the contents of electronic devices. Sgt. Spekat said the IHIT crime scene van was generally stocked with Faraday bags. Defence counsel suggested the presence of Faraday bags on scene was significant, because it showed that investigators intended to search for electronic devices. I find they are common items that police have on hand and nothing turns on their presence at the November 3 search.
- [50] Once the ERT members cleared the house, Sgt. Spekat did a walk through to get a lay of the land and formulate a plan of how to look for things. She drew some rudimentary sketches of the house while Sgt. Hodson took photographs.
- [51] Det. Marshall told Sgt. Spekat that he had spoken with a female occupant of the home, Ms. Enright. Ms. Enright advised that Mr. Teixeira occupied the southeast bedroom while she and Mr. Provencher occupied the master bedroom with the en suite bathroom and used a third room in the house as their office.
- [52] Sgt. Spekat assigned searchers to different areas of the house while she searched the living room, dining room, and kitchen. She put a copy of the search warrant on the fridge. Det. Marshall had pointed out several electronic devices to her in the kitchen: a white iPhone identified by Ms. Enright as Mr. Provencher's personal phone; a black iPhone identified by Ms. Enright as a joint business phone for her and Mr. Provencher; and a white iPad which Ms. Enright said belonged to Mr. Teixeira.
- [53] While searching the cupboard above the fridge for occupancy documents and knives, Sgt. Spekat located another iPhone. She found knives in the kitchen but did not seize any of them. None appeared to have blood on them and all appeared to be standard kitchen knives.
- [54] There was a bowl of miscellaneous items on the counter which contained identification that did not belong to anyone in the house. This struck Sgt. Spekat as odd. She seized a folding knife from the bowl as well as an old Motorola flip phone and the identification. She asked herself what was the purpose or potential use of having other people's identification.
- [55] After searching the kitchen, Sgt. Spekat went to Mr. Teixeira's bedroom. She saw a Samsung phone on the bed with a charger in close proximity (Exhibit 123). Sgt. Hodson directed her attention to a bulletproof vest. Sgt. Spekat thought it was significant, because not many people other than law enforcement have them. In her mind it was a sign that someone was wearing it for protection. In the context of the investigation it alerted her to the fact that it may have been worn during the homicide. She seized it (Exhibit 132).

- [56] Sgt. Hodson had placed an evidence marker near another cell phone, a black Aquaris X, located on top of the laundry hamper. Sgt. Spekat had never heard of that kind of cell phone; however, Cpl. Mouland told her it was a very popular phone for encryption so she seized it (Exhibit 125). She seized a Samsung S5 from a grey duffle bag in the closet (Exhibit 129). The bag also contained an Aquaris X box and a charger (Exhibit 130).
- [57] From the left pocket of a Burton hoodie in the closet, Sgt. Spekat seized a ZTE flip phone (Exhibit 131). She seized an older model Blackberry from an accordion file (Exhibit 133). She looked in the accordion file for proof of Mr. Teixeira's residence and seized it. She also seized a composition book from under the television (Exhibit 137).
- [58] Sgt. Spekat seized several bundles of cash: \$900 from a grey hoodie in the closet; \$740 from a black hoodie in the closet; and \$645 from grey pants in the closet. She seized the cash because she thought it could have been payment for something or payment potentially received in the course of the homicide or from some other transaction. The bundles of cash were in close proximity to a bulletproof vest and various telephones, in particular the encrypted phone, and the cash was not packaged as if it came from a bank. Sgt. Spekat said in her mind it was potentially related to what they were investigating.
- [59] Finally, Sgt. Spekat seized a WestJet boarding pass in Mr. Provencher's name, from Edmonton to Abbotsford on October 29, 2017. The vehicle that had been burned was associated to Alberta and she thought maybe there was a connection.
- [60] Moving on to the master bedroom, Sgt. Lee showed Sgt. Spekat the brass knuckles, crack cocaine, \$2,000 cash, pink iPhone, and identification belonging to Ms. Enright. She seized those items.
- [61] From the office, Sgt. Spekat seized the frequency jammer, because it is a prohibited device that could have potentially been used in the commission of the offence. She also seized an Alberta licence plate, a Mac computer, Avis and Bell documents from the desk, a flip phone, a Blackberry Curve, a smashed iPhone, Mr. Provencher's passport, a Rogers SIM card, a ZTE tablet, an iPad, a Louis Vuitton box with pills in it, some marihuana and a small amount of cannabis resin oil.
- [62] In the garage, from a Rubbermaid tote that appeared to contain Mr. Teixeira's belongings, Sgt. Spekat seized a ZTE flip phone and two black Samsung phones as well as a box of ammunition with three bullets in it.

