SUPREME COURT OF YUKON

Citation: *R v Silverfox*, 2022 YKSC 12

Date: 20220304
S.C. No. 20-01513
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

CHARABELLE SILVERFOX and LYNZEE SILVERFOX

APPLICANTS

No information, evidence, submission or part of the Judge's decision with respect to this application that is before the Court, that are in relation to the factual allegations against Charabelle Silverfox and Lynzee Silverfox, shall be published in any document or broadcast or transmitted in any way before such time as the evidentiary part of the trial of the two accused starts. <u>This publication ban has lapsed.</u>

Publication of evidence taken at the preliminary inquiry is prohibited by court order pursuant to s. 539(1) of the *Criminal Code*. <u>This publication ban is no longer in effect.</u>

Corrected Decision: The text of the decision was corrected at para. 71 and a heading was added before para. 97 where changes were made on March 23, 2022

Before Chief Justice S.M. Duncan

Counsel for the Respondent	Leo Lane and William McDiarmid
Counsel for the Applicant, Charabelle Silverfox	Jennifer Cunningham
Counsel for the Applicant, Lynzee Silverfox	Jennifer Budgell

REASONS FOR DECISION
(*Garofoli* Application)

Introduction

[1] This is an application by the two accused persons (the "applicants") for an order under s. 24(2) of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*") to exclude evidence of seized telephone calls obtained pursuant to three production orders, on the basis of a breach of s. 8 of the *Charter*.

[2] The applicants are jointly charged with first-degree murder, forcible confinement, and indignity to human remains in relation to the death of Derek Edwards in Pelly Crossing on December 13, 2017. The applicants are sisters.

[3] The applicants say the test of reasonable and probable grounds that their phone calls from the Whitehorse Correctional Centre ("WCC") will provide evidence of the offences was not met, so that the authorizations for their search and seizure was inconsistent with s. 8 of the *Charter*. The evidence in the three Informations to Obtain ("ITO") did not give rise to a credibly-based probability that the calls would provide evidence sufficient to override the expectation of privacy to which the applicants were entitled.

[4] The Crown says the evidence in the ITOs met the test of reasonable and probable grounds that the calls will provide evidence respecting the commission of the offence.

Background

[5] The RCMP obtained three production orders related to telephone calls of the applicants and data recorded over three different time periods and stored at WCC:

a. #1 – December 14, 2017 to February 8, 2018;

b. #2 – April 16, 2019 to April 25, 2019; and

c. #3 – January 8, 2020 to February 8, 2020.

ITO #1 and #3 are for calls and data for both applicants, while #2 is for calls and data for Lynzee Silverfox ("Lynzee") only.

[6] The ITOs set out details of the investigation beginning on the morning of December 13, 2017. It is not necessary to summarize those details here, but it is recognized they form part of the totality of the circumstances.

[7] The applicants were arrested on charges not related to the homicide on December 13, 2017, and remanded to the custody of WCC. Lynzee was released from custody on February 7, 2018, and Charabelle Silverfox ("Charabelle") was released from custody on February 8, 2018.

[8] While they were in custody during this period, both applicants had conversations with other incarcerated individuals, who gave statements to the police about those conversations.

[9] Lynzee was arrested and charged on March 8, 2018, in relation to an unrelated incident that occurred on February 26, 2018. She has been incarcerated since then and has been ordered not to communicate with Vance Cardinal, among other people. Vance Cardinal and Lynzee were in a relationship at the time of her arrest on December 13, 2017.

[10] The applicants were both arrested on May 16, 2019, and charged with the offences set out above related to the death of Derek Edwards. Charabelle remained out of custody between February 8, 2018 and May 16, 2019.

[11] Both applicants remain in custody.

[12] The affiant relies on two grounds for ITO #1. The first is his belief based on his experience that people charged with a serious offence or with knowledge of a serious offence will sometimes talk to trusted associates on the phone from prison and sometimes make comments pertinent to the investigation. He describes his experience as 14 years as a police officer with eight of those years in the major crimes unit where he investigated more than 60 homicides or suspicious deaths.

[13] The second ground is the reasonable inference to be drawn from the applicants' conversations or messaging with others. First, two inmates at WCC, [redacted] and [redacted], reported conversations during which the applicants referred to the offence. These conversations provided evidence that the applicants were likely to speak on the phone from jail to others about the offence. The ITO also references a police interview with a niece of the victim, [redacted]. She said she received a Facebook message from Charabelle after her release saying she hoped [redacted] was not mad at her, and "sorry about your uncle and all that, didn't mean to do it, stuff like that." The message was deleted. Finally, the affiant refers to an interview by police of [redacted], a friend of Lynzee's. She heard from [redacted] at a party that Lynzee had told her while they were both incarcerated she had killed two people and had no emotions about it; Derek Edwards was one of the people she killed for crack cocaine; and she and Charabelle each stabbed Derek Edwards in the back.

[14] In ITO #3, related to ITO #1 and sought two years after ITO #1, the affiant relies on the calls obtained through the first two production orders, the same evidence about the investigation relied on for the issuance of ITO #1, and a statement made by Lynzee

to a programs officer, also a corrections officer, at WCC. In that statement, Lynzee indicated there were strained relations between her and her sister and stated her intention to testify against her at trial. The affiant draws an inference from this information that the applicants would talk about the offence to others on the phone from jail.

[15] In ITO #2, the affiant sought production of Lynzee's telephone calls during a 9-day period in April 2019 to learn more about the lifestyle of Vance Cardinal. The affiant's belief they would talk on the phone about Vance Cardinal's residence and daily activities, his interactions with the police, and the offence was based on three things: the same information about the investigation set out in ITO #1; the 20 phone calls between Lynzee and Vance Cardinal in January 2018; and a sighting of someone appearing to be Vance Cardinal waving one night across the road from WCC towards Lynzee's cell window.

[16] At the hearing, defence counsel sought leave to cross-examine the affiant for all three ITOs, Corporal Donison, in 10 areas. The Crown consented to seven of these areas and after argument I granted leave in seven areas.

[17] Crown and defence counsel submitted at the hearing agreed statements of fact related to the statement of [redacted] and the statement of Lynzee to the programs officer at WCC. [Redacted]'s statement and criminal record and [redacted]'s criminal record were also included on consent. This material and the cross-examination constituted the amplification of the record.

