R. v. *Bulatci*, 2009 NWTSC 39

Date: 2009 06 04
Docket: S-1-CR-2008 000 056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Respondent

\- and -

EMRAH BULATCI

Applicant

Restriction on publication: Pursuant to subsection 648(1) of the *Criminal Code*, no information regarding this portion of the trial shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

Pre-trial rulings on admissibility of evidence.

Heard at Yellowknife on March 10, 11, 12 13 and April 6, 7 & 8.

Reasons filed: June 4, 2009.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicant (Accused): L.K. Stevens, Q.C. and D. Rideout.

Counsel for the Respondent (Crown): J.D. Cliffe, C. Greenwood and J. MacFarlane.

R. v. *Bulatci*, 2009 NWTSC 39

Date: 2009 06 04
Docket: S-1-CR-2008 000 056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Respondent

- and -

EMRAH BULATCI

Applicant

REASONS FOR JUDGMENT

[1] Emrah Bulatci is charged with first degree murder arising from the death of Christopher John Worden, a Royal Canadian Mounted Police constable, in Hay River, Northwest Territories, on October 6, 2007. His trial on that charge is scheduled to commence later this year. He has, however, brought these applications to exclude certain evidence sought to be used by the Crown at his trial.

[2] These reasons address the accused's applications to exclude evidence obtained as a result of an authorization for electronic interception of private communications on the basis that (a) the requirement of investigative necessity was not met so as to support issuance of the authorization; and (b) if it was met at the time the authorization was issued it was not met following the accused's arrest and detention. Also, the accused submits that the interception of his private communications in custody was not authorized by the order granted in this case. Finally, the accused seeks to exclude evidence of his conversations with an undercover police officer in his cell after his arrest on the ground that his right to silence, protected by s. 7 of the *Canadian Charter of Rights and Freedoms*, was violated.

[3] In addition, the Crown seeks a ruling as to the admissibility of a statement made by the accused to two correctional officers while in custody. These reasons will address that as well.

Factual Background:

[4] In the early morning hours of October 6, 2007, Cst. Worden was dispatched in response to a call for assistance. Later that morning another officer found his body. He had been shot several times.

[5] Early in their investigation the police identified the accused as a suspect. They learned he had left Hay River, heading to Edmonton, and had taken someone else's cell phone. They obtained information as to the type of vehicle he may have been using. They obtained statements from people who had dealings with the accused. Many of these people spoke with the police reluctantly and some gave inconsistent accounts. The police also obtained information from confidential sources, none of whom willing to be identified.

[6] On October 7, 2007, the police applied for and obtained an emergency authorization pursuant to s. 188 of the *Criminal Code* from a judge of the Alberta Court of Queen's Bench. The authorization identified the number of the cell phone that the police believed to be in the accused's possession. This authorization expired on October 9, 2007.

[7] On October 8, 2007, an authorization to intercept private communications, pursuant to sections 185 and 186 of the *Criminal Code*, was issued by a judge of this court. On October 9th, a further authorization was sought from the same judge (to replace the earlier authorization) due to the need to correct some typographical errors. It is this October 9 authorization that is the subject-matter of the accused's application.

[8] The accused was arrested in Edmonton on October 12, 2007, and eventually moved to the North Slave Correctional Centre in Yellowknife. He has been in custody since his arrest.

[9] Prior to being moved to Yellowknife, the accused was detained in a jail cell at the R.C.M.P. detachment in Sherwood Park, Alberta. For approximately 26 hours, over October 12 and 13, the accused shared the cell with an undercover police officer posing as a person arrested on a variety of charges. There were

several conversations between the two of them during this period that the Crown intends to adduce as evidence at the trial.

[10] The authorization issued on October 9th covered the period from October 9 to December 6, 2007. Apparently a great many calls were intercepted and recorded. These included calls made by the accused's father and girlfriend. The interceptions continued following the accused's arrest. The Crown has given notice of its intention to tender the contents of thirty-five oral communications into evidence (as required by s. 189(5) of the *Criminal Code*).

[11] By monitoring intercepted calls pursuant to the authorization, the police became aware that the accused had arranged a visit with his family at the North Slave Correctional Centre. On October 20, 2007, the accused met there with his father and his girlfriend. The police, relying on the authorization granted on October 9, 2007, used an audio device and recorded the conversations between the accused and his family. They did the same during a second family visit on November 11, 2007. The Crown's s. 189(5) notice includes these conversations.

<u>Issues Relating to the Authorization</u>:

[12] The accused raises three issues with respect to the intercepted communications.

[13] First, the accused says that the application for the authorization failed to demonstrate investigative necessity for the interceptions. The police, it is argued, established only that electronic interceptions would be helpful, not necessary. Further, the authorization failed to state on its face that this requirement had been met.

[14] Second, the accused submits that even if investigative necessity had been demonstrated prior to his arrest, his subsequent arrest and detention were significant developments that required a new application if it was intended to continue recording his conversations while in custody.

[15] And, third, the accused argues that the recording of his conversations while in custody were not authorized. This argument focuses on the extent of the "resort to" clause in the authorization granted on October 9th.

Investigative Necessity:

[16] There is no dispute among counsel as to the governing jurisprudence.

[17] On a motion to exclude evidence obtained pursuant to a judicial authorization, the objective is to determine first the facial validity of the authorization and the sufficiency of the information provided to the issuing judge. A further objective is to consider whether the execution of the authorization was in accordance with its terms and conditions. But, with respect to the primary objective, it is not the function of the reviewing judge to conduct a rehearing of the application. In *R.* v. *Garofoli*, [1990] 2 S.C.R. 1421, Sopinka J. summarized the standard of review as follows (at para. 68):

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[18] The reviewing judge must show deference to the issuing judge. The function of the reviewing judge is to assess the record that was before the authorizing judge, as amplified on review, and determine whether the authorization could have been issued; not whether the reviewing judge would have issued it.

[19] With respect to authorizations for electronic interceptions, the *Criminal Code* sets out two criteria in s. 186(1):

> 186. (1) An authorization under this section may be given if the judge to whom the application is made is satisfied
>
> > (a) that it would be in the best interests of the administration of justice to do so; and
> >
> > (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

[20] The first requirement, in sub-section (a), has been judicially defined as importing a minimum requirement, consistent with the s. 8 *Charter* protection against unreasonable search or seizure, that the authorizing judge be satisfied that there are reasonable and probable grounds to believe that an offence has been committed and that the authorization sought will afford evidence of that offence: *R*. v. *Duarte*, [1990] 1 S.C.R. 30. The defence takes no issue on this point.