Sgt. Spekat's General Assessment of the Relevance of Electronic Devices

- [63] Sgt. Spekat explained that she started noting the presence of cell phones after Det. Marshall alerted her to the two devices in the kitchen. When she went into Mr. Teixeira's room she noticed more cellphones and became concerned and interested in whether he had used any of them to communicate with people at the time of the homicide of Mr. Khabra. The murder occurred in an out of the way place, cell phones are commonly used to communicate with

the subject to "maybe" get him to that location and she thought that "maybe" one of these phones communicated with the victim or others who may have participated in the murder.

- [64] Sgt. Spekat said her thinking about cell phones shifted as she moved through Mr. Teixeira's bedroom. The bulletproof vest was a turning point for her, an indication of the risk associated to the murder and steps potentially taken. It "added to the phones" because Mr. Teixeira was a person of interest and there was an encrypted phone in his room. Most of the phones were active and there was a power cord in proximity to the phone on the bed, so that would have been a phone that "may have been used" and there "may be evidence" in the phone related to the homicide of Mr. Khabra.
- [65] Sgt. Spekat said her authority to seize items not in the search warrant came from s. 489(1) of the Code. It allowed her to seize things not listed in the warrant that may have been used in the commission of the offence, obtained by the offence or may afford evidence of the offence. She needed to form reasonable and probable grounds that the items she seized would afford evidence.
- [66] Sgt. Spekat believed that Mr. Provencher and Mr. Teixeira may have used the phones in the commission of the murder of Mr. Khabra by communicating either with the victim or with known associates or with each other at the time of the offence. Cell phones can contain location data, text messages, photos, videos, contact, recent phone calls or communication on apps. She did not consider halting the search of the residence to obtain a new warrant for the phones because they were lawfully there under a warrant and to apply for a telewarrant would cause further delay.

Sgt. Spekat's Specific Articulation of Grounds for Seizing each Electronic Device

- [67] I have described Sgt. Spekat's evidence as to her subjective grounds for seizing each item in issue in this application.

Exhibit 120 - White iPhone Identified by Ms. Enright as Belonging to Mr. Provencher

- [68] Sgt. Spekat seized this phone for further investigation as she believed that it may have been involved in the commission of the murder of Mr. Khabra. Mr. Provencher had been identified as a suspect or a person of interest and he had rented the suspect vehicle. She believed there may have been information in the phone associated to the murder of Mr. Khabra and it should be seized under s. 489.

Exhibit 121 - Black iPhone Identified by Ms. Enright as the Joint Business Phone of Mr. Provencher and Ms. Enright

[69] Sgt. Spekat seized this phone because although it was identified as a business phone, there was no proof of that beyond Ms. Enright's assertion. Sgt. Spekat believed there was a potential that the phone may have been used by Mr. Provencher, who was a suspect in the homicide of Mr. Khabra, to communicate with people and there may be evidence in that phone relating to the homicide.

Exhibit 122 - White Samsung Tablet Identified by Ms. Enright as Belonging to Mr. Teixeira

[70] Sgt. Spekat seized it because it was associated to Mr. Teixeira, who at the time was a suspect in the homicide of Mr. Khabra. She believed that a tablet is often synched to a phone and could contain contacts and other information associated to the homicide of Mr. Khabra and Mr. Teixeira's association to it, such as searches of locations, contacts, phone contacts, photos, videos, apps, map apps, and recent searches. She said it was a potential goldmine.

Exhibit 123 - Black Samsung Phone Located on the Bed in Mr. Teixeira's Bedroom

[71] Sgt. Spekat said the phone was potentially identified to Mr. Teixeira, given that it was found on his bed. She seized it because he had been identified as being involved in the homicide of Mr. Khabra and she believed there was a potential that the phone was used and contained evidence and potential evidence concerning the homicide in the form of videos, location data, contacts, communications and the like.

Exhibit 124 - Black iPad Found on the Living Room Couch

[72] Sgt. Spekat did not identify who the device belonged to but she seized it because it was associated to an occupant in the residence. Two of the three occupants had been identified as being involved or potentially involved in the homicide of Mr. Khabra and she believed there may have been information and evidence in it that they could use to further their investigation. There was the potential it was synched to a phone and possibly previous location data, communications, photos, videos, purchases, bank records, and potentially a lot of other information.