Law

[18] The basis for obtaining the production orders in this case is set out in s. 487.014 of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Criminal Code*"):

> 487.014 (1) Subject to sections 487.015 to 487.018, on *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.
>
> Conditions for making order
>
> (2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that
>
> (a) an offence has been or will be committed under this or any other Act of Parliament; and
>
> (b) **the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence**.[emphasis added]

[19] For a judge to issue a production order, they must be satisfied from the affiant in the ITO there are reasonable grounds to believe:

a. the records sought exist;

b. an offence has been committed; and

c. the records sought will afford evidence respecting the commission of the offence.

[20] Here the applicants concede a) and b). The only issue to be determined for all three production orders is whether the records sought will afford evidence of the offence.

[21] Generally, a production order is issued on reasonable and probable grounds. This standard requires "credibly-based probability" (*R v Morris*, 1998 NSCA 229, and *R v Debot*, [1989] 2 SCR 1140 at para. 47). The standard was explained in *R v Floyd*, 2012 ONCJ 417 at para. 9:

> In sum, the "reasonable and probable grounds" or "credibly-based probability" concept requires that the grounds furnished must demonstrate that there is a probability as opposed to a suspicion that the relevant facts could be true, assuming the information to be true (the "sufficiency inquiry"), and that there are reasonable grounds to believe that the information relied upon is credible enough to support a conclusion that there is a reasonable probability that the relevant fact exists (the "credibility inquiry").

[22] This inquiry contains both subjective and objective elements. The affiant must personally believe in the existence of reasonable and probable grounds and the belief must be objectively reasonable (*R v Storrey*, [1990] 1 SCR 241 at 250). The role of the issuing judge is to read the ITO as a whole and be satisfied not only by the assertion of a belief but also by the disclosure of facts sufficient to substantiate that belief (*Restaurant Le Clémenceau Inc v Drouin*, [1987] 1 SCR 706).

[23] A production order is presumptively valid. The onus is on the applicant to persuade the reviewing judge on a balance of probabilities that it should not have issued.

[24] The reviewing judge is not entitled to substitute their view about the issuance of the order. "[T]he test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R v Araujo*, 2000 SCC 65 ("*Araujo*") at para. 54). Put another way, the reviewing judge is to consider whether the ITO, as amplified or excised on review, could support the issuance of a

production order, not whether the reviewing judge would have granted it. That assessment must be done by deciding on a "practical, non-technical and common sense basis" whether the totality of the circumstances could support the issuance of an order (see *R v Le*, 2014 BCCA 166 ("*Le*") at para. 35, quoting from *R v Scott*, 2012 BCCA 99 at para. 42). The review is not meant to parse the ITO and look for minor omissions or misstatements. Using a common sense approach, "[t]he question is ultimately whether the core substance of the ITO could support the issuance of the warrant" (see *R v Otto*, 2019 ONSC 2514 ("*Otto*") at para. 23 and cases cited therein).

[25] The reviewing court does not always base its review only on the ITO provided to the issuing judge. It must exclude erroneous information included in the original ITO (*Araujo* at para. 54). It may also have additional evidence through the *voir dire* to address errors in the ITO or through agreement. Courts have cautioned that the use of amplification evidence such as this be restricted to correct "some minor, technical error in the drafting of their affidavit material" (*Araujo* at para. 59). It is not meant to provide a way to authorize a search retroactively by introducing additional information.

[26] The legal obligation on anyone seeking an *ex parte* authorization is to make full and frank disclosure of material facts (*Araujo* at para. 46). As stated by the Supreme Court of Canada in *R v Morelli*, 2010 SCC 8 ("*Morelli*") at para. 58:

> … When seeking an *ex parte* authorization such as a search warrant, a police officer -- indeed, any informant -- must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present *all material facts, favourable or not*. Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn

> or a conclusion that would not be reached if the omitted facts were disclosed. [emphasis in original]

[27] An ITO can be facially or sub-facially invalid. Facial validity is determined by examining the ITO as a whole, without any additional material. Sub-facial validity is determined by considering the ITO along with additional material that amplifies the record.

[28] Section 8 of the *Charter* provides: “Everyone has the right to be secure against unreasonable search or seizure.”

[29] If the searches and seizures in this case are found to be unreasonable within the meaning of s. 8 of the *Charter*, the next consideration is whether the admission of evidence obtained would bring the administration of justice into disrepute and should be excluded under s. 24(2) of the *Charter*. The test for exclusion of evidence under s. 24(2) is a three-part test requiring consideration of the following factors: a) seriousness of the police conduct; b) interest of the accused; c) importance of adjudication on the merits.

Issue – ITO #1 – December 14, 2017-February 8, 2018

[30] Is the evidence for the grounds in ITO #1, namely the experience of the police officer and the conversations with the two other inmates as well as the social media message, viewed within the totality of the investigation to that date and the amplified record, sufficient for a credibly-based probability that the applicants spoke on the phone from WCC to unknown people about the offence?

Analysis – ITO #1

[31] On a review of the ITO material and the amplified record, and applying the relevant legal principles, I conclude that there was reliable evidence from which an

issuing judge could properly conclude there were reasonable grounds to believe the applicants were talking on the phone from WCC about the offence.

[32] While there exist weaknesses in the ITO, aptly noted by the thorough submissions of defence counsel, I am not persuaded on a balance of probabilities that the ITO contained insufficient reliable evidence to permit a justice to issue the production order.

[33] The ITO must be looked at as a whole and considered in the totality of the circumstances. A common sense, practical approach is indicated. The ITO is not to be picked apart or criticized for each misstatement or omission. This must be balanced against the requirement of the affiant to be full and frank in their disclosure.

[34] The applicants argue that ITO #1 is both facially and sub-facially invalid.

Facial invalidity

[35] The applicants state that the affiant's experience as set out lacked the necessary factual base. He did not include any specific information about his experience with inmates' phone calls from jail providing evidence of an offence, such as the number of his investigations in which this occurred.