[21] Sub-section (b), however, sets out not one but three different criteria. As explained in *R*. v. *Araujo*, [2002] 2 S.C.R. 992, the use of the disjunctive "or" means that there are three circumstances in which an authorization can be justified. The first ("other investigative procedures have been tried and failed") is a situation of "last resort". The third ("the urgency of the matter is such that it would be impractical …") refers to an emergency situation. It is the second criterion ("other investigative procedures are unlikely to succeed") that is the one in issue here.

[22] While not a test of "last resort", this requirement for "investigative necessity" was held in *Araujo* (at para. 29) to mean that "practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry" is available. As defence counsel said, this is a stringent requirement: see *R*. v. *Williams* (2003), 181 C.C.C. (3d) 414 (Ont. C.A.), at para. 14. But it is one to be applied in a practical commonsense fashion. It does not require that all alternative techniques be tried or that they fail. What must be shown is a need for electronic interception.

[23] Counsel for the accused submits that the affidavit relied on for the authorization established no more than a belief by the police that electronic interceptions would be a useful tool. Counsel referred me to the following extract from *R*. v. *Smyk* (1993), 86 C.C.C. (3d) 63 (Man. C.A.), at para. 47:

> While the authorities do not require the applicant for an authorization to establish that *all* other investigative procedures have been tried and have failed or are unlikely to succeed, the "court must be apprised of the nature, progress and difficulties in the investigation to insure that eavesdropping is more than just a 'useful tool' …": *People* v. *Baris*, adopted by Martin J.A. in *Garofoli* [p. 125].

[24] As Crown counsel noted, in reviewing the information put before the authorizing judge to determine whether there was investigative necessity, the legitimate objectives of the police must be considered. When the authorization was sought, the accused's whereabouts were unknown. The weapon used in the shooting had not been located. There were no eyewitnesses to the shooting. And

those witnesses who did provide some information were extremely reluctant to do so due to their involvement in the drug subculture in Hay River. There was also evidence that others may have been assisting the accused in his flight. So, at that point, the objectives were to locate the accused, to find the murder weapon, and to gather evidence for a prosecution.

[25] With respect to the criterion of investigative necessity, the affidavit of Cst. Lesage of the R.C.M.P., sworn on October 8, 2007, sets out the following:

> To date, I and other investigators have relied on conventional investigative techniques such as interviews of witnesses, a scene examination, and interviews of other persons all of which established that Emrah Bulatci is the person responsible for the murder of Constable Worden.
>
> Witness Interviews
>
> 40. As set out in this Affidavit *(name in original)* stated "Justin" admitted to the murder of Constable Worden. Later when asked again *(name in original)* refused to repeat what he had said earlier. I believe, given the nature of the persons involved in the drug sub culture that this is likely to occur again. I believe they may be afraid or reluctant to provide any information in a forthright manner. This may be due to a real or imagined threat to the safety of themselves or their families either directly or indirectly from the individual who committed the murder of Constable Worden.
>
> 41. A number of friends and associates of the principal known person have been identified. Though it is believed they have little evidence to offer in respect of the offence being investigated, it is the intention of the police to continue conducting interviews. I believe these interviews are likely to stimulate conversation between these individuals and Bulatci. Should an Authorization be granted, the interception of these private communications are likely to assist the investigation. I believe these conversations may reveal Bulatci's current whereabouts, the location of the murder weapon or other evidence the investigators are not aware of.
>
> 42. For these reasons I believe that interviews combined with the interception of private communications are likely to produce evidence which will bring this investigation to a successful conclusion.
>
> Confidential Informant Information
>
> 43. Investigators have utilized the information received from three confidential informants. Their information has been of value in identifying at least in part some of the circumstances surrounding the

murder of Constable Worden. The information to date has not however identified the location of the murder weapon, Bulatci's current whereabouts, or the motivation behind the murder of Constable Worden.

44. The information provided by the confidential informants was provided on the basis of anonymity. Only two of the confidential informants are known to investigators, the third is a Crime-stoppers Tipster. I do not have any information before me at this time which would allow me to believe that any of these people would be willing to testify at a later date relative to this investigation.

. . .

50. Investigators may disclose this forensic information via the media. I believe that investigative activity is likely to generate conversation between Bulatci and his associates. Should the proposed Authorization be granted I believe the interception of those private communications is likely to provide some evidence regarding the murder of Constable Worden as well as Bulatci's current whereabouts.

. . .

52. Physical surveillance alone is unable to provide the content of the communications made by persons via telephone or in private. As such this investigative technique is of limited value.

53. Investigators do not currently know where Bulatci is. As such surveillance is of little value. The offence of murder has already been committed. As such continued surveillance of Bulatci is not likely to provide any information relative to the murder of Constable Worden. Should the proposed Authorization be granted I believe the interception of private communications combined with surveillance is likely to assist in bringing this matter to a successful conclusion. I believe that the interception of Bulatci's private communications is likely to garner information relative to Emrah Bulatci's knowledge of and participation in the murder. It may also assist in identifying the location of the weapon used to murder Constable Worden.

. . .

Search Warrants

55. I and other investigators intend to obtain a warrant to search for the Ford Expedition bearing Alberta license plate *(number in original)* as well as the attached garage of the residence located at *(address in original)* St. Alberta, Alberta. Should the search warrant for this locations be granted, the search may reveal further evidence in relation to the murder of Constable Worden. I have no information to support the belief that this

search alone will provide information sufficient to prove beyond a reasonable doubt that Bulatci is that person responsible for the murder of Constable Worden.

Number Recorder Warrant

56. A Number Recorder Warrant was authorized in the Authorization granted pursuant to Section 188 of the *Criminal Code* on October 7, 2007. At the time of this writing no calls have been intercepted. A Number Recorder Warrant will only identify the incoming and outgoing telephone calls from any particular location. It will not identity the parties speaking nor will it determine the content of that communication.

57. At the time of this writing, I and other investigators are trying to determine what other telephones Bulatci may be using. Bulatci's associates are being interviewed towards that end. Should the proposed Authorization be granted and other devices that are being used by Bulatci to communicate with his associates, be identified those devices may be monitored.

Tracking Warrant

58. A Tracking warrant as well as a General warrant were authorized in the Authorization granted on October 7, 2007. These orders were sought to allow investigators to track any cellular telephone which Bulatci had in his possession. At the time of this writing, I and other investigators are trying to identify a telephone which Bulatci is using. Should this occur and the proposed Authorization be granted I believe a Tracking Warrant combined with the authority of a General warrant will allow investigators to determine the whereabouts of Bulatci.

59. These warrants or orders alone will not however provide that evidence in relation to the events which led up to the murder of Constable Worden nor will they alone provide information relative to the location of the murder weapon.

. . .

63. The investigative procedures that have been tried thus far have not determined conclusively: The events that led up to the murder of Constable Worden; the location of the murder weapon; and Bulatci's current whereabouts.