Exhibit 125 - Black Aquaris X Phone

[73] Sgt. Spekat seized this phone from Mr. Teixeira's bedroom on top of the laundry hamper. She did not know specifically whose phone it was, but it was located in a room associated to a suspect in the homicide of Mr. Khabra. She believed the phone may have evidence concerning the homicide such as phone records, search history, communications in and around the time of the offence and the location of the phone in and around the time of the offence. Sgt. Spekat said she had never heard of this kind of cellphone at the time and that Cpl. Mouland told her it was a very popular phone for encryption.

Exhibit 126 - Silver iPhone Located in a Kitchen Cupboard Above the Fridge

[74] Sgt. Spekat did not identify who the device belonged to, but the location was very significant to her. She asked herself why someone would put a phone there. There were no chargers in the cupboard and it was a weird location. She seized it because she believed it may have been used or potentially used in the homicide of Mr. Khabra by one of the occupants of the house.

Exhibit 129 - Samsung S5 from the Closet of Mr. Teixeira's Bedroom

[75] Sgt. Spekat seized this phone from the duffle bag but did not identify it to anyone in particular. She believed, based on the fact that it was in Mr. Teixeira's bedroom closet, that it may potentially have been used in the murder of Mr. Khabra, through communications, text messages, emails, phone calls, and location data. It was in an odd location, in a duffle bag in the closet, in close proximity to a bulletproof vest. It struck Sgt. Spekat as odd and very suspicious.

Exhibit 131 - ZTE Flip Phone from the Left Pocket of a Burton Hoodie in Mr. Teixeira's Bedroom Closet

[76] Sgt. Spekat did not identify who the phone belonged to, but she seized it because it was in Mr. Teixeira's bedroom and he had been identified as involved in the homicide of Mr. Khabra, the phone potentially may have been used in the homicide to communicate with others or contain location data, text messages, "cellphones" and search history. She said a flip phone is used primarily for calling and texting by numbers rather than a keyboard, which is quite difficult and was a factor in her decision to seize it.

Exhibit 133 - Blackberry from the Accordion Folder on the Floor in Mr. Teixeira's Bedroom

[77] Sgt. Spekat did not identify who the device belonged to, but she seized it because Blackberry devices are known for being encrypted and she did not know if it had recently been used. It was in Mr. Teixeira's bedroom and he had been identified as being involved in the murder of Mr. Khabra. There was the potential that the phone may have been used in the commission of that offence to communicate with others and it may have contacts, text messages, or the BlackBerry Messenger PIN. While it was an older phone, she did not know which of the phones in this room may have been used in the homicide and she did not want to leave potential evidence behind.

Exhibit 148 - Three Older Model Phones (Two Blackberry Phones and an LG Phone) from a Nike Box on the Floor of Mr. Teixeira's Bedroom

[78] Sgt. Spekat listed these three devices (an LG and two BlackBerrys) together because they were found together. She was looking for documentation and other items listed in the warrant and came across them in a Nike box. She seized them because she thought they may have been used to communicate with others and potentially had information on them related to the murder of Mr. Khabra.

Exhibit 155 - Ms. Enright's Pink iPhone from the En Suite Bathroom Counter

[79] Ms. Enright identified an iPhone in a pink case with Alberta identification as hers. Sgt. Spekat seized it because she was not sure of Ms. Enright's involvement, if any, in the murder of Mr. Khabra. She was living with Mr. Provencher and Mr. Teixeira, and her phone may have had communications and other information related to the murder of Mr. Khabra. Sgt. Spekat saw the potential for text messages with Mr. Provencher and possibly Mr. Teixeira.

Exhibit 158 - Mac Apple Computer from the Couch in the Office

[80] Cpl. Mouland found this computer in a knapsack on the office couch. Sgt. Spekat did not know who it belonged to, but thought it may have contained information such as documentation regarding residency. It could possibly have been linked up to a phone or contained information relating to the occupants of the residence. She did not think of the computer as much different from a cell phone and capable of having similar, if not the same, information as a cell phone.

Exhibit 160 - ZTE Black Cell Phone from the Office Credenza

[81] Cpl. Mouland found this device in the office. Sgt. Spekat did not know who it belonged to, but it was in the office identified as belonging to Mr. Provencher and Ms. Enright. Sgt. Spekat thought it may have contained data or information such as contacts, location, and apps that would provided further information regarding the homicide of Mr. Khabra.