[36] The applicants argue the affiant's statements that "sometimes" incarcerated people talk to "trusted associates" and "sometimes" make comments pertinent to the offence is insufficient to meet the credibly-based probability standard. The applicants liken this choice of words to the impermissible stereotypical or generalized assumptions found in the warrant cases where the affiant refers to proclivities or propensities of child pornographers or drug dealers. The failure in this case of the affiant to identify the

"trusted associates" with whom calls occurred contributed to the generalized assumption and the consequent weakness of the ITO.

[37] The applicants further argue the second ground relied on of the conversations with [redacted] and [redacted] lacked the requisite credibility and reliability. The issuing judge was not provided with the informants' criminal records, any occurrences in which they mislead police, or any other indicia of dishonesty.

[38] There was nothing in the ITO from the informants saying the applicants were talking to people on the phone from WCC about the offence. The applicants state that the information highlighted by the affiant in the conclusion section of the ITO was intentionally misleading. His emphasis on [redacted]'s statement that Lynzee was "telling a bunch of people on the outside" about the offence gave the impression she was in WCC and talking to others by phone. However, [redacted] was in fact referring to a time during Lynzee's release from WCC, evident from her full statement. The applicants argue there is a qualitative difference between speaking with incarcerated persons while in custody and speaking with persons not in custody in recorded telephone calls from jail. A reasonable inference cannot be drawn that information about an offence disclosed to a fellow inmate in prison will also be disclosed to others during recorded phone calls from prison.

[39] The applicants say the evidence of [redacted] is unreliable and not credible because it is triple hearsay and not consistent with the information obtained to that date in the investigation – for example, cocaine was not a motivation for the killing and the autopsy showed that Derek Edwards was not stabbed in the back.

[40] The applicants argue that the standard applied in this case was reasonable suspicion and not credibly-based probability.

[41] Before addressing the applicants' arguments, the first point here is to recognize the applicants have a reasonable expectation of privacy in prison. Although expectations of privacy are substantially diminished, as imprisonment necessarily involves surveillance, searching and scrutiny, they are not extinguished. In the context of telephone calls, as described by the affiant, inmates at WCC must read and sign an agreement. It provides that privileged conversations are not monitored or recorded and are made on privileged phones, but all other calls made or received from standard phones are recorded and may be monitored. All standard phone calls are prompted with this message.

[42] Recording of phone conversations from jail (except privileged ones) is generally considered acceptable but judicial authorization is required to provide any recordings to police, thus engaging s. 8. The essence of the inquiry in this case is whether the degree of privacy intrusion by police listening to and disclosing phone calls of the applicants is justified by the basis on which the judicial authorization is granted (*R v Siniscalchi*, 2010 BCCA 354 ("*Siniscalchi*") at paras. 68-72).

Experience of officer

[43] It is clear from the ITO that the affiant is basing his grounds for belief on both his experience in homicide investigations and the information from the other witnesses.

[44] The affiant's reliance on these two aspects is a distinguishing factor from *Morelli*. In that case, a warrant was successfully challenged because of improper generalizations in the ITO by police about propensities of child pornographers. There

was no evidence from the police of any of their experience with child pornography. Only their names, positions, and places of work were included. They made generalizations about those “types of offenders” being habitual and continuing their computer practices with child pornography. They also made generalized assumptions in saying that these “types of offenders” treasure their pornography collections and like to store and create backups. The court in *Morelli* found that not only did the officers fail to provide any factual basis from their experience for these statements, but they provided no other factual support.

[45] Here, it was not necessary for the affiant to state the number of investigations he was involved in where phone calls from inmates revealed information about offences. At that time he had been a police officer for 14 years, eight of those in the major crimes investigation unit, involving him in over 60 homicide or suspicious death investigations. This is a sufficient factual basis to establish his participation in a large number of investigations of serious offenders, many of which would likely occur while the alleged offender was in custody. An offender’s ability to obtain judicial interim release after being charged with a homicide offence is more difficult because of the *Criminal Code* requirements. An issuing judge could draw a reasonable inference that homicide investigations would include monitoring phone calls from prison.

Generalized Assumptions

[46] In *R v Aboukhamis*, 2015 ONSC 2860 at paras. 35-40, the court found the warrant to search the suspect’s residence was a violation of s. 8 because it was based on generalized assumptions about the propensity of those engaged in drug trafficking and not on any case-specific evidence. The affiant wrote that in his experience

investigating drug related offences, drug dealers keep their drugs with them in their vehicles or their residences (para. 35). In addition, the ITO contained compelling information from a confidential informant that the defendant sold cocaine, but provided no information, not even an approximate location of where the defendant lived, to link the alleged activities to the residence. The generalized statement about the propensity of those engaged in drug trafficking without case-specific evidentiary support was found to be of little value (*Aboukhamis* at para. 36). “Suspecting someone of trafficking a Schedule I drug does not automatically justify the issuance of a search warrant with respect to their home: *R. v. Rocha*, [2012 ONCA 707] at para. 26” (*Aboukhamis* at para. 38).

[47] The court in *Otto* stated that while police officers are permitted to base their beliefs on experience, caution must be exercised so to not confuse “experience” with reliance on generalized or stereotypical assumptions about how certain types of people are expected to act (para. 92).

[48] The case at bar can be contrasted with the decisions in which the courts criticize the affiant police officers for generalizing about a certain type of offender such as a drug trafficker or a child pornographer. The affiant in this case does not describe a type or class of offender. Instead, he refers to people with intimate knowledge of an offence or charged with a serious offence. This is a broad description and the statement that sometimes people charged with a serious offence will sometimes talk on the phone from jail to trusted associates cannot be considered to be a generalization or stereotype about a certain type of offender.

[49] Instead, the affiant is describing from his experience in 60 homicide or suspicious death investigations that offenders who talk in one high-risk environment about the offence may talk in other high-risk environments about the offence. This is an observation based on the affiant's extensive experience combined with the factual basis of the conversations he described in this case.

[50] Here, there is little qualitative difference between talking about the offence to other inmates in jail, who may be acquaintances, or in a Facebook message, and talking about the offence to family or friends in phone calls from jail. In all cases there are risks that the content of the conversation may be turned over to police. If people are willing to talk carelessly about the offence, then it is reasonable to believe they could do so in different locations or mediums. It is the act of talking about the offence in any setting with risks that creates a reasonable inference providing a basis on which a judge could issue a production order for the phone calls from jail.