64. I believe that the conventional investigative techniques conducted to date, have carried the investigation as far as possible. I believe the Principal Known Person has information which is likely to assist the investigation into the murder of Constable Worden. I believe the interception of the private communications of the Principal Known Person is the only

> practical alternative to successfully conclude the investigation into the murder of Constable Worden.

[26] What this demonstrates is that, as of October 8, 2007, the police had a circumstantial case, with no accused, no motive, and no murder weapon. It also outlines the various investigative efforts made up to that point and the deficiencies in those efforts should they be continued without the additional aid of electronic interceptions. All this goes to show that other investigative procedures were unlikely to succeed. Cst. Lesage expressed his belief that the conventional techniques employed up to that point had carried the investigation as far as possible and that interception of private communications was the only practical alternative to conclude the investigation. There was no evidence to suggest otherwise.

[27] As in a case referred to by Crown counsel, *R*. v. *Blais* (2004), 182 C.C.C.(3d) 39 (Ont. C.A.), it is apparent here, when reviewing the information contained in Cst. Lesage's affidavit, that the investigation had come to a standstill. In these circumstances, electronic interception is not merely a useful tool but the only reasonable means by which the police could bring the investigation to a conclusion. There was "no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry" (as per *Araujo*). It was clearly open to the authorizing judge to conclude that investigative necessity had been established.

[28] Defence counsel, however, also argued that there was no explicit statement in the authorization that the requirement of s. 186(1)(b) had been met. In counsel's submission, the requirement to establish investigative necessity is so important that strict construction of the authorization is mandated.

[29] The authorization contains, in its preamble, the following:

> UPON BEING SATISFIED that the requirements of sections 186(1)(a), 184.2 and (b), 492.1, 492.2(1), 492.2(2), 487.01, 487.02 and 487.3 of the *Criminal Code* have been met;

[30] There is no reference to s. 186(1)(b). There is a reference, however, to section 186(1)(a) and then one to "section 184.2 and (b)". I think the only conclusion, as submitted by Crown counsel, is that there is a typographical error in the preamble in accidentally inserting "184.2" between "186(1)(a)" and "and (b)". There is no section "184.2(b)" in the *Criminal Code*. Plus, I am not convinced that

such an express statement, in the preamble or elsewhere, is necessary. The authorizing judge is presumed to know the law. Having issued the authorization it can be presumed that the authorizing judge was satisfied as to investigative necessity.

Investigative Necessity After Arrest:

[31] The defence concedes that the affidavit disclosed sufficient grounds to arrest the accused. Locating and arresting him was the primary focus of the request for the authorization. But, defence counsel argued, once the accused was arrested, the "circumstances of the particular criminal inquiry" changed. The continuing interceptions of private communications cannot, in counsel's submission, be justified by the desire to turn a strong case into a perfect one.

[32] Cst. Lesage, in his affidavit, speaks of the intention to continue interceptions of private communications after the accused's arrest. He says the police will "intercept the private communications of Bulatci while in custody" and that "should Bulatci be arrested undercover officers may be placed in cells with him". The objective of all this is stated to be "to gather evidence in support of a successful prosecution against Emrah Bulatci for the murder of Constable Worden". In Crown counsel's submission, the objective of obtaining admissible evidence is just as pressing after an arrest as before.

[33] The authorization of October 9, 2007, authorizing interceptions until December 6, 2007, does not contain any express term regarding post-arrest surveillance. This is so even though Cst. Lesage's affidavit contained the following:

> 83. Should an Authorization be granted, it is proposed that it contain the following terms:
>
> a. If any of the Principal Known Person(s), are arrested and incarcerated or arrested and released pending court proceedings during the time period for which an Authorization to intercept communications is in effect, then the communications subsequent to that arrest may continue to be intercepted;

[34] Defence counsel submits that in the absence of such a term one cannot assume that such surveillance was authorized.

[35] The question therefore is whether investigative necessity for electronic surveillance post-arrest was demonstrated; or, whether such surveillance expanded the scope of the authorization in such a way that a new authorization was required?

[36] Counsel are in agreement with the proposition, asserted in *R*. v. *Thompson*, [1990] 2 S.C.R. 1111 (at para. 128), that where the police seek to extend the scope of the surveillance, the proper course is to seek a fresh authorization. Crown counsel argued, however, that in this case the scope of the authorization had not changed. The known parties were the same and the intention to continue surveillance after arrest was clearly indicated in the information supplied to the authorizing judge. Therefore, that judge must have contemplated this event when the authorization was granted.

[37] Defence counsel referred me to the decision in *R*. v. *Heikel* (1990), 110 A.R. 161 (Q.B.), as an example where the arrest and detention of the accused was held to be such a significant change as to require a new authorization. There the court held that the continued interception of a person's private communications after that person's arrest is a *prima facie* violation of that person's s.7 *Charter* right to silence. Thus a new authorization is required so that the authorizing judge, when considering the request, can take the change in circumstances into account. Murray J. wrote in *Heikel* as follows (at paras. 44 and 49-50):

> To my mind, to allow the continued interception of private communications premised on facts that existed prior to the arrest or detention, without a complete review by the Court in the context of the individual's right to silence, is to deprive that person of his right to liberty and security of the person contrary to the principles of fundamental justice. Once Part IV.1 is complied with following detention or arrest, then those principles would be satisfied in the same way that an invasion of a person's right to privacy has been held to be reasonable in the context of s. 8 by the Court in *Duarte* …
>
> As with any court order which is ongoing, if the facts upon which the Part IV.1 authorization was granted change in a material way, then the Court that granted it must be apprised of that change so that it may re-evaluate whether or not, based on the facts now known, to give a new authorization would be in the best interests of the administration of justice. If the answer is "yes" then the authorizing judge must consider what, if any terms and conditions are now advisable in the public interest as contemplated by s. 178.13(2)(d).

> I cannot imagine a change of circumstance more material to the issues an authorizing judge must address than the fact that the object of the authorization has been arrested or detained which, as we have seen and discussed, has triggered his or her rights to silence guaranteed by s. 7 of the *Charter*.

[38] The reference to "s. 178.13(2)(d)" in the extract above is to what is now s. 186(4)(d) of the *Criminal Code* (requiring a judge to consider what terms or conditions would be advisable in an authorization).

[39] As Crown counsel noted, the decision in *Heikel* seems to stand on its own. I can find no case that has adopted its specific ruling that the arrest of the subject must result in a new application for an authorization. Furthermore, the case is distinguishable since in *Heikel* there was no intention or plan disclosed by the authorities to continue surveillance after the subject's arrest. In this case that was disclosed to the authorizing judge. It is instructive as well that in *Heikel*, with respect to a second authorization where the arrests were disclosed, Murray J. held that the authorizing judge "would have taken that into account" (at para. 59). The interceptions of those individuals whose earlier arrests were disclosed, made after the issuance of the second authorization, were not regarded by Murray J. as being tainted with the same problem.

