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(Brandon Centre)
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COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

		Appearances/Counsel
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- and -	)	
	)	
	)	
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accused (applicant).	)	for the accused (applicant)
	)	
	)	
	)	
	)	Judgment Delivered:
	)	October 17, 2023

ABEL J.

INTRODUCTION

[1] Jovaughn Thomas, the Applicant, seeks an order excluding evidence on the basis that the Brandon Police Service (BPS) ought to have named him as a known person, using the alias "Rohan Smith", in the Part VI Authorization granted February 10, 2021. The Applicant argues that the failure to do so

results in any intercepted communications attributed to him being unlawful and contrary to s. 8 of the ***Canadian Charter of Rights and Freedoms,*** *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), c 11 (the ***Charter***). As a result, any such communications ought to be excluded pursuant to s. 24(2) of the ***Charter***.

BACKGROUND

[2] In January of 2020, BPS began Project Brazen, the target of such investigation being RTF. RTF was using several individuals under him as runners and couriers to conduct his drug transactions. Several judicial authorizations were granted by judges of the Provincial Court, including transmission data recorder (TDR) warrants and tracking warrants.

[3] TDR warrants and tracking order warrants were granted on March 4, 2020, June 17, 2020, August 11, 2020 and October 6, 2020 (the TDR Warrants).

[4] A TDR warrant provides the means for obtaining transmission data through a TDR. A TDR identifies the times and durations of a phone call and text message transmitted by cellphone, the location of the cellphone and the telephone numbers that communicated with the cellphone. The substance and contents of those communications are not revealed through a TDR warrant.

[5] On October 31, 2020, the October 6, 2020 warrant identified a new cellphone number, ending in 5856, the subscriber information associated the number to Rohan Smith. BPS believed that Rohan Smith was an alias for an

unknown person. BPS undertook no further investigation as to the identity of Rohan Smith or the cellphone number.

[6] On February 10, 2021, BPS was granted an omnibus Part VI warrant to intercept private communications along with accompanying TDR warrants, a General Video warrant, a General Warrant and Tracking Order warrants (the First Communications Warrant).

[7] BPS named two principle known persons as part of the application for the First Communications Warrant, namely RTF and Nanshak Emmanuel, and 21 other individuals. Emmanuel is a co-accused of the Applicant. The authorizations for the First Communications Warrant did not name either the Applicant or Rohan Smith, nor did they relate to the cellphone number ending in 5856, despite Rohan Smith and the cellphone number showing up in the TDR data.

[8] On April 8, 2021, BPS applied for and obtained another omnibus Part VI warrant (the Second Communications Warrant). BPS identified the Applicant as an Other Known Person for the purpose of the Second Communications Warrant.

[9] On May 18, 2021, BPS concluded the investigation and arrested the Applicant. The Applicant was charged with trafficking cocaine, conspiracy to traffic cocaine, possessing the proceeds of crime, and conspiracy to possess proceeds of crime.

ANALYSIS AND DECISION

Was the Applicant a "known person" prior to the February 10, 2021 authorization?

The Law

[10] For the purposes of ss. 185(1) and 186(4) of the ***Criminal Code,*** RSC 1985, c C-46 (the ***Code***), a person is "known" if they are a person whose identity was known to the police at the time they applied for the authorization and if there are reasonable and probable grounds to believe that the interception of her private communications may assist in the investigation of the offence". Similarly, and to the contrary, an "unknown" person is a person who does not meet these two conditions (***R. v. Chesson***, 1988 CanLII 54 (SCC) at paras. 19 to 20).

[11] In order to be a "known person", the evidence must amount to a "credibility-based probability" that the interception of the person's private communications may assist in the investigation of the named offence (***R. v. Montgomery***, 2016 BCCA 379 [***Montgomery***] at para. 81).

[12] "Known persons" must be named in both the application and in the authorization for the interception of their private communications to be lawful. If a person whose private communications were intercepted was "known" in the full sense but not "named" in the authorization, those interceptions will have been "unlawfully made". With respect to that person, those interceptions will amount to a "warrantless search and seizure" and a breach of that person's rights (***Montgomery*** at para. 75)

[13] A clause in an authorization which permits the interception of private communications of "unknown persons", is known as a "basket clause". It permits the interception of private communications of any "unknown person" to the police at the time of the application for the authorization who communicates at locations designated in the authorization.

[14] The interception of private communications of "known persons" cannot fall under the "basket clause" (***R. v. Chung***, 2008 Canlii 12705 (ON SC) [***Chung***] at para. 17).

[15] The threshold for naming a person in an affidavit and authorization is not onerous (***R. v. Beauchamp***, 2015 ONCA 260 at para. 104 and 105).

[16] The obligation to name persons extends to all people who satisfy the two requirements of s. 185(1)(e) of the ***Code***, not merely to that subset of those persons whose real names are known to the police (***Chung*** at para. 41).