[51] This is not analogous to the generalized assumption with no factual support made by the affiant in *Aboukhamis* that because a person sells illegal drugs out of his vehicle he will be selling or keeping illegal drugs in his residence. Selling illegal drugs is an offence and generally involves some assessment of risks. By contrast, talking about an offence is not an offence and is different from a plan to carry out criminal activity. Reliable evidence that an offender is talking indiscriminately to fellow inmates about the offence creates a credibly-based probability that she will talk about it on the phone from jail.

Credibility and reliability of [*redacted*] *and* [*redacted*]

[52] Unlike the police officers in *Morelli*, the affiant in this case relies not only on his experience but also statements provided by other offenders for factual support.

[53] The statement from [redacted] contained details about the circumstances of the offence that she could not have known unless she learned from one of the applicants. These details included: Charabelle's sister called the police on December 13, 2017; Charabelle and Lynzee left the house and went to Daniel Luke's house where they passed out; Charabelle did not "stab up" Derek Edwards' face. All of these details were part of the investigation and set out in ITO #1.

[54] Likewise, [redacted]'s statement has some objective verifiability. She reported that Lynzee said "[w]e didn't just stab him" or "[w]e didn't just do that to him." The police officer taking the statement also warned [redacted] about telling the truth and received her acknowledgement that what she was saying was true, although this was done at the end of the statement.

[55] I acknowledge that often ITO affiants who rely on confidential informants include details to support their credibility and reliability, such as previous verified informer tips and the absence of any crimes of dishonesty. The affiant in this case provided no such information. Further, the affiant included no information in the ITO about the relationship between these inmates and the applicants.

[56] However, these informants were not confidential informants subject to any special arrangement with police. It was clear from the ITO they were in custody, allowing the issuing judge to make inferences about their trustworthiness. The affiant included in the ITO the facts that [redacted] was a cousin of the victim. [Redacted]

told Charabelle that she would tell police about their conversation if asked because the victim was like “a brother” to her. These factors known to the issuing judge assisted him in making credibility and reliability determinations.

Misleading judge by highlighting phrase

[57] I cannot accept the applicants’ argument that the affiant intentionally mislead the issuing judge by highlighting the phrase in his conclusion section of the ITO “telling a bunch of people on the outside”. This supposition was not put to him in cross-examination so he had no opportunity to explain his intentions in highlighting that phrase. The highlight is only in the summary; the same information in 4.17(e) of the ITO is not highlighted. Further, as noted by the Crown, the affiant stated in the ITO that the applicants were released from custody respectively on February 7 and 8, 2018. The time period for authorization for the calls requested in ITO #1 ended on February 8, 2018. Both informants were interviewed after February 8. It was open to the issuing judge to interpret the highlighted phrase to mean that Lynzee was on the outside when she talked about the offence. There is insufficient evidence that this highlighted phrase was a deliberate attempt to mislead the issuing judge.

[58] The applicants draw a significant distinction between in-person conversations with others while in or out of custody and conversations on recorded phone calls by persons in custody. They rely on this distinction to argue that the only aspect of the ITO that supports the affiant’s belief that the applicants were talking on the phone about the offence is [redacted]’s statement that Lynzee was talking to people on the outside. The applicants say [redacted]’s statement provides no reliable evidence because there is nothing in it to suggest the applicants would be talking on the phone.

[59] I do not accept this distinction made by the applicants. As a result, [redacted]'s statement is not the only relevant evidence to be considered. As noted above, a reasonable inference can be drawn from evidence that an offender was discussing the offence with fellow inmates in prison, that they will probably discuss it with trusted associates to whom they speak on the phone from prison. A willingness to talk about the offence in prison to someone less well-known to them than a close family member or friend reveals a certain carelessness. The applicants know the information shared with other inmates could be passed on to police. The affiant included in the ITO the statement by Charabelle to [redacted] warning her against revealing their conversation to the police and [redacted] replying that she would talk to police if they asked because Derek Edwards was her "brother". Lynzee was present during this conversation. Their willingness to talk about the offence in the face of the obvious risks provides a basis for a belief that it is credibly probable the applicants would speak to those closer to them on the phone about the offence, even while knowing that the calls were being recorded.

Credibility and Reliability of Facebook message to [*redacted*]

[60] The evidence of the Facebook message to [redacted] also indicates a willingness of Charabelle to make reference to the offence to acquaintances on a social media platform that could be shared, and lends credence to the basis for the belief that she would also talk on the phone about the offence.

Credibility and Reliability of [*redacted*]

[61] I agree with the applicants that the statement of [redacted] has no weight because of its triple hearsay character and the fact the content is inconsistent with the information from the investigation found in ITO #1.

Standard of suspicion or credibly-based probability

[62] The applicants argue that at most the affiant could have a suspicion, not a credibly-based probability, that the applicants were talking on the phone from jail. The applicants say if this were the standard for judicial authorization then virtually every serious offender's calls from prison could be accessed and disclosed by police. This would be an unacceptable intrusion on privacy, especially given the importance of calls to friends and family as a source of support, comfort and companionship while offenders are in custody.

[63] I do not agree that allowing the judicial authorization in this case amounts to succumbing to a standard of suspicion rather than reasonable and probable grounds. In *Le* at para. 43, the court wrote:

> … the question here is whether the "totality of the circumstances demonstrate reasonable grounds for the belief "that the appellants were storing drugs at their home". Is there a credibly based probability that drugs were being stored at McKay Avenue or was it merely a suspicion? …

[64] Here the question can be framed as whether the totality of the circumstances (this must meet the standard of reasonableness) leads to a credibly- based probability that the applicants were talking about the offence to unknown persons on the phone from WCC.

[65] The totality of the circumstances here includes not only the two main grounds of belief set out by the affiant, but all of the investigation material set out earlier in the ITO that the applicants say is not necessary to consider. The officer is not only relying on his experience, but also the statements from the other inmates. Those statements must be considered in the context of all of the investigation material to that date. In this case, evidence from the investigation corroborates the information provided by [redacted] and to a lesser extent by [redacted]. This contributes to the reliability of the evidence. There is enough case-specific evidence in this case on which an issuing judge could rely to issue an authorization for production of the phone calls during this period of incarceration.