[40] Crown counsel referred me to *R.* v. *Chrisanthopolous*, [2002] N.J. No. 262 (S.C.), as an example of a case demonstrating that a new authorization is not required automatically once the accused is arrested. There, a one-party consent authorization named the accused as a known target and stated his address as unknown. The authorization permitted interceptions at any "residence", whether permanent or temporary, of any of the persons named in it, and in particular the "residence" of the accused (a named target of the authorization). After issuance of the authorization the accused was arrested and detained in jail. The Crown sought to tender as evidence a recording of a conversation of the accused at the jail. The defence argued that a new authorization should have been obtained once the accused was arrested setting forth his address at the jail. The trial judge rejected this argument holding that the term "residence" was broad enough to include a jail, that being regarded as a "temporary residence" (at para. 17).

[41] Defence counsel here argued, in response, that there is a fundamental difference between surveillance in an in-custody situation and an out-of-custody situation. Once arrested the accused was in the complete control of first the police and then the correctional authorities. Since a higher level of intrusion is possible in a custodial situation then a higher level must be authorized. One cannot simply

assume that post-detention surveillance was considered by the authorizing judge since the authorization is silent on this point.

[42] Defence counsel acknowledges, however, that there is a lessened expectation of privacy in a jail or prison setting: see W*eatherall* v. *Canada*, [1993] 2 S.C.R. 872; *R*. v. *Major* (2004), 23 C.R. (6th) 294 (Ont. C.A.). And, in my opinion, the main thrust of the defence argument is more pertinent to the discussion following on the scope of the "resort to" clause in the authorization. The issue on this aspect of the application is whether investigative necessity was established so as to justify continued surveillance after the accused's arrest.

[43] As Crown counsel noted in his written submissions, it is not the role of a reviewing judge to assess investigative necessity as the investigation progresses after the authorization is issued. The role of the reviewing judge is to determine whether the authorizing judge could have concluded that investigative necessity existed based on the information provided. I agree. That information outlined what the objectives were over and beyond locating and arresting the accused. It also outlined the plan to continue surveillance after the accused's arrest. All of this would have been in the contemplation of the authorizing judge.

[44] Several cases have noted that the investigative necessity requirement is to be considered by the authorizing judge in the context of the investigation as a whole: *R*. v. *Tahirkheli* (1998), 130 C.C.C. (3d) 19 (Ont. C.A.); *R*. v. *Pham* (2002), 165 C.C.C. (3d) 97 (B.C.C.A.). These cases specifically address attempts to dissect investigative necessity "target by target" but I think the same reasoning applies to stages of an investigation. The nature and purpose of the particular investigation, judged as a whole, must inform the analysis of the investigative necessity test. As stated in *Araujo* (at para. 29):

> The words of the *Code* must be read with some common sense having regard both to the nature and purpose of the particular investigation which the police wish to undertake.

[45] When the investigation is looked at as a whole and the objectives and proposed steps are taken into account, I am satisfied that there was sufficient information for the authorizing judge to conclude that the investigative necessity requirement was met, for both the periods before and after the accused's arrest.

The “Resort To” Clause:

[46] The issue here is whether, notwithstanding the validity of the authorization, it can be said that it actually authorized the interception of the accused’s communications at the North Slave Correctional Centre. As previously noted, the authorization does not contain any express term respecting post-arrest surveillance.

[47] Crown counsel’s position is that the electronic surveillance of the accused at the North Slave Correctional Centre was authorized by the “resort to” clause contained in the authorization:

> 4. The communications of the persons in paragraph 3 may be intercepted at:
>
> . . .
>
> e. Any other place, stationary or mobile, that there are reasonable grounds to believe is being, or will be, resorted to, or used by, a person in paragraph 3(a).

[48] The terminology “resorts to” or “resorted to”, as used in this authorization, has been interpreted as meaning “go”, as in a place that a person goes to: *R*. v. *Leclerc* (1985), 20 C.C.C. (3d) 173 (B.C.C.A.), at p. 178. The words “used by” in the clause have been interpreted as meaning “to act or serve for a purpose, to bring into service and to avail oneself”: *R*. v. *Mojtahedpour* (2002), 171 C.C.C. (3d) 428 (B.C.C.A.).

[49] The accused’s argument on this aspect of his application is that the authorization did not expressly identify any prison or custodial institution, much less the North Slave Correctional Centre, as a place at which the known targets may be intercepted. And, the “resort to” clause cannot be relied upon to authorize the recording of his conversations in prison since he has not “resorted to” the place but rather has been confined therein by the authorities. Defence counsel referred me to two authorities as examples of situations where a “resort to” clause was ineffective in validating an interception at a place not authorized.

[50] In *Mojtahedpour* (*supra*), the accused attended voluntarily at a police station. After being interviewed he was told his parents were coming to speak to him. The accused was detained at the time. The police directed the accused and the parents to a room set up with recording equipment. There was an authorization which named the accused and his parents and contained a “resort to” clause. The court concluded that the intercepted communications were beyond the parameters

of the authorization. The accused had been “placed” in the room so it could not be said that the room was a place “resorted to” or “used by” the targets.

[51] In *R*. v. *Papadopoulos*, 2006 CarswellOnt 8712 (S.C.J.), the authorization specified the place of interception (a cell block in a detention centre). The authorization also contained a “resort to” clause. The police decided to move the interception operation from the detention centre to a cell at police headquarters. The court held that the interception was beyond the authorization since it specified the place of interception. The police could not change the designated place without prior judicial authorization. The court also held that the “resort to” clause could not be relied on since the accused was in custody and was directed to go to a place that was not covered by the authorization.

[52] Defence counsel also referred to *R*. v. *Moore* (1993), 81 C.C.C. (3d) 161 (B.C.C.A.), as authority for the proposition that once a location has been identified as being “resorted to” by an accused, there is an obligation on the part of the police to obtain a fresh authorization naming that location. With respect, I do not think *Moore* says that.

[53] In *Moore*, the police obtained an authorization with a “resort to” clause. Relying on that clause the police installed an interception at specific commercial premises. Prior to the expiration of the authorization three telephone conversations were intercepted. Subsequently the police applied for another authorization. The police, however, did not disclose in the new application the location of the commercial premises, the fact that they installed a listening device there or that interceptions had been made there. The court held that, as a result, any interceptions obtained at that location under the authority of the second authorization were not authorized and hence unlawful. The police could not rely on the “resort to” clause since that specific location was a known, but undisclosed, location. The interceptions made in reliance on the “resort to” clause in the first authorization, however, were lawful.