[17] The offence under investigation is a key factor to consider when determining whether an individual is or is not a known person. All individuals who are known associates, criminal or otherwise, of named targets need not be named in a supporting affidavit or authorization. Rather, the question is whether there are reasonable grounds to believe that interception of the private communications of an individual known to police may or will assist in the investigation of the identified offence or offences. If such grounds exist the individual should be named regardless of whether there are reasonable grounds to believe the individual is actively involved in the offence or is otherwise an

associate such as an unsuspecting roommate (***R. v. Dhak***, 2012 BCSC 2199, at para. 34).

Was Rohan Smith a known person?

[18] Pursuant to the TDR Warrants, and prior to October 31, 2020, Rohan Smith was not identified in any of the TDR data. It is only on October 31, 2020 that a new phone number showed up, which was linked to Rohan Smith.

[19] The edited affidavit in support of the First Communications Warrant was provided in the Application Record (the Affidavit). The Affidavit identified persons whose communications may be intercepted, and grouped those persons into principle known persons, other known persons, and unknown persons. Rohan Smith was not named as a known person.

[20] However, by the time of the granting of the First Communications Warrant through the collection of TDR data, Rohan Smith had been identified as having over 1,200 contacts with RTF.

[21] The Applicant argues that individuals with fewer contacts than the Applicant were specifically named as other known persons, specifically referring to SW, MC, MS and JS.

[22] With respect to SW, he was listed on the BPS intelligence database as a cocaine and methamphetamine trafficker, there being two reports in 2020 that support that listing. That information was consistent with the offences being investigated as part of Project Brazen, and was temporally connected (see page

117 of the Affidavit). He was also identified on the TDR database for contacting RTF.

[23] With respect to MS, as noted at para. 149 of the Affidavit, he was observed interacting with another known person, TC. MS is in the BPS intelligence database as a cocaine trafficker, and is identified as someone on the TDR for contacting RTF. Again, that information was consistent with the offences being investigated as part of Project Brazen, and was temporally connected.

[24] With respect to MC, as noted at paras. 151 and 152 of the Affidavit, MC is believed to be a cocaine trafficker according to the BPS intelligence database, was seen with TC, and is on the TDR for contacting RTF.

[25] For each of SW, MS and MC, the information that may have assisted the investigation went beyond raw TDR. There was a credibility-based probability that the interception of their communications may have assisted in the investigation of the named offence and as such ought to have been named.

[26] With respect to the Applicant, despite there being no such other information or evidence as in the case of SW, MS and MC, the Applicant ought still have been named as a known person.

[27] Whether or not a person is involved in criminal behaviour, the naming of a person in an authorization involves the state being able to intercept their private communications. The test is not whether they are involved in criminal

behaviour, but rather, whether the interception of the person's private communications may assist in the investigation of the named offence.

[28] While TDR data alone does not provide the contents of any communications, in this case, the Applicant was noted as having over 1,200 contacts with RTF by the time the application for the First Communications Warrant was sought.

[29] The accused notes that BPS relied on TDR data and its investigative importance, in obtaining the TDR Warrants. Specifically, at para. 59 of Tab 3 of the Applications Record, being the Affidavit sworn October 6, 2020 by a member of BPS, the officer avers that "the information obtained from the TDR continues to be extremely valuable for the ongoing investigation. There are still several people who are consistently showing up on the TDR that are believed to be involved in RTF's network…"

[30] In ***R. v. Chow***, 2005 SCC 24 (***Chow***) although the accused was known in the drug trade, the officers did not have reasonable grounds to believe that he was connected to the offence they were investigating, being murder, despite the existence of TDR data regarding Chow.

[31] Context regarding the offence under investigation is important. In ***Chow***, the accused was known in the drug trade, but the offence under investigation was murder. Frequent and numerous contacts as revealed in TDR data may not assist in the investigation of a murder. In this case, and to the contrary,

frequent and numerous contacts are important in the context of an investigation for drug trafficking.

[32] Given that the naming threshold is not an onerous one, regardless of whether an alias is used or not, given the offence under investigation, and given the number and frequency of the contacts as revealed in the TDR data, the Applicant ought to have been named a known person in the application for the First Communications Warrant.

[33] As such, there was a breach of the Applicant's rights pursuant to s. 8 of the ***Charter***.

The Section 24(2) Analysis

[34] As outlined in ***R. v. Grant***, 2009 SCC 32, at para. 71:

> ... When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. …

Seriousness of the state conduct which led to the breach

[35] With respect to the seriousness of the ***Charter***-infringing state conduct, as noted at paras. 72-75 of ***Grant***, the seriousness of the state conduct that led to the breach is to be evaluated. One of the main purposes for such inquiry is to preserve public confidence in the rule of law by carefully evaluating the gravity of

the offending state conduct. ***Charter***-offending state conduct may fall along a continuum from trivial or minor violations which minimally undermine public confidence in the rule of law, to wilful or reckless disregard for ***Charter*** values, which would severely undermine such public confidence.