Sub-facial invalidity

[66] The applicants also argue that the ITO is sub-facially invalid. As noted above, the record was amplified by the full statement of [redacted], her criminal record, [redacted]'s criminal record, the agreed statements of fact and the cross-examination of Corporal Donison.

[67] The applicants note:

a. The full statement of [redacted] makes it clear Lynzee was not in custody when she was "telling a bunch of people on the outside" about the offence.

b. The criminal record of [redacted] shows convictions for assaults and the occurrence reports referenced in the agreed statement of fact show on several occasions she made misleading statements to police.

c. The criminal record of [redacted] shows impaired convictions and the occurrence reports referenced in the agreed statement of fact show that she made several misleading statements to police.

d. Corporal Donison confirmed he did not check the criminal records or any occurrence reports for the informants and treated them no differently from any other witnesses – in other words he did not treat them any differently because they were in jail.

e. Corporal Donison confirmed that the statements given by [redacted] and [redacted] were not under oath. [Redacted] was warned about the importance of telling the truth at the end of her statement.

f. Corporal Donison testified he did not provide the information that the actual results of the investigation contradicted the information provided by [redacted] about what [redacted] allegedly told her Lynzee had been saying and doing.

[68] The applicants say these selective and omitted facts by the affiant constituted a failure to live up to his duty to provide full and frank disclosure of all relevant information, whether or not it is helpful.

Misleading highlighted section

[69] I have addressed above the applicants' concern about the misleading nature of the highlighted phrase in the ITO above. The "telling a bunch of people on the outside" comment can equally be interpreted to mean that this occurred after she was released, given the information about the dates of release that are clearly set out in the ITO. The focus of the affiant was on the evidence that the applicants were talking about the

offence to various people in various locations around the time of the ITO. This formed the basis of their belief that the phone calls were reasonably likely to issue further information.

Absence of criminal records and occurrence reports

[70] The issuing judge knew the informants were in custody. It is expected that judges will assess the reliability of any statements from individuals in custody with this in mind. The information the informants provided was corroborated by other facts in the investigation set out in the ITO, providing sufficient reliability on which a judge could issue a production order.

[71] Even if the issuing judge had more information about the offenders, he could still have issued the ITO. The criminal records of [redacted] and [redacted] do not include convictions for crimes of dishonesty. The incidents involving misleading of police were related to incidents involving [redacted] or [redacted] themselves or as witnesses, and were often associated with intoxication. Here, in contrast, their reports to police occurred in a controlled environment of jail, did not involve the informant directly except as a receiver of information, and intoxication was not a factor.

Statements not under oath

[72] As noted above, many of the facts in the statement of [redacted] were corroborated by the investigation, adding to its reliability.

[73] [Redacted] was given a form of warning about telling the truth during her statement. She acknowledged telling the truth. However, I accept it is of limited value as it was provided at the end of the statement. It provides some limited evidence of reliability.

Unreliability of [*redacted*] *statement*

[74] I have noted above that I agree with the applicants that the statement of [redacted] should have no weight.

Conclusion on sub-facial validity

[75] Even with the full statement and the criminal record information the judge could still have issued the production order. This information was insufficient to negate the reasonable and probable grounds for belief that the applicants were talking to people on the phone from jail about the offence.

Issue – ITO #3 – January 8-February 8, 2020

[76] Is the evidence for the grounds relied on in ITO #3, namely Lynzee's conversation with the programs officer at WCC combined with the content of the phone calls obtained through the production order from ITO #1, in the totality of the circumstances and with the amplified record, sufficient reasonable and probable grounds that the applicants were speaking on the phone about the offence between January 8 and February 8, 2020?

Analysis – ITO #3

[77] I conclude on a review of all the material in ITO #3, in addition to the amplified record, that there were no reasonable and probable grounds for belief that the phone calls of the applicants between January 8 and February 8, 2020 would provide evidence with respect to the commission of the offence.

[78] ITO #3 is connected to ITO #1, two years later. It relies on the same information about the investigation set out in ITO #1, including the statements of [redacted] and [redacted]. The new information in ITO #3 on which the affiant bases his

reasonable and probable grounds for belief the applicants talked about the offence on the phone from jail in early 2020 is:

a. Lynzee spoke with a programs and corrections officer, Brittany Montpellier, at WCC on January 25, 2020, who wrote a report and was later interviewed by two police officers; Lynzee told her among other things she wanted to testify against Charabelle about the killing because Charabelle alone killed Derek Edwards; she could not stand being near Charabelle especially as she was bragging about the killing; she was upset because Charabelle was trying to get Lynzee to take full responsibility because she did not have kids like Charabelle; and she described her own actions on the night of the death to show she did not participate;

b. the previous phone calls to friends and family from jail between December 14, 2017, and February 8, 2018, obtained after ITO #1; and

c. the belief that a strained relationship on or around January 25, 2020, existed between Lynzee and Charabelle because of issues related to the killing, as revealed in the conversation between Lynzee and Brittany Montpellier.

[79] The affiant does not include in ITO #3 his statement in ITO #1 that sometimes people charged with serious offences will talk on the phone from jail to trusted associates and sometimes will talk about the offence. He also does not rely on the [redacted] social media post or the [redacted] statement set out in ITO #1. He

relies on all the other information obtained during the investigation, also included in ITO #1.

[80] The applicants state that ITO #3 is facially and sub-facially invalid.

[81] This analysis will focus on the applicants' arguments about the new information relied on in ITO #3.

Facial invalidity

[82] The applicants say the ITO summary of Brittany Montpellier's statement does not indicate Lynzee was speaking to anyone else about the offence. The fact that there were previous recorded calls made to friends and family, the applicants' main connection to the outside world, does not provide a ground for belief that they were talking about the offence. In any event, the previous calls relied on by the affiant are from two years earlier and do not support the belief that the applicants were talking on the phone about the offence between January 8 and February 8, 2020.