[54] What I take from *Moore*, therefore, is that the police have an obligation to disclose the results of their investigation to date when seeking a fresh authorization. And if a specific location is to be targeted, that should be disclosed. This is so the authorizing judge can put her or his mind to what conditions may be appropriate in the circumstances. But there is no obligation to seek a new authorization just because a specific location is identified as one being resorted to or used by the named individuals during the currency of the authorization. In other

words, if the police know of a specific location when they apply for the authorization then that should be specifically identified. If it is not identified, then the police may be precluded from relying on the "resort to" clause.

[55] So I do not accept the argument that the police should have obtained a fresh authorization once the accused was placed at the North Slave Correctional Centre. But that does not resolve defence counsel's argument that someone in custody, who is under the control of the authorities, cannot be said to "resort to" or "use" the place where he is kept.

[56] Crown counsel argues that the focus in an authorization is on the individuals named in it, not necessarily the "place" (as in a search warrant). Section 185(1)(e) of the *Criminal Code* requires an applicant for an authorization to give "a general description of the nature and location of the place, *if known*, at which private communications are proposed to be intercepted". Accordingly, Crown counsel says, there was no need to specifically name the Correctional Centre (especially since at the time the accused had not even been arrested and the police did not know where he would be kept once he was arrested). The *Criminal Code* envisages interceptions at places unknown at the time of the authorization. Therefore the use of "resort to" clauses, limited to named persons, is acceptable: see *Thompson* (*supra*), at paras. 92 – 95.

[57] Crown counsel also distinguishes the *Mojtahedpour* and *Papadopoulos* decisions. The Crown does not necessarily take issue with the result in those cases, being premised as they are on the argument that a "resort to" clause cannot encompass a place where an in-custody accused is directed or forced to go by the police. Crown counsel does, however, draw a distinction in the fact that it was the accused and two other individuals named in the authorization (his father and his girlfriend) who decided to meet. No one in the police planned such a meeting or manipulated the situation. Because of that voluntary decision, and because of the fact that the accused is in custody, the meeting had to take place at the correctional centre. In that sense the Correctional Centre was "resorted to" or "used by" these individuals. Once the parties chose to meet, the police were entitled to implement the authorization they already had to record the conversations.

[58] I agree with these observations. In both *Mojtahedpour* and *Papadopoulos*, the police manipulated the situation so as to put the accused in a place where his conversations can be recorded. No such actions were taken here. It was only when the police learned that the accused was going to meet with these other individuals

that they took steps to implement the authorization they had already obtained and which was still in effect. The evidence before me was that the arrangements for the family visit were made by the correctional officials, after a request from the accused's father, and without the involvement of the police.

[59] In *Thompson* (*supra*), Sopinka J. wrote as follows, in reference to "resort to" clauses within the context of the broader principle that the constitutional protection found in s.8 of the *Charter* protects people, not places (at para. 111):

> . . . From the perspective of the rights of a person who is a target of the authorization, if it is reasonable to intercept the communication of a person at a specified address, it seems equally reasonable to intercept that person's communication at another place to which he resorts. Subject to what will be said about residences and pay telephones, the nature of the invasion of *that person's* privacy does not change with that person's location. It is the issuing judge's function to determine whether there are grounds sufficient to justify *this* invasion. If the judge is so satisfied, it is no invalid shirking or delegation of his or her function to permit the police to conduct this surveillance at places for which there is sufficient evidence to believe the target resorts to.

[60] In this case the authorizing judge was satisfied that the interception of these individuals' private communications was justified. The authorizing judge was aware of the police plan to continue electronic surveillance after the accused's arrest. While it would certainly have been preferable to have included in the authorization the specific term contemplated by paragraph 83(a) of Cst. Lesage's affidavit (reproduced above), its omission does not derogate from the scope of the "resort to" clause. The fact that the accused was in jail does not, in the particular circumstances of this case, negate the police's ability to rely on the clause for the interception of the conversations at the correctional centre. The accused and these other named individuals wanted to meet and they "resorted to", or "used", the visitation facilities at the correctional centre to do so. No one forced them to meet. It was their decision. As long as the authorization is valid, which I find it is, there is no basis to exclude this evidence. In my opinion, the intercepted communications at the North Slave Correctional Centre come within the terms of the authorization.

<u>Conclusions Respecting the Authorization</u>:

[61] For the foregoing reasons, I dismiss the accused's application to exclude from evidence the private communications intercepted as a result of the authorization of October 9, 2007.

[62] In the event that I am mistaken as to the validity of the authorization, or the lawfulness of the correctional centre interceptions, I want to make a few comments regarding s. 24(2) of the *Charter* and whether the admission of this evidence would bring the administration of justice into disrepute. This requires a consideration of three factors: trial fairness, the seriousness of the breach, and the effect of the admission of the evidence. An unauthorized interception would be a breach of the accused's rights under s. 8 of the *Charter*.

[63] Wiretap evidence has generally been considered to be non-conscriptive evidence: *R*. v. W*ijesinha*, [1995] 3 S.C.R. 422; *R*. v. *Pope* (1998), 129 C.C.C. (3d) 59 (Alta. C.A.); *R*. v. *Mooring* (2003), 174 C.C.C. (3d) 51 (B.C.C.A.). The accused was not compelled to speak because of the *Charter* breach. Admission of this evidence would not affect the fairness of the trial.

[64] The seriousness of the breach has to be examined from differing perspectives. As already noted, there is a reduced expectation of privacy in a custodial setting. This has an impact on the assessment of the seriousness of the breach: *R*. v. *Belnavis*, [1997] 3 S.C.R. 341 (S.C.C.). Another consideration is whether the breach was deliberate or flagrant, or whether it was inadvertent or committed in good faith. Here, the police acted on the basis of an authorization apparently valid on its face. I do not ignore the fact that there were a great many interceptions. But the overall context mitigates, in my opinion, the seriousness of the breach.

[65] Finally, in considering the impact of the admission of this evidence on the repute of the administration of justice, I take into account that the charge in this case is the most serious in our criminal law. The intercepted communications provide evidence as to the accused's involvement in the crime. Otherwise, the Crown's case is a circumstantial one relying to a great extent on unreliable witnesses. In my opinion, the harm in the eyes of the public in admitting this evidence would be outweighed by that in excluding it.

[66] For these reasons, even if I had found that the evidence was not lawfully obtained, I would nevertheless have admitted it.

[67] I should note that, in the brief filed in support of the accused's application, defence counsel wrote that "it is not conceded . . . that all of the communications the Crown seeks to introduce are relevant or admissible under the ordinary rules of evidence". This was not argued at the hearing before me so I have not addressed

it. Issues as to the relevance of any specific item of evidence, or its admissibility in the context of probative value and prejudicial effect, can be addressed at trial.