Exhibit 161 - Grey BlackBerry Curve from the Office Credenza

[82] This phone was located by Cpl. Mouland in the office. Sgt. Spekat believed this cell phone may have been associated to any of the three occupants of the house, two of whom had been identified as being involved in the murder of Mr. Khabra. She hoped to obtain location data, communications, texts with other people, searches or any information that would also put that phone "into an associate involved in the homicide of Mr. Khabra."

Exhibit 162 - Smashed iPhone 6 from the Office

[83] This phone was located by Cpl. Mouland in the office. Sgt. Spekat did not know who it belonged to but believed it may have been associated with one of the three residents of the house. She did not know when the phone had been damaged and thought that it may have been involved given that there was a time lapse between the time of the offence and the search. Sgt. Spekat thought there may have been information on it such as contacts, anything saved to the hard drive of the phone, search history, photos, or videos.

Exhibit 164 - Rogers SIM Card from the Office

[84] Sgt. Spekat seized the SIM card because it can take data from an old phone into a new or different phone. Data includes contacts, dialed phone numbers, search locations, conversations, and text messages. Anything the old phone captured could be put into a new phone.

Exhibit 165 - ZTE Grand Tablet Device from the Office

[85] Sgt. Spekat seized the tablet because it could have been used by any of the three occupants of the residence. It potentially had information such as contacts, location searches, or apps containing information that would lead and potentially provide information regarding the homicide of Mr. Khabra.

Exhibit 166 - iPad from the Office Found with Exhibit 165

[86] Sgt. Spekat did not identify who the device belonged to but thought that given the location in the office, any of the three residents of the home could have owned it. She thought it may have held information associated to any one of the occupants and may have contained contacts, search history, or apps with information about the suspects and their involvement in the homicide of Mr. Khabra.

Exhibit 179 - Motorola Flip Phone from the Bowl on the Kitchen Counter

[87] Sgt. Spekat thought that since it was in an open area in the kitchen, it had potentially been used by any one of the three occupants of the home. She thought a flip phone could have been used to call or text individuals by a suspect during the homicide of Mr. Khabra.

Exhibit 182 - ZTE Flip Phone Found Inside a Rubbermaid Container in the Garage

[88] Sgt. Spekat seized this phone from a Rubbermaid tote with Mr. Teixeira's belongings in it. Sgt. Lee located this phone. Sgt. Spekat believed it may have been used in the commission of the Khabra homicide, potentially to exchange phone calls or texts with others.

Exhibit 183 - Small Black Samsung Cell Phone Found Inside the Same Rubbermaid Container as Exhibit 182

- [89] Sgt. Spekat seized this phone from the Rubbermaid container with Mr. Teixeira's belongings because it may have contained information such as phone calls, contacts, or data concerning the homicide of Mr. Khabra.

Exhibit 184 - Large Samsung Cell Phone Located with Exhibits 182 and 183

- [90] Sgt. Spekat seized this phone because it may have contained information relating to the homicide of Mr. Khabra, such as the planning of the murder with phone calls, text messages or location data. It was associated to Mr. Teixeira because it was found with his belongings.

Cross-Examination of Sgt. Spekat

- [91] On cross-examination, Sgt. Spekat acknowledged that investigators were aware of communications between the 6005 number and Mr. Khabra's cell phone prior to his death, but on November 3 she had no other information that any other numbers were used to arrange or assist with the killing. As she entered the Langley residence, Sgt. Spekat had in mind that the phone used to lure Mr. Khabra to his death could potentially be found in the house. Its whereabouts were unknown.
- [92] Sgt. Spekat did not disagree that the grounds she provided for seizure of the 23 electronic devices were fairly generic, along the lines of "I found this, it was in the house of the suspect, it was either owned by him or associated to him and could have had information in support of the offences." The sergeant acknowledged that she used the phrase "may potentially have relevant information" in relation to all 23 electronic devices. She agreed that the phrase "the phones may potentially have information" reflected a suspicion on her part.
- [93] Sgt. Spekat was aware that cell phones require SIM cards to operate and that there was no evidence that the SIM card associated with the 6005 number was in the Langley residence, though she was alive to the possibility. She had no information about what type of phone the 6005 number was associated to, whether iPhone or Android. She could not tell by looking at a SIM card whether it was attached to a particular phone, but believed or suspected it may have been associated to a phone that was potentially involved in the planning and communications leading up to the homicide of Mr. Khabra.
- [94] Sgt. Spekat agreed with defence counsel's assertion that there was a very clear investigative focus on cell phones and cell phone numbers and that this was not unique to this particular investigation. She agreed that electronic devices generally, including computers and iPads, were quite important.
- [95] Sgt. Spekat agreed there was only a possibility or suspicion that the 23 electronic devices had information on them relating to the offence. However, she did not agree with the defence assertion that there was no evidence that any data on the phones would assist in the investigation. She said that when she saw the bulletproof vest in Mr. Teixeira's closet, it drove home to her that phones in and around that vest, especially the one in the duffle bag, were connected to the homicide. She was alive to that possibility while searching for and

seizing cell phones.

[96] Sgt. Spekat pushed back when defence counsel again suggested, later in cross-examination, that she only had a suspicion that the items other than the phone in the duffle bag might provide evidence:

Q It was -- you certainly had the suspicion that these other 22 items may provide evidence in support of the Khabra investigation, correct?

A I would say in most -- a lot of the cases, it was more than a suspicion. In particular, the phones that were -- had been turned on, and the phones that were in Mr. Teixeira's bedroom.

Q One of them is the Aquaris that you were talking about.

A Yes.

Q So you talked about the Aquaris being close to a cable, correct?

A Correct.

Q And I think that's the one that you tried to turn off and you couldn't. Am I -- do I get that correctly?

A No, the Aquaris was the one -- exhibit number 125. That was on top of the laundry hamper.

Q Right.

A But the Samsung S5 that was taken from the duffel back that I struggled to turn off.

Q Okay.

A There was a cord beside that as well as the one that was on the bed, showing recent use.

[97] The balance of cross-examination was focussed on the papers and journals found in Mr. Teixeira's bedroom. Sgt. Spekat found Exhibit 135, the composition book, but does not recall examining it at the scene. She was trying not to scoop up everything as there were a lot of documents. She believes she "would have" glanced at it and then taken it away for further examination. She recalled numbers in it and thought it contained information relevant to the offence.

[98] After refreshing her memory from the post-search briefing notes, she said there were two journals and a composition book. Sgt. Spekat believed they were from Surrey Pre-trial and there was writing consistent with a score sheet in them. She said the journal was not the same as the composition book, but did not provide much clarity on why they were different. Again, Sgt. Spekat believes she "would have" looked at the journal at the scene but cannot recall specifically what she saw. She clarified that the black coil binders are the ones that had what appeared to have drugs scoresheets in them. The black plastic accordion folder held various identification and documentation. She closed it up so she could further examine it.

The Positions of Counsel

[99] Both parties correctly acknowledge that a warrantless seizure is presumptively unreasonable and a breach of s. 8 of the Charter. The burden is on the Crown to demonstrate that the seizure is authorized by law and both the law and manner of seizure are reasonable.

[100] In this application, the seizures in issue were made pursuant to s. 489 of the Code. The Crown must show that the police had the subjective reasonable grounds to seize the items and those grounds were in fact objectively reasonable.

The Position of Crown

[101] The Crown conceded that Sgt. Spekat's "manner of expressing herself was less than rigorous" and that her use of the words "possibility", "suspicion", and "potential" should be considered an "unsophisticated way to express the lawyerly test of 'credibly-based probability'". However, the Crown argues that Sgt. Spekat's evidence did demonstrate her subjective reasonable grounds.

[102] In particular, the Crown says that Sgt. Spekat demonstrated that she possessed the requisite subjective belief for three items:

- a) Exhibit 123 - black Samsung phone from Mr. Teixeira's bed;
- b) Exhibit 125 - black Aquaris X phone; and
- c) Exhibit 126 - silver iPhone in kitchen cupboard above the fridge.

[103] The Crown says there are grounds to meet the objective reasonable grounds standard including:

- a) The use of a phone to lure Mr. Khabra to the scene of the murder;
- b) The planned nature of the murder;
- c) The likelihood of the occupants possessing cell phones;
- d) The ability of personal digital devices to record a myriad of activities of their users;
- e) The fact that Mr. Teixeira and Mr. Provencher were both suspects in the murder and the only three people who lived in the house were Mr. Teixeira, Mr. Provencher, and Ms. Enright; and
- f) Devices found in Mr. Teixeira's room almost certainly belonged to him.