[83] More specifically, the applicants say the statement from Lynzee to Brittany Montpellier does not provide a credibly-based probability that Charabelle will be talking on the phone about the offence. Her phone calls obtained from ITO #1 were from the week after the death and do not lead to a reasonable inference that she would be speaking to others over the phone two years later about the offence.

[84] The applicants further note there were many calls made by Lynzee and obtained through the ITO #1 and ITO #2 and from all of them only one was considered to be relevant to the investigator, as indicated in ITO #3 (4.18(f)). This suggests that a further production order would not provide any additional evidence.

[85] The Crown responds that the evidence from the statement by Lynzee to Brittany Montpellier of the strained relationship between the sisters provided a reasonable ground for the affiant to believe they would be discussing this breakdown with family and friends, including information related to the offence. The timing of the ITO #3 request is appropriately limited to the time frame leading up to and around the evidence of the strained relationship.

[86] The Crown's further argument is that Lynzee's statement in which she is blaming her sister for the death is consistent with a call with Vance Cardinal two years earlier, in January 2018, in which the Crown says she was attempting to shift blame to Vance Cardinal. According to the Crown, the similarity between the earlier phone call and the statement to the programs officer provided a reasonable ground for belief that at least Lynzee was continuing to have these same types of conversations on the phone.

[87] The Crown submits that the totality of the circumstances, including the previous phone calls where some discussion of the offence occurred, and Lynzee's conversation with the programs officer where she reported a breakdown in the relationship between the sisters, provided reasonable grounds for belief that the applicants would be discussing circumstances of the offence on the phone from jail.

[88] In this case, I find there are no reasonable and probable grounds meeting the standard of credibly-based probability that the applicants were talking on the phone about the offence at this time. The ITO is facially invalid.

Previous calls including call with Vance Cardinal

[89] The evidence that provided reasonable grounds for ITO #1 and is repeated in ITO #3 is dated. The circumstances that existed two years earlier, shortly after the

applicants were incarcerated and shortly after the death are different than the circumstances in January 2020. Similarly, the fact that phone calls were made in early 2018, some of which contained some information about the offence, is insufficient now to provide a reasonable basis for belief that phone calls disclosing evidence of the offence in 2020. The one call to Vance Cardinal referenced by the Crown contains a vague statement that may be related to the offence but it is not clear.[1]

Statement to Brittany Montpellier

[90] Other than the calls produced from ITO #1, the new information is the statement of Lynzee to Brittany Montpellier and the strained relationship between the sisters, as described by Lynzee. On its face, the statement to the WCC programs officer is of a different quality than the spontaneous conversations that occurred among the inmates in early 2018. The later statement by Lynzee is more detailed and deliberate, indicating a choice of action for her case. Unlike the unstructured reactive answers to questions from the other inmates, and almost off-hand comments about the offence made to the others in early 2018, her conversation with the WCC programs officer in January 2020 was designed to achieve a certain outcome. There was no finger pointing or blaming in the statements to the other inmates in 2018, unlike the later statement where Lynzee was clear in blaming her sister for the killing. The consequences to Lynzee of such a statement if it were disclosed to others were potentially serious. The 2020 statement was made to a person in some authority, the WCC programs officer, for a purpose. It

[1] "You're supposed to be my best friend. It's not like you're going to be here so I can talk about it with you in person … I'm not going to keep living my life, like, it's fucking happy, wonderful … Like, look where it got me. Look how angry I got. Look what it made me do. I know, I'm not dumb. And you're the one that pushed me to my limit."

was not part of a casual conversation with peers which turned to a discussion of the offence.

[91] The more careful, focussed character of the statement does not lead to a reasonable inference that Lynzee would be talking to others on the phone about the offence in January or February 2020. This statement is unlike the relatively careless comments about the offence made by the applicants in early 2018.

No grounds for belief Charabelle is talking on phone about offence

[92] There is even less of a basis for a reasonable inference to be drawn that Charabelle may be talking to others on the phone about the offence from the new information. She made no statement to anyone and there is no evidence that she felt animosity towards Lynzee or felt there was a strained relationship between them. There are no reasonable and probable grounds for belief that Charabelle would be talking on the phone from jail about the offence at that time.

Sub-facial invalidity

[93] The applicants say the sub-facial invalidity is based on the agreed statement of fact submitted to amplify the record about the statement to Brittany Montpellier. That document states that Brittany Montpellier wrote in her information note and said in her statement to police that Lynzee wanted to speak to her lawyer and an investigator about the events surrounding the death of Derek Edwards. There was no mention of Lynzee speaking with anyone else about the death, Charabelle's involvement, or her plan to testify. Brittany Montpellier also advised she never overheard the sisters talking with each other or anyone else about the death. The applicants state this additional

information further negates the existence of reasonable and probable grounds that the applicants were talking on the phone about the offence at that time.

[94] I have already found that ITO #3 is not valid on its face so it is not necessary to make a determination based on the sub-facial arguments. I note the information set out in the agreed statement of fact supports the conclusion reached above that the statement made by Lynzee was not part of a spontaneous conversation like the earlier statements by both applicants to the other inmates. Instead, the fact that she said she wanted to talk to her lawyer and an investigator about her plans shows the statement was more deliberate and consequential, and of a different character than the comments made in the 2018 conversations.

[95] For these reasons, I find there are no reasonable and probable grounds for belief on which a judge could issue a production order for the calls between January 8 and February 8, 2020, and the production order is not valid.

Issue – ITO #2 – April 16-25, 2019

[96] Is the evidence for the grounds relied on in ITO #2, namely the surveillance efforts by police of Vance Cardinal, the January 2018 phone conversations from jail between Lynzee and Vance Cardinal, and the man believed to be Vance Cardinal waving outside WCC, in the totality of the circumstances including the amplified record, sufficient to constitute reasonable and probable grounds for belief that the phone calls will provide evidence of the offence?

Analysis – ITO #2

[97] I conclude on a review of all the material in ITO #2, in addition to the amplified record, that there was no reasonable and probable ground for belief that the phone calls

of Lynzee between April 16 and April 25, 2019, would provide evidence with respect to the commission of the offence.

[98] The affiant seeks production of Lynzee's phone calls from jail during this time based on the belief she and Vance Cardinal communicated regularly from the 20 calls in 18 days made from December 2017 to January 2018 and produced after ITO #1, and from seeing a man believed by two police officers to be Vance Cardinal waving his arms in the direction of Lynzee's WCC cell window on April 24, 2019. The affiant's belief from this information is that Vance Cardinal would tell Lynzee details of his present lifestyle, including his current residence and daily activities. This information in turn will afford evidence of the offence because it will provide investigators with a location where Vance Cardinal can be found to be arrested; and insight into his lifestyle which will assist the planned undercover operation and which will lead to information about the offence to be disclosed to the undercover officer. The affiant also believed that Vance Cardinal's recent interactions with police may be discussed with Lynzee and those conversations could include the investigation into the death. Finally, the affiant believed that Lynzee's phone calls to people other than Vance Cardinal will identify friends or associates of Lynzee in whom she has likely confided about the offence.

[99] The affiant stated police surveillance efforts had failed. Despite some contact with Vance Cardinal and knowing where he had been staying until approximately April 16, 2019, they did not know his current residence nor his daily routine after that time. The affiant stated there was concern that Vance Cardinal suspected police surveillance. The police were seeking phone calls from April 16-25. The date of the ITO is April 26, 2019.

[100] The applicants challenge this ITO facially and sub-facially.

Facial invalidity

[101] The applicants argue that the stated purpose of the production order was to learn about the lifestyle and residence of Vance Cardinal, so the police could more easily start their undercover operation. This stated purpose does not meet the requirements in s. 487.014 – "evidence respecting the commission of the offence." The belief that the phone calls may provide information about the offence appears to have been included as an afterthought as there is no evidence in support.

[102] The Crown in response relies on the decision of *CanadianOxy Chemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743, in which "evidence respecting the commission of the offence" in s. 487.014 is interpreted as: "anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant" (at 750-751). The Crown says the undercover operations plan was to extract information about the offence from Vance Cardinal, a suspect in the killing at that time, and the phone calls sought through ITO #2 would provide information about his location and residence, allowing the undercover operation to commence and evidence about the offence to be obtained.

Purpose of ITO

[103] Acknowledging the interpretation of evidence with respect to the commission of the offence is broad, I find the stated purpose of the ITO here does not meet that element as required by s. 487.014. The primary evidence sought through the phone calls is Vance Cardinal's current residence and daily routine. This is not evidence of the offence. It is information that will allow an undercover operation to commence, which

may then reveal evidence about the offence, assuming another ITO is successfully obtained.

[104] While the affiant also states that the phone calls will reveal evidence about the commission of the offence, there are no reasonable grounds for this belief. The previous 20 phone calls between Lynzee and Vance Cardinal from January 2018 only contained one oblique reference to the offence (see footnote 1, page 27 above) suggesting that the two of them did not discuss it. There was no evidence other than the dated 2018 conversations with the other inmates, [redacted] and [redacted], on which to base a reasonable belief that Lynzee was talking with others about the offence. The 2018 conversations were 15 months old and could not for that reason provide a reasonable ground of belief the calls with others would reveal evidence about the offence.

[105] ITO #2 is facially invalid.

Sub-facial invalidity

[106] I will also address briefly the sub-facial invalidity arguments of the applicants although it is not essential. The record for this ITO was amplified by the cross-examination of the affiant, Corporal Donison. The applicants argue the amplified record shows:

a. There was no evidence that Lynzee and Vance Cardinal were in a relationship or communicating regularly – the affiant agreed they were known to have a tumultuous relationship and he had no information other than the waving outside WCC they had been in contact since January 2018.

b. There was no basis for the belief that they would discuss Vance Cardinal's lifestyle, interactions with police and the murder investigation.

c. Vance Cardinal had been cooperative in meeting with police when asked and their surveillance efforts to date had provided them with information about his daily activities, various places he visited and people he saw. The affiant did not include in the ITO other observations by police including a visit two days earlier to someone's house where they were advised he and Charabelle would be returning that night, and the observation of a vehicle associated with Vance Cardinal by police at the Yukon Inn but an absence of any surveillance there. The applicants say the police mischaracterized the surveillance to make it appear as though he was deliberately attempting to evade police when in fact they had only lost sight of him temporarily. The affiant was attempting to use the production order as an impermissible shortcut to learn about Vance Cardinal.

[107] The Crown disputes the description by the affiant attributed by the applicants of the relationship between Lynzee and Vance Cardinal, saying he called it an "on again/on again" relationship, although agreed it was tumultuous. There was no evidence the relationship had ended and the waving outside WCC indicated that there was ongoing communication. The Crown did not address the reasonableness of the belief that they would discuss the offence or his lifestyle, residence, and investigation. The Crown argued the police were entitled to use a production order as a shortcut to assist with surveillance and undercover efforts, that the unavailability of resources for the police to continue extended surveillance was a legitimate underlying reason to request

the production order, and that the few minor omissions and description of the surveillance efforts did not amount to a misleading of the issuing justice by the affiant.

Relationship between Lynzee and Vance Cardinal

[108] Given the past close relationship between Lynzee and Vance Cardinal, and the information gained during surveillance that he and Charabelle and her family were still in contact, combined with the waving outside of WCC, there were reasonable grounds to believe that they were still in contact with one another.

No grounds for belief of conversation about offence

[109] There were no reasonable grounds to believe Lynzee and Vance Cardinal would be talking about the offence, based on the previous 20 calls from 2018 where it was only obliquely referred to once.

[110] While it is possible they may have discussed his residence and activities, as noted above, this does not constitute evidence about the commission of the offence and so was not a legitimate reason to issue the production order.

Surveillance efforts

[111] The information about the surveillance efforts read in totality indicates the police did have a significant amount of information about Vance Cardinal's lifestyle, daily activities and possible whereabouts. The affiant's failure to include some of the surveillance information in the ITO was not significant enough to detract from the overall conclusion that the police already had information about the lifestyle and activities of Vance Cardinal.

[112] It does not matter for the purpose of the ITO whether surveillance was affected because Vance Cardinal was evading police, or because the police merely lost sight of

him. Either way, surveillance had ended. The affiant testified the police did not have sufficient resources to continue the surveillance. The police had decided to stop their surveillance of Vance Cardinal. However, they still wanted more information about him before they could start their undercover operation. The purpose of the undercover operation was to obtain information from him about the offence. The affiant did not specify in the ITO what kind of additional information they were looking for in the phone calls other than his residence and lifestyle.