Conversations with Undercover Officer:

[68] At the outset I should note that on March 11, 2009, I issued a ban on the publication of the identity of the undercover officer or any information that may tend to identify him. I will simply refer to him as "the operative".

[69] As previously noted, after his arrest the accused was placed into a cell at the Sherwood Park R.C.M.P. detachment. In the cell with him, for a period of some 26 hours, was the operative posing as someone who had just been arrested. The issue here is the admissibility of statements made by the accused to the operative. The defence argues that the statements are inadmissible because they were actively elicited by the operative and thus violated the accused's right to silence under s. 7 of the *Charter*.

[70] For purposes of this *voir dire*, certain facts were conceded by the defence. For this I am grateful since these concessions significantly reduced the time needed to examine this issue.

[71] The accused was apprehended at 4:46 p.m. on October 12, 2007, at a residence in Edmonton, by members of the Edmonton police tactical squad. The defence conceded that nothing arises from the officers' conduct or the arrest that affects the issue of voluntariness. The accused was immediately turned over to a paramedic since he suffered some injuries prior to the arrest. These injuries were not connected in any way to the conduct of the police.

[72] At 5:15 p.m., Cpl. Rechner of the R.C.M.P. formally arrested the accused for the murder of Cst. Worden and advised him as to his right to call a lawyer and to remain silent. The accused indicated that he wanted to call his lawyer. He was then taken by ambulance to a hospital where he was examined by a doctor and nurses and given some pain medication. He was discharged into the custody of the R.C.M.P. at 7:30 p.m. The defence conceded that the conduct of the paramedic or the hospital staff did not affect the voluntariness of anything said by the accused.

[73] The accused was then taken in a police vehicle to the R.C.M.P. detachment. He was booked in by a jail guard who also had subsequent dealings with him later in the evening, delivering food and providing other amenities. The defence

confirmed that there was no need to hear from the guard. The accused was placed in the cell at 7:36 p.m.

[74] The operative was already in the cell when the accused was placed in it. The two remained as cell mates until approximately 10:30 p.m. on October 13, 2007.

[75] The particular cell has a camera which is plainly visible built into the wall at a corner of the ceiling. The interaction between the accused and the operative was recorded by the camera and audio recorded. Transcripts of the recorded conversations were prepared. The Crown does not intend to tender at trial the recording of the conversations but, instead, wants to call the undercover officer to give *viva voce* evidence regarding his conversations with the accused. This is so notwithstanding that there was, at the time, the authorization issued on October 9, 2007, which was still in effect.

[76] In *R.* v. *Fliss*, [2002] 1 S.C.R. 535, the Supreme Court confronted a similar situation. There a conversation between the accused and an undercover officer was recorded pursuant to an authorization. The trial judge, however, excluded the recordings ruling that the authorization was deficient. The officer, however, was permitted to testify as to the content of the conversation. The Supreme Court held, on this point, that the officer could testify as to the conversation since he had a present recollection of it. Furthermore the officer could refresh his memory by any means including a transcript of the inadmissible recording. Writing for the majority (and on these points the entire court agreed), Sopinka J. said (at paras. 43 and 45):

> There is no doubt that the jury was entitled to hear from the undercover police officer about his conversation with the appellant on January 29, 1997. The officer had at the time a present recollection of the "gist" of all of the important elements of the conversation.
>
> . . .
>
> There is also no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection – not the tape – would be admissible.

[77] The problem in *Fliss* was that there were portions of the conversation that the officer could not recall, whether aided or not. He was allowed by the trial judge then to read into the record verbatim the transcript of the entire conversation (a transcript based on the previously-ruled inadmissible recording). This the Supreme Court said was an error.

[78] That problem does not arise in this case. The operative testified from his recollection. He acknowledged, however, that prior to testifying he refreshed his memory. Shortly after the cell interaction the operative reviewed a transcript of the conversations as well as the audio recording. He also made notes at the conclusion of the operation which he also used to refresh his memory. The operative testified before me that he had his own independent memory of the facts he was testifying about but on occasion he needed, and was allowed to, refresh his memory from the transcript. The transcript itself was an exhibit on the *voir dire* as an aid (since it was used by the defence for cross-examination purposes and the operative confirmed its accuracy).

[79] The operative testified that, when the accused was brought into the cell, the accused and the operative greeted each other and shook hands. The accused then looked at himself in the mirror, checking some bruises on his body, and the two of them spoke almost simultaneously. The accused asked the operative what he was "in for" while the operative asked him, "What happened?" The accused then sat down on his bunk. The operative testified as to what happened next:

> A At the same time he asked me what I was in for and I asked him what happened, and he said – kind of leaned up on a corner, on the edge of his bunk, and looked down and he said that's what happens when you shoot a cop like that. He looked down at the ground, shoulders shrugged over like he had just appeared defeated with the weight of the world on him. He looked down at the ground, he said that, and I said what do you mean?
>
> And he got up and began pacing around. He was again looking at his bruises and showing me his bruises, and he says he's charged with shooting a cop. I said holy fuck, that's pretty heavy. Then he's still standing in front of me, he said sarcastically and laughed "so they say," and looked down to the ground again. At that point he sits back down on his bunk and he's looking at his bruises again, and I asked him what it was all about, referring to the bruises. He said well, they say I shot the cop, and gestured with his hands, quotation mark, shot the cop.

[80] In reference to the initial question he posed to the accused ("What happened?"), the operative testified that he was referring to the bruises on the accused's body.

[81] This initial exchange, as recorded in the transcript, is as follows:

Bulatci: (Talk over) What you in here for?

Operative: (Talk over) *What happened, man?*

Bulatci: He stands to take a shit probably.

(Chuckles)

Operative: (Unintelligible).

(19:36:18)

Bulatci: That's what happens when you shoot a cop like that.

Operative: *What do you mean?*

Bulatci: I'm charged with shooting a cop, dog.

Operative: Fuck off.

Bulatci: You don't watch the news?

Operative: What do you – oh, that fuckin' Alaska or whatever the …

Bulatci: Yeah. Hay River.

Operative: Holy fuck man. No kidding. Ah nice. Holy fuck.

Bulatci: So they say.

(Chuckles)

Operative: Holy fuck you – that's fuckin' heavy.

Bulatci: Ah fuck.

(Clatter)

Bulatci: What are you in here for?

Operative: Ah fuckin' bulllshit fuckin' warrant from Calgary.

Bulatci: From Calgary?

Operative: Yeah. Where are you from?

Bulatci: Fuck man. Edmonton bro.

Operative: *Yeah? So what the fuck was it all about?*

Bulatci: Well, they say that I fuckin' shot the cop (unintelligible). So I'm here you know.

Operative: Yeah. No kiddin'.

Bulatci: I guess it's guilty till proven innocent right?