[36] In this case BPS did not name the Applicant, through the use of his alias Rohan Smith. BPS was aware of the requirement to name persons in order to draw the authorizing judge's attention to the full extent of the interference with privacy rights that would flow from the granting of the requested authorization.

[37] Failing to name a person is not trivial or minor in nature because it undermines one of the basic principles of the pre-authorization process, that a neutral judicial arbiter must carefully balance competing state and individual interests. This is particularly important in the context of the electronic interception of private communications as the privacy interests of many persons beyond those who are the targets of the investigation can be gravely affected.

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

[39] It must also be remembered that s. 24(2) of the ***Charter*** is concerned with the long term impact that ***Charter***-infringing state conduct can have on the repute of the administration of justice.

[40] In the long term, failing to draw the authorizing judge's attention to the full extent of the invasion of privacy that may be a consequence of the authorization that is sought by the state tends to undermine the legitimacy and level of protection that Canadians rightly expect from the pre-authorization process. Part VI applications often involve long and complicated affidavits and appendices that relate to complex fact situations. They are dealt with *ex parte* and there is an obligation on the affiant to make full, fair and frank disclosure. Failure to name persons known to the investigators, the interception of whose communications may assist the investigation, is related to that obligation and its underlying purposes.

[41] This is a serious violation of the applicant's privacy rights, especially in the context of state interception of private communications.

[42] However, in concluding that this a serious violation, I note the following. Firstly, the failure of BPS to use the name Rohan Smith does not arise as a result of knowing who Rohan Smith was through the TDR data, and making a specific choice to not name him as an "other known person". Rather, the evidence is clear in that BPS did not know who Rohan Smith was.

[43] Secondly, BPS did not withhold relevant information from the authorizing judge. They gained no tactical advantage by failing to name the applicant. They placed the information they had before the authorizing judge. This was not a wilful or a flagrant disregard of the ***Charter***.

[44] These two factors will be further considered in my balancing of the different lines of inquiry.

[45] With respect to the seriousness of the violation, the invasion of privacy by surreptitious means is serious. This is a serious violation of ***Charter*** rights.

Impact on the applicant

[46] The second aspect of a s. 24(2) analysis as described in ***Grant*** at paras. 76-78, is the impact of the ***Charter*** breach on the ***Charter***-protected interests of the accused. A determination must be made of the extent to which the Applicant's protected interests were actually infringed. Pursuant to s. 8, the protected interest engaged is a reasonable expectation of privacy.

[47] The affidavit in support of the Second Communications Warrant refers to the efforts made to identity Rohan Smith. As a result of the First Communications Warrant, communications between RTF, who was a principal known person and Rohan Smith were intercepted. Those communications included text messages between RTF and the number associated with Rohan Smith.

[48] In these circumstances it can be seen that the Applicant's private communications would have been intercepted in any event. BPS were lawfully entitled to intercept the private communications of RTF because he was named.

[49] In the circumstances the actual negative impact the ***Charter*** violation had on the Applicant's privacy interests was relatively minor. The captured communications were not conscripted statements. They were statements that

were going to be captured by the state in any event due to the naming of others in the First Communications Warrant.

Societal interest

[50] With respect to society's interest in adjudication of the case on the merits, as stated in ***Grant*** at para. 79, society has a collective interest in ensuring that offenders are brought to trial and dealt with according to law.

[51] The reliability of the evidence is important in this aspect of the inquiry (See ***Grant*** at para. 81). The court must consider whether exclusion of the evidence would extract too great a toll on the legal process (see ***Grant*** at para. 82). The seriousness of the offence is also a factor, but as explained in ***Grant*** at para. 84, aspects of this consideration cut both ways.

[52] The evidence in question here is important in terms of the applicant's liability. The charge is reasonably serious, and the evidence is very reliable, being the applicant's own words. Given these factors a balanced consideration of the factors mentioned in ***Grant*** as important under this line of inquiry favours admission of the evidence.

[53] The ultimate determination of the admissibility question requires the court to balance the assessments made under each of the three lines of inquiry.

[54] This is a serious breach by BPS, although BPS did not know who Rohan Smith was, and did not deliberately withhold information. Despite the seriousness of the breach, the assessments under the second and third lines of inquiry tip the balance in favour of admission. There was little actual negative

impact on the applicant's privacy interests. BPS achieved no tactical advantage by failing to name the accused. The evidence would have been obtained in any event from the naming of RTF as a known person in the First Communications Warrant. The prosecution of drug trafficking offences are ones which the public has a strong interest in seeing resolved on the merits.

[55] According, the evidence is admissible. The s. 24(2) application is dismissed.

CONCLUSION

[56] In conclusion, BPS ought to have used the name Rohan Smith in the affidavit for the authorization for the First Communications Warrant.

[57] There were reasonable and probable grounds to believe that interception of the Applicant's communications may have assisted in the investigation of the offence.

[58] There was a breach of the Applicant's rights pursuant to s. 8 of the ***Charter***.

[59] Although there was a breach of the Applicant's rights, the evidence is not excluded pursuant to s. 24(2) of the ***Charter***.

_____J.