IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Cater 2012 NSPC 15

Date: March 5, 2012

Docket: 1997518 to

1997550; 2035773 to 2035784

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Kyle Cater

DECISION ON THE ADMISSIBILITY OF THE COMMUNICATIONS ON THE PART VI AUTHORIZED INTERCEPTS

JUDGE:	The Honourable Anne S. Derrick
HEARD:	March 1, 2012
DECISION:	March 5, 2012
CHARGES:	Sections 86(1) x3; 88(1) x3; 95(1) x 2; 92(1) x 2; 92(2) x 1; 100(2) x 6; 99(2) x 6; of the *Criminal Code*
COUNSEL:	Richard Hartlen and Marian Fortune-Stone, for the Crown
DEFENCE:	Elizabeth Cooper, for Kyle Cater

By the Court:

[1] Kyle Cater is charged with various weapons possession and weapons trafficking charges. On November 22, 2011 I ruled on the validity of the authorization obtained to intercept Mr. Cater's private communications. (*R. v. Cater, [2011] N.S.J. No. 626*) I concluded that the intercepts were admissible evidence at Mr. Cater's trial:

> **41** The Affidavit provides an ample basis on which the authorizing justice could have concluded that there were reasonable and probable grounds to believe that Kyle Cater was engaged in drug trafficking activities with or on behalf of other named targets and other individuals and that the interceptions being sought may assist in the investigation of these activities. Mr. Cater's section 8 *Charter* rights were not violated by the granting of the authorization and the evidence obtained as a result of the authorization is not excluded from Mr. Cater's trial.

[2] Ms. Cooper on Mr. Cater's behalf has challenged the admissibility of the statements made in the intercepted communications. This issue was first raised at a case management/pre-trial conference in January and although I had understood her objection to be directed to the statements on the intercepts of third parties, she clarified her position at the end of the trial to indicate that she views all the statements made on the intercepts as inadmissible hearsay, including those of Kyle Cater, should I find that he was the speaker in any of the conversations. Paradoxically, in oral submissions Ms. Cooper urged me to admit an intercepted conversation between third parties on the basis that it is exculpatory of her client. This is even though this intercept is no different from the other intercepts: a declarant could have been subpoenaed by the Crown and the language is coded, guarded and/or slang. In Ms. Cooper's submission, all the intercepted conversations are hearsay and fatally flawed but for this one, which I should admit despite it being indistinguishable from the others.

Procedure

[3] In light of the Defence stance on the admissibility of the intercepted communications, Ms. Fortune-Stone laid out the grounds upon which the Crown is relying for the admission of the conversations captured by the

intercepts. In the Crown's submission the intercepted communications, insofar as any or all of them are hearsay, can be admitted, in the case of statements made by Kyle Cater, as admissions, an established exception to the hearsay rule, and/or on the basis of the principled analysis. The Crown noted that before I grapple with the question of whether the intercepts are admissible on any basis, I must first determine, on a balance of probabilities the issue of voice identification. Voice identification continues to be a contested issue in this trial. Kyle Cater does not concede that it is his voice captured on the interceptions.

[4] The requirement that I decide voice identification as a threshold issue emerges from the Supreme Court of Canada's judgment in *R. v. Evans, [1993] S.C.J. No. 115* where Sopinka, J. held for the five person majority that the assertions in statements being challenged as hearsay cannot be accepted for their truth until there has been a preliminary determination of authenticity, that is, that the statements are those of the accused. *(paragraph 30*)

[5] The standard of proof to be applied in determining this preliminary question is proof on a balance of probabilities. Noting that in *R. v. Carter, [1982] S.C.J. No. 47* the Court had affirmed that preliminary questions of fact may be decided on a balance of probabilities, Sopinka, J. in *Evans* held:

> **31**…The determination of a preliminary question of fact in respect of both authenticity and admissibility is a prelude to access to the contents of the statement as proof of the truth thereof. If the standard of proof on a balance of probabilities is appropriate to determine a preliminary question of admissibility, there is no reason to exact a higher standard due to the mere fact that the determination is shifted to the fact-finding stage of the trial…
>
> **32** …If there is some evidence to permit the issue to be submitted to the trier of fact, the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or

> guilt. While the contents of the statement may only be considered for the limited purpose to which I have referred above in the first stage, in the second stage the contents are evidence of the truth of the assertions contained therein.

[6] Plainly there is "some evidence" in this case to permit the issue of admissibility to be determined by me and I therefore must make a balance of probabilities finding in relation to voice identification. I note that, if I admit any of the intercepted communications into evidence, voice identification must still be proven by the Crown beyond a reasonable doubt at the conclusion of the case. Please note that, without any disrespect to the parties, on occasion I will be referring in these reasons to Kyle Cater as Kyle and Paul Cater as Paul so as to avoid any confusion.

Voice Identification

[7] The Crown tendered 60 Part VI intercepts in total for voice identification purposes and a 911 call from December 26, 2008. 57 intercepts are found in Exhibit 4, and only two of these intercepts do not involve the speaker whom the Crown claims is Kyle Cater: Intercept #6 (session #869) is a conversation that the evidence indicates was between D.S and A.M. (I also note that Intercept #8 (session #2589) is a text.) Therefore of the substantive intercepts in Exhibit 4, there are 55 intercepts that involve a speaker who has been identified as Kyle Cater. In addition the Crown tendered three intercepts for voice identification purposes only. This means I have listened to 58 intercepts that are said to contain Kyle Cater's voice.

[8] Det/Cst. Pepler, the lead investigator for Operation Intrude, has had considerable exposure to Kyle Cater's voice, a voice he identified on the 58 intercepts I just mentioned – the 55 in Exhibit 4 and the three additional voice id intercepts. He testified that he personally listened to the 64,000 intercepts captured pursuant to the Part VI authorization of which approximately 5000 intercepts involved a speaker that Det/Cst. Pepler identified as Kyle Cater. He has listened to each of the 56 intercepts - the Exhibit 4 intercepts - selected for the Crown's case, approximately a dozen times. In a number of these calls, a speaker either identifies himself or is identified during the call as Kyle, Ky, Peanut or Cater. There is also the 911 call from December 2008 in which the speaker identifies himself as Kyle

Cater living at an address on the Purcell's Cove Road. Mr. Cater's mother, Barbara Chase, confirmed in her testimony that the call had been placed by Kyle: she identified his voice and indicated she had been standing next to him when he made it. The Purcell's Cove Road address was where she lived with Kyle at the time.

[9] Det/Cst. Pepler's exposure to Kyle Cater's voice has also been direct and personal. He spent an hour with Mr. Cater following his arrest on the weapons trafficking charges on April 29, 2009. He and Mr. Cater spoke during a traffic stop in 2008. He first met Kyle and his family when Kyle was eleven years old.

[10] Det/Cst. Pepler testified that, in addition to becoming familiar with Kyle Cater's voice, features of the actual intercepts satisfied him that he was listening to him speaking. These features included commonly repeated phrases and context.

[11] Det/Cst. Pepler testified to being sufficiently familiar with the voices of other individuals captured on the intercepts to confidently identify the speakers. Individuals such as Shawn Shea and Jeremy LeBlanc were targets of Operation Intrude and featured in thousands of calls. They would, on occasion, identify themselves or be identified in the calls. Det/Cst. Pepler also got to know some of the idiomatic turns of phrase and expressions employed by various speakers. In the cases of Mr. Shea and Mr. LeBlanc, Det/Cst. Pepler also had had direct personal voice exposure through arrests, service of documents, and appearances in court. In Jeremy LeBlanc's case, Det/Cst. Pepler listened to a six hour police interview.

[12] Other voices Det/Cst. Pepler became familiar with were those of Paul Cater, L.S., Matthew Cater, and J.M. In Paul Cater's case, Det/Cst. Pepler had spoken with him at court several times. He listened to approximately 200 intercepts involving Paul Cater. The phone numbers used by Paul Cater were registered in Kyle Cater's cell phone under "Dad". Det/Cst. Pepler testified to knowing J.M. from Spryfield and having spoken to him several times at court. He described J.M. as a "regular, everyday caller" to Kyle Cater.

[13] Clues as to who was speaking were also available to Det/Cst. Pepler in the calls themselves where for example, Matthew Cater can be identified by his referring to himself as Kyle Cater's brother. Det/Cst. Pepler noted that Matthew

Cater is Kyle Cater's only brother. Police knowledge about nicknames and relationships also informed Det/Cst. Pepler's voice identification.

[14] Det/Cst. Johnny Mansvelt also gave evidence about voice identification. He assisted Operation Intrude as an investigator and listened as a monitor to over a thousand calls. He testified that he listened to all of the calls in Exhibit 4 (56 calls as noted above) at a minimum of 6 – 10 times each.

[15] Like Det/Cst. Pepler, Det/Cst. Mansvelt used familiarity, self-identification and context to identify voices in the intercepts. He testified that voices he was familiar with from personal interaction were Paul Cater's, Torina Lewis', Kyle Cater's, Matthew Cater's, and Aaron Marriott's. Self-identification, extensive exposure through the intercepts, and contextualized references cemented Det/Cst. Mansvelt's confidence in his identification of these speakers.

[16] Det/Cst. Mansvelt's voice identifications of Kyle Cater, Paul Cater and Torina Lewis were the same in every instance as Det/Cst. Pepler's. He was also able to identify Aaron Marriott's voice as Voice 2 in Intercept #6 (session #869), a call that occurred on November 30, 2008 at 12:44 p.m.

[17] In reviewing the intercepts myself, I note there are numerous instances of Kyle either identifying himself in the call, being identified specifically by name or nickname, or being identifiable by context. For example, in Intercept #3, Kyle is referred to by his caller as "Cater." In Intercept #17, he is referred to as "Kyle". In Intercept #24, he is called "Peanut" which Barbara Chase confirmed in her testimony was Kyle's nickname. In Intercept #26, Kyle gets called "Ky", another nickname according to Ms. Chase. And he is identified by name in the January 15, 2009 calls that followed the police raid on 80 Cavendish Road.

[18] Self-identifying or identification by others is also a feature of the intercepts on which the Crown asserts Paul Cater, Torina Lewis, Aaron Marriott and others can be heard talking.

[19] The speaker identified through the evidence as