[Emphasis added]

[82] I refer to the transcript, not only because it was entered as an aid on the *voir dire*, but because of the stress the defence put on the emphasized portions as being indicative of elicitation. The defence says that it was the operative who was directing the accused and questioning him. I keep in mind, however, that it is the operative's *viva voce* evidence the Crown seeks to adduce at trial, not the transcript. The *viva voce* evidence, however, tracks what is recorded in the transcript by and large (as can be seen by comparing the above extracts from the testimony and the transcript).

[83] Other pertinent excerpts from the transcript also reflect questions posed by the operative:

> Operative: *What the fuck's the fiberglass from?*
>
> Bulatci: Fuckin' insulation in this house.
>
> Operative: Fuckin' shits. Itches, man.
>
> Bulatci: I know man.
>
> Operative: Fuck, man. *Fuckin' when did all that happen?*
>
> Bulatci: Huh?
>
> Operative: When did all that happen?
>
> Bulatci: This shit?
>
> Operative: Yeah
>
> Bulatci: (Sighs) a couple days ago. (Unintelligible).
>
> . . .
>
> Operative: *You've been up in the Territories working or what?*
>
> Bulatci: Huh?
>
> Operative: *What were you doin' up in the Territories?*
>
> Bulatci: Shit selling crack. (Laughter)
>
> Operative: Good business up there or what?
>
> Bulatci: Fuck a hundred and twenty dollars for twenty piece.
>
> . . .
>
> Operative: Goin' good though.
>
> Bulatci: Oh yes. All this fuckin' stupid bullshit happened. (Unintelligible) a cop and they got the fuckin' evidence.
>
> Operative: *Well what fuck's the deal? What are they sayin' what the fuck.*
>
> Bulatci: I wanted up there eh?

> Operative: Yeah?
>
> Bulatci: I wanted fuckin' somebody said that fuckin' probably I did it you know? And then they just fuckin' went on it. You know? They got, they charged me (unintelligible) after they, until the trial comes up you know? I got two years till the trial probably comes so I fuckin' (unintelligible) right?
>
> [Emphasis added]

[84] The defence contends that what these exchanges demonstrate is that the operative was not engaged in passive listening. This was, in defence counsel's submission, active elicitation of information by the operative in a situation where the accused is detained and has exercised his right to silence.

[85] The accused had earlier expressed his desire to speak to his lawyer. He was given an opportunity to do so by telephone prior to being placed in the cell with the operative. It was not until 11:17 p.m., however, that the accused met face-to-face with his lawyer. I am satisfied from the evidence I heard that the delay in arranging the meeting was due to the lawyer's schedule, not to anything done by the police. The defence did not suggest otherwise.

[86] The question of elicitation directly implicates the accused's right to silence. The governing jurisprudence on this point was set out in two decisions of the Supreme Court of Canada: *R*. v. *Hebert*, [1990] 2 S.C.R. 151; and *R*. v. *Broyles*, [1991] 3 S.C.R. 595.

[87] The essence of the right to silence is that the accused be given the freedom to choose whether to speak to the authorities. If a detained person speaks to someone by his or her own choice, they must be taken to have accepted the risk that the recipient may inform the police. For this reason, there is no *Charter* violation where the police resort to subterfuge, by the use of an undercover officer for example, so long as the officer does not actively elicit statements from the accused.

[88] The test to be applied is whether there is a causal link between the conduct of the undercover officer and the making of the statement. This was explained in *Broyles* where two primary factors to assist in making this assessment were set out (at p. 611 per Iacobucci J.):

> In my view, it is difficult to give a short and precise meaning of elicitation but rather one should look to a series of factors to decide the issue. These factors test

> the relationship between the state agent, and the accused so as to answer this question: considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused? For convenience, I arrange these factors into two groups. This list of factors is not exhaustive, nor will the answer to any one question necessarily be dispositive.
>
> The first set of factors concerns the nature of the exchange between the accused and the state agent. Did the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done? *The focus should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation.*
>
> The second set of factors concerns the nature of the relationship between the state agent and the accused. Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?
>
> [Emphasis added]

[89] It is the first set of factors ("the nature of the exchange") that are critical in this case. There is no evidence of any special relationship between the operative and the accused so as to bring the second set of factors into play.

[90] The first set of factors was explained as follows by Professors Paciocco and Steusser in their text, *The Law of Evidence* (5th ed., 2008), at p. 338-339:

> The first set of useful factors relates to the nature of the exchange, and asks whether the exchange that produced the incriminating statements was akin to an interrogation. If so, the *Hebert* rule has been offended. An exchange does not have to involve overbearing or oppressive questioning to become akin to an interrogation. It can become akin to an interrogation where the undercover state agent engages in a form of conversation that has the effect of provoking admissions and where that form of conversation is not one that would ordinarily be engaged in by someone in the role the undercover state agent is playing. If, on the other hand, the undercover state agent simply permits a conversation to develop naturally, in the fashion that someone in the role he is playing would converse, then any admissions that are made by the detainee will simply be the product of the detainee's voluntary choice to speak. In short, if the undercover agent goes outside of his assumed role, he may have begun to actively elicit statements, thereby offending the rule.

[91] It is readily apparent that the application of the law in this area is fact-driven. This can be illustrated by the subsequent case of *R*. v. *Liew*, [1999] 3 S.C.R. 227, where no causal link was found even though the undercover officer posed questions and moved the conversation to more incriminating subjects while posing as a drug dealer arrested in the same transaction as the accused.

[92] In *Liew*, the accused was arrested in connection with a cocaine transaction. At the scene, he witnessed another person ("Jones") also being arrested. Jones was an undercover officer. They were placed in the same cell. The accused initiated a conversation that proceeded as follows (from *Liew* at para. 2):

> Appellant: That Lee is hot.
>
> Jones: What?
>
> Appellant: That Lee is hot.
>
> Jones: Fuck.
>
> Appellant: Did you pass the money?
>
> Jones: Fuck. The cops got it.
>
> Appellant: How much?
>
> Jones: $48,000.00
>
> Appellant: Ah, fuck.
>
> Jones: *What happened?*
>
> Appellant: *[T]he cops watching us.*
>
> Jones: *Yeah. They got my fingerprints on the dope.*
>
> Appellant: *Lee and me too.*
>
> Jones: Why the fuck didn't you give it to me out of the black car? Why did you drive away?
>
> Appellant: That the other guy. That not my dope. I just give it to Lee and drop him off. We very careful.
>
> Jones: The cops must have been following you guys.
>
> Appellant: No we were very careful but Lee very hot.
>
> [Emphasis in original]

[93] At the Supreme Court, Lamer C.J.C., in dissent, would have excluded the four lines emphasized above. In his view, at that point, the officer took over the conversation and directed it so as to elicit an admission. The majority, however, held that the undercover officer was merely conducting his part as someone in the role. The reference to fingerprints in the disputed portion "simply alluded the

concerns that Jones would naturally have regarding the arrest" (per Major J. at para. 49). The statement was held to be in keeping with his role. His introduction of the subject did not change the voluntary nature of the accused's responses.