The Position of the Defence

[104] The defence position is that Sgt. Spekat's evidence concerning why she seized the electronic devices did not rise above a suspicion and is insufficient to satisfy the subjective component of the reasonable grounds test under s. 489.

- [105] Counsel notes that Sgt. Spekat's testimony with respect to the seizure of the 23 electronic devices was peppered with phrases such as they "may", "might", "may potentially", or "might potentially" have been used in the commission of the offence or contain evidence relevant to the investigation. The grounds upon which Sgt. Spekat based her seizure of the electronic devices were generic.
- [106] The defence maintains that there was an unlawful and inappropriate "blanket seizure" of the electronic devices in the Langley residence and advances other arguments concerning the search. I will deal with these arguments later in these reasons when I discuss some of the relevant authorities.

The Law

- [107] Warrantless searches are prima facie unreasonable and a breach of s. 8 of the Charter. The party seeking to justify a warrantless search has the onus of rebutting this presumption: *Hunter et al. v. Southam Inc.*, [1984] 2 S.C. R. 145. The same onus applies where the police seize items that are outside of the search warrant: *R. v. Mandziak*, 2014 BCCA 41.
- [108] The Crown acknowledges that the seizure of items from the Langley residence outside the scope of the search warrant is presumptively unreasonable and a breach of s. 8 of the Charter. The onus is on the Crown to establish that Sgt. Spekat had lawful authority to seize items not listed in the search warrant.
- [109] The lawful authority relied on is in Section 489 of the Code, which provides:

Seizure of things not specified

489 (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

- (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
- (b) has been used in the commission of an offence against this or any other Act of Parliament;
or
- (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Seizure without warrant

- (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

- (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
- (b) has been used in the commission of an offence against this or any other Act of Parliament; or
- (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[110] Mr. Justice Smart's decision in *R. v. Sipes*, 2011 BCSC 1763, is the leading authority in this jurisdiction concerning seizure under s. 489 of the Code. The following principles emerge:

- a) Section 489(1) of the Code authorizes the police to seize things they find during a lawful search, without delaying to apply for another warrant: para. 203.
- b) Police have authority under 489(1) to seize evidence not authorized by the warrant provided they have the required reasonable grounds to do so. This shifts the onus of demonstrating the required grounds to after the search rather than before: para. 204.
- c) Section 489(1) does not require the police to obtain a second warrant when they "discover" things not authorized by the warrant, but the discovery must be made in the course of searching for the things that are authorized by the warrant: para. 204.
- d) A search does not become "unreasonable" because the police also anticipated or expected to find evidence of other offences not identified in the warrant: para. 208.
- e) Section 489 is not confined to "inadvertent" discovery of other evidence (as is required by the common law plain view doctrine). The police may seize things not authorized by the warrant when they are found during a search for the things that are authorized. This is so even though the police considered before the search that additional things may be found: para. 209.
- f) However, police cannot use s. 489 as a "Trojan Horse" to enter a place to search for things not disclosed in the ITO. The primary purpose of the warrant must be to search for things that are authorized by the warrant, not to search for things that are not: para. 210.

[111] Points (c), (d), and (e) dispense with most of the defence assertions that do not turn on what Sgt. Spekat said about her grounds to seize under s. 489. To be clear, I am satisfied that the police found the cell phones in the course of searching for items listed in the warrant. I am cognizant that one or more of the witnesses referred to "searching" for cell phones. I am satisfied this was loose language rather than an admission that they were searching for things not listed in the warrant, because the searchers and Sgt. Spekat reviewed the warrant and noted the list of items to be searched for. Many of the phones were out in the open. The rest were in places where the searchers could reasonably be expected to find things listed in the warrant. As I remarked on earlier in my review of the evidence, the presence of Faraday bags to prevent remote erasure of the contents of electronic devices does not support the contention that the police were searching for cell phones even though they were not listed in the search warrant.

[112] In *Sipes*, Mr. Justice Smart concluded:

[212] If the police do not have reasonable grounds to believe that things will be found that will afford evidence of the offences listed in the warrant, the police will not be granted a warrant to search for those things. If they find such things and seize them pursuant to s. 489 of the Code, they will have to demonstrate at trial that they had reasonable grounds for doing so if the Crown seeks to introduce them into evidence. Whether the police had the required grounds can be challenged by cross-examination and the introduction of other evidence. The result is that while the police need not demonstrate the requisite grounds before seizure, they maybe required to after seizure; and when they are, those grounds can be thoroughly challenged by the accused.

[113] The standard of reasonable grounds, also referred to as reasonable and probable grounds, has both a subjective and objective element. The officer must have subjectively believed that they had reasonable grounds to seize the items and those grounds must in fact have been reasonable.

[114] Reasonable grounds must be distinguished from the lower threshold of reasonable suspicion. Reasonable grounds are established at "the point where credibly-based probability replaces suspicion": *Hunter* at 167. While reasonable grounds and reasonable suspicion are similar in that they must both be grounded in the objective facts, reasonable suspicion is a lower standard as it engages the reasonable possibility rather than probability, of crime: *R. v. Chehil*, 2013 SCC 49 at para. 27. The language of s. 489 is clear that there must be reasonable grounds for a seizure and not merely reasonable suspicion.

[115] In *R. v. Latimer*, 2020 BCSC 2173, Justice Ker summarized the reasonable grounds standard:

[30] Insofar as the reasonable grounds standard is concerned, it is well-known and not as high as the civil standard of proof on a balance of probabilities: *Whitaker* at para. 39. Rather, the standard is one of reasonable belief, a standard lower than the balance of probabilities: *R. v. Glendinning*, 2019 BCCA 365 at para. 7.

[31] As Mr. Justice Frankel noted in *R. v. Vu*, 2011 BCCA 536 at para. 39 [*Vu* (BCCA)], rev'd on other grounds 2013 SCC 60, reasonable grounds "is the point at which credibly-based probability replaces suspicion". Deciding whether the standard has been satisfied therefore requires a "practical, non-technical, and common-sense assessment of the totality of the circumstances": *Vu* (BCCA) at para. 39.

[emphasis added.]

Section 489 of the Code: Subjective and Objective Reasonable Grounds

[116] Some of the important factors in determining whether an officer has the requisite subjective reasonable grounds to seize items pursuant to s. 489 include:

- the words used by the officer in their evidence;

- the officer's experience and understanding of the power they are seizing the items under, and their understanding of the search more generally;
- the individual assessment of each item, i.e. no blanket seizures;
- the amount, nature, state, and location of the item(s); and
- the credibility and reliability of the officer.

See: R. v. Robertson, 2016 BCSC 2474 at paras. 76, 91, 92 and 96; R. v. Thomas, 2013 ONSC 8032 at paras. 63, 65 and 66; and R. v. Cook, [2008] O.J. No. 4765 at paras. 46 and 47.

[117] R. v. Gill, 2020 BCSC 2030, provides a useful comparator to the circumstances before me. Police executed a search warrant which included a term for the seizure of the suspect's cell phone. There were seven residents in the home, only one of whom was a suspect in the investigation. The police seized all of the phones located in the house during the search.

[118] Justice Masuhara considered whether the seizing officer had the necessary subjective belief that she had reasonable grounds to seize all nine cell phones in the home. The search occurred over the course of two days and no effort was made to identify who owned which phone.

[119] Most significantly, Masuhara J. found that the officer's evidence suggested that she failed to consider each phone separately and that she believed "merely in the possibility that each phone might provide evidence", which fell below the credibly-based probability standard (para. 48).

[120] The seizure of the cellphones was also made without objectively reasonable grounds. It was unclear to those conducting the search which family members used particular rooms, yet phones were indiscriminately seized from all areas of the house. Masuhara J. held that there could not have been objectively reasonable grounds to expect that each of the phones of uncertain ownership would afford evidence in respect of the offence (para. 50).

[121] Compendiously, the jurisprudence illustrates that there must be an evidentiary basis to justify the use of the seizure power under s. 489: R. v. Fedan, 2016 BCCA 26 at para. 72.

Sgt. Spekat's Credibility and Reliability

[122] Sgt. Spekat was a forthright and candid witness. She was not unnecessarily defensive about any of the actions she took and she did not try to backfill her reasons for seizure with things she learned after the search of the Langley residence. She obviously came to court to tell the truth and was a credible witness.

[123] Sgt. Spekat was not prone to overstatements in her evidence. To the contrary, her explanation of why she seized things came across as tentative. She articulated the standard in s. 489, although that is not a magic incantation that will justify the seizure of all things not listed in a warrant. More is required.

- [124] What was most difficult in assessing the reasonableness of the subjective grounds in this application was Sgt. Spekat's use of the words "maybe", "potentially" and "possibly" when describing why she believed she had grounds to seize the electronic devices. This lack of certainty crystallized on cross-examination, when she agreed with the defence assertion that there was only a possibility or a suspicion that the 23 electronic devices had information in them relating to the offence. She then qualified her answer and said in a lot of the cases it was "more than a suspicion". I reproduced the verbatim portion of her evidence at that point in cross-examination.
- [125] In their submissions, Crown counsel characterized some of the cross-examination as unfair, but there is nothing unfair about defence counsel testing whether a police witness had the requisite subjective reasonable grounds to seize evidence. In this case, the cross-examination largely eroded an already tenuous basis for the seizure of most of the electronic devices.
- [126] Despite being the crime scene manager, Sgt. Spekat did not appear to have the file knowledge that others, such as Cpl. Mouland, believed she had. I do not fault her for that. She described her position as somewhat isolated at times, although she tried to catch up on briefings she missed by asking the file coordinator for updates.
- [127] It is puzzling that the searchers did not appear to share their thoughts and observations with Sgt. Spekat concerning some of their finds. It may well be that they did and Sgt. Spekat did not note everything she was told, or it may be that they kept their thoughts to themselves because they were not responsible for making the decision to seize. The exception to this was Cpl. Mouland, who shared his knowledge of the Aquaris X phone and the frequency jammer with her.

Did Sgt. Spekat have Subjective Reasonable Grounds to Seize the Subject Items?

- [128] I conclude that the only electronic devices for which Sgt. Spekat articulated and held subjective reasonable grounds to seize under s. 489 are the Samsung S5 from the duffle bag, the Samsung on the bed, and the Aquaris X located on the laundry hamper, all from Mr. Teixeira's bedroom.
- [129] On direct examination Sgt. Spekat explained that the circumstances in which the Samsung S5 was located, in a duffle bag in close proximity to a bulletproof vest, near bundles of cash, was a turning point for her. Mr. Teixeira was a person of interest and there was an encrypted phone in his room. She resisted the defence suggestion on cross-examination that she only had a suspicion about the 23 electronic devices, specifically singling out the Samsung S5, the encrypted Aquaris X phone, and the Samsung phone on the bed as the ones that were the subject of "more than suspicion."
- [130] Taking a practical, non-technical and common-sense assessment of the totality of the circumstances, Sgt. Spekat's articulation of "more than suspicion" equates to subjective reasonable and probable grounds to seize the three devices that she specifically singled out.

[131] Sgt. Spekat also identified the devices that had been turned on were of interest to her; however, her evidence in this regard was not clear or specific enough to anchor subjective reasonable and probable grounds.

[132] As for the documents and journals that Sgt. Spekat seized from Mr. Teixeira's bedroom, I conclude from that while she was trying to avoid scooping up all the papers in his room, she only glanced at things and apart from assessing some of them as identification (which might prove residency and fall within the warrant) and others as drug score sheets, she seized them to search through later. This is not a permissible use of the seizure power in s. 489.

Were There Objective Reasonable Grounds to Seize the Three Phones from Mr. Teixeira's Bedroom?

[133] I find there were objective reasonable grounds for the seizure of these three phones. Someone used a phone (the 6005 number) to lure Mr. Khabra to his death. It appeared to be a planned killing. While the 6005 number did not "ping" as present in the house, there was an encrypted phone in Mr. Teixeira's bedroom and he was a suspect in the murder of Mr. Khabra.

[134] The Samsung S5 from the closet was found in close proximity to a bulletproof vest and quantities of cash. Those are objectively reasonable hallmarks of organized crime. The Samsung on the bed had more than a tenuous connection to Mr. Teixeira and, being out in the open and near a charging cord, appeared to be in current use. It was likely the phone that the officers in charge of detaining and searching Mr. Teixeira outside the residence expected to find on his person.

Conclusion

[135] Exhibits 123, 125, and 129 were lawfully seized under s. 489. On the basis of the evidence and submissions on the application, the balance of the items seized and accounted for in a Form 5.2 were not lawfully seized, except those which were unlawful to possess. This includes the frequency jammer and the substances that were suspected to be illegal drugs.

[136] The bullet proof vest may also fall into the category of unlawfully possessed items, although there was no specific evidence in this regard. In any event, in my ruling on discreditable conduct (Application 27) I determined the prejudicial effect of permitting the Crown to introduce this evidence at trial outweighed its probative value.

"Duncan J."

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