[113] Vance Cardinal had been cooperative with police in recent days. As noted, through their surveillance efforts up to the date of the ITO, the police obtained a significant amount of information about his lifestyle and leads about his residence. They could have asked him where he lived during one of their meetings, but they did not. To request production of phone calls of Lynzee, which may or may not include phone calls with Vance Cardinal, to find out information that police could have discovered in other ways based on information they already had or could obtain, is an unjustified intrusion into the expectation of privacy of Lynzee in her phone calls. While I agree with the Crown that an ITO could provide a valid "shortcut" in some instances to obtaining information through surveillance or undercover efforts, the circumstances in this case do not justify this approach.

[114] ITO #2 is sub-facially invalid.

Exclusion of Evidence under s. 24(2) obtained from ITO #3 and #2

[115] Will the introduction of this evidence obtained in a manner that infringed s. 8 at trial bring the administration of justice into disrepute? As noted above in para. 29, three factors must be considered:

a. the seriousness of the *Charter* infringing conduct;

b. the impact of the breach on the *Charter*-protected interests of the defendant; and

c. society's interest in the adjudication of the charges on their merits (*R v Grant*, 2009 SCC 32 ("*Grant*") at para. 71).

Seriousness of the conduct

[116] The Court in *Grant* said at paras. 73 and 74:

> … The concern of this inquiry is not to punish the police or to deter *Charter* breaches … .The main concern is to preserve public confidence in the rule of law and its processes … .
>
> State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[117] ITO #3 – The infringement of s. 8 resulted from an absence of sufficient evidence in the ITO for a production order for the phone calls of the applicants in early 2020. Phone calls disclosed two years earlier in a different context were not a sufficient basis for this request. A significant disclosure by Lynzee to a WCC programs officer of her intention to testify against a co-accused, her sister, including a description of her own involvement in the incident, does not provide a reasonable inference that Lynzee would talk about the offence in recorded phone conversations from jail.

[118] There was even less evidence on which to request an order for Charabelle's phone calls in early 2020. As noted, the 2018 conversations were not a sufficient basis

for this request. Lynzee's statement to the WCC programs officer set out Lynzee's feelings about her relationship with Charabelle. There was no evidence about whether Charabelle felt their relationship was strained. It did not provide any basis for a reasonable belief that Charabelle's phone calls would provide evidence about the offence.

[119] Despite the inadequacies in the evidence to support the grounds for a production order in ITO #3, this was not a deliberate violation by police, nor a wilful disregard of the *Charter*. The inadequacies were inadvertent and not in bad faith. The seriousness of the breach falls on the lower end of the spectrum. This finding favours inclusion of the evidence.

[120] ITO #2 – The failure of the stated purpose of the ITO – to learn more about Vance Cardinal's lifestyle – to fit with the requirement of s. 487.014 that the information sought by the ITO will provide evidence of the commission of the offence was an unusual deficiency. Further, while it may have been reasonable to believe that Lynzee and Vance Cardinal were still in communication, there was no factual basis for a belief they would talk about the offence. Any discussion of his lifestyle or residence that may have occurred was not evidence about the offence.

[121] This confusion of purpose and lack of evidence to support a reasonable belief the calls would disclose evidence about the offence was more serious. However, there was still no evidence of bad faith by the affiant or wilful disregard of the *Charter*. This was an attempt by police to get more information in a more expedited way to assist them with the next steps in their investigation. They made errors in this attempt but the

seriousness of their conduct is at the moderate to low end of the spectrum. It favours inclusion of the evidence.

Impact of the breach on the Charter-protected interests of the accused

[122] The Court in *Grant* explained this factor as follows at paras. 76 and 78:

> This inquiry … calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.
>
> …
>
> … [A]n unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

[123] ITO #3 – The phone calls at issue here were recorded and subject to being listened to because of the incarceration of the applicants. The applicants, like all inmates, are aware from a message at the beginning of every call on the standard phone that the call is being recorded and may be monitored. Privacy expectations are reduced.

[124] At the same time, inmates' phone calls were one of the few ways of connecting with friends and family and were likely full of personal information. Although privacy expectations are reduced in the prison setting they are not eliminated. The impact of having personal phone calls introduced as evidence in open court is significant. Yet the

significance of the intrusiveness must be reduced by the knowledge that all phone calls are recorded and may be monitored. The reduced, but not extinguished, expectation of privacy weighs in favour of including the evidence.

[125] ITO #2 – The same privacy concerns as described for ITO #3 exist here and so their seriousness weighs in favour of inclusion.

Society's interest in an adjudication on the merits

[126] This factor requires a balancing of the truth-seeking function of the trial with the importance of upholding fundamental rights. As stated by the Court in *Grant* at paras. 82-83:

> ….The court must ask "whether the vindication of the specific *Charter* violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.
>
> The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry.
> …

[127] As noted in the case of *R v Reilly*, 2021 SCC 38, a determination of whether evidence should be excluded is a balancing exercise, to be done after the court has considered all of the circumstances and whether introducing the evidence would bring the administration of justice into disrepute.

[128] The court in *Grant* at paras. 81 to 85 concluded that the reliability of the evidence, its importance to the Crown's case, and the seriousness of the offences are all factors to be considered.

[129] In this case, society has a significant interest in adjudicating this case on the merits. The offences are serious. The Crown concedes however, that the calls are not

the crux of the prosecution case and their exclusion would not significantly impact it. The reliability of the evidence is not clear at this stage. The Crown notes it would be useful information for the jury to know. As stated by the court in *R v McGuffie*, 2016 ONCA 365 at para. 63, "if both of the first two inquiries [in *Grant*] provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence."

[130] In this case, given my findings for both ITOs that the seriousness of the conduct was on the lower end of the spectrum, the impact on the applicants' privacy interests is less severe because of their reduced expectation of privacy while in WCC, and considering society's interest in adjudicating these serious offences on the merits, I conclude that the evidence should be admitted.

_____

DUNCAN C.J.