[94] Before addressing the conversation in this case, I wish to comment on one further point raised in the jurisprudence.

[95] In both *Hebert* and *Broyles*, the Supreme Court commented that evidence of the instructions given to the undercover officer, particularly evidence that the officer was instructed not to initiate things or ask leading questions, may be important in the assessment of this issue. In this case, the operative testified that as part of his training and experience he was aware that he cannot actively elicit information or interrogate the target. And, when he was given his instructions regarding this operation, he was aware of those limitations.

[96] In my opinion, the conversation between the operative and the accused was the natural conversation between two cell mates. The operative acted and spoke in a manner that would be expected of someone in the role that he was playing. He allowed the conversation to flow naturally. The questions he posed were ones that anyone would pose in response to what the accused was doing and saying.

[97] The initial question by the operative ("What happened?") was prompted by the bruises on the accused. The accused was checking himself out and looking at his bruises. It would have been unnatural for someone watching this to not ask "What happened?".

[98] The operative was not required to be a mere "listening post" (see *Liew* at para. 58). He could, and did, play a normal conversational role. I find nothing in the exchanges in question that would be akin to an interrogation. This can be seen by comparing these exchanges with cases where active elicitation was found.

[99] In *Broyles* itself, a friend of the accused, acting as a police agent, visited the accused while in custody and questioned him about the crime. He was effectively instructed to elicit information and the resulting conversation was held by the Court to be the functional equivalent of an interrogation. In *R.* v. *Van Osselaer*, [2002] B.C.J. No. 1652 (S.C.), the trial judge found that the undercover officer directed the conversation toward the accused's involvement in the crime using interrogation techniques.

[100] I do not find any of these attributes in the present case. It was the accused who first mentioned “shooting a cop”. The conversation flowed naturally after that. Any information provided by the accused was done so voluntarily and not actively elicited by the operative.

[101] For these reasons, the evidence of the operative is admissible. The accused’s application is dismissed.

[102] I will note that if I had found that the statements made by the accused had been the result of active elicitation, resulting in a breach of his right to silence, I would have excluded the evidence under s. 24(2) of the *Charter*. Such evidence is conscriptive and therefore its admission would generally render a trial unfair: *R*. v. *Stillman*, [1997] 1 S.C.R. 607. Such a finding usually leads to exclusion.

Statement to Correctional Officers:

[103] The final issue I have to address is the Crown’s request for a ruling as to the admissibility of a statement made by the accused to correctional officers at the North Slave Correctional Centre on September 19, 2008. The defence concedes voluntariness. The issues are relevance, or more accurately the accuracy or meaning of what was said, and whether its probative value is so tenuous as to be outweighed by its prejudicial effect.

[104] The accused had been admitted to the correctional centre on October 17, 2007. He was kept in what was known as the “administrative segregation” unit meant for high security inmates. On September 19, 2008, two correctional officers were on duty, Brent Horn and Sven Grafen. They testified as to a conversation with the accused at approximately 7:15 a.m. that morning.

[105] The three of them were engaged in small talk in the kitchen area of the unit. At one point the accused asked where was another officer. Horn told him that he was in the Yukon hunting. At that point the accused said, according to Horn, “I shoot something and I go to jail.” According to Grafen, the accused said, “That’s funny. I shoot I go to jail.” In a later e-mail to his supervisor recounting the conversation, Grafen had the accused saying, “I shoot something and go to jail.”

[106] At the moment it was said, Grafen attached no significance to it. Horn, on the other hand, testified that he took it as a threat. He immediately informed his supervisors about the comment.

[107] While there is some slight variation in the accounts offered by the two witnesses as to exactly what the accused said, they are similar enough for me to say that what was said is not an issue. The issues are the meaning to ascribe to what was said and whether admitting this evidence would be so prejudicial as to outweigh any probative value it may have.

[108] The Crown asserts that the statement is capable of a meaning and has relevance. It is, in Crown counsel's submission, an admission from which can be drawn an inference of guilt. This is a complete statement and there is a context to it, specifically, the fact that the accused is in jail on a charge of shooting a police officer. The weight to be given to this evidence, what probative value can be given to it, is for the jury to decide at the trial, according to Crown counsel.

[109] The defence argues that the context is ambiguous and the meaning to be ascribed to the statement is speculative. There was evidence that the accused was already subject to two 10-year firearm prohibition orders. Could the references to "shooting" and "going to jail" have been made in the context of those prohibition orders? Defence counsel also submits that the statement is not on its face an admission of past conduct ("I shoot something …"). It is a statement of present or future intent.

[110] In my opinion, the meaning of the statement is so speculative that it should be excluded because its prejudicial effect outweighs its probative value: *R.* v. *Ferris*, [1994] 3 S.C.R. 756; *R.* v. *Hunter* (2001), 155 C.C.C. (3d) 225 (Ont. C.A.).

[111] The probative value of any evidence is the degree to which the evidence would prove a fact in issue. I agree that the words uttered by the accused are capable of being taken as an admission. But that would require speculation on the part of the jury. There is no direct reference to the shooting of Cst. Worden. We know that there is an alternative context, i.e., the firearm prohibition orders. And the fact that the guards themselves had different reactions to the utterance (Grafen thinking nothing of it while Horn took it as a threat – not an admission) suggests to me that the risk of speculation by a jury is high, thereby adding to the prejudicial effect of this evidence should it be admitted.

[112] For these reasons, the statement of September 19, 2008, is inadmissible.

<u>Conclusions</u>:

[113] To summarize:

1. The authorization to intercept communications is valid, both before and after the accused's arrest. The interceptions as a result of the authorization are generally admissible subject to arguments respecting relevance and/or prejudicial effect respecting specific items.

2. The intercepted communications at the North Slave Correctional Centre (identified as the two "open visits") are admissible.

3. The evidence as to the conversations with the undercover officer in the R.C.M.P. cell is admissible.

4. The evidence as to the statement made to correctional officers on September 19, 2008, is inadmissible.

[114] I thank all counsel for their helpful submissions

J.Z. Vertes
J.S.C.

Dated this 4th day of June, 2009.

Counsel for the Applicant (Accused): L.K. Stevens, Q.C. and D. Rideout.

Counsel for the Respondent (Crown): J.D. Cliffe, C. Greenwood and J. MacFarlane.

S-1-CR-2008 000 056

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Respondent

- and -

EMRAH BULATCI

Applicant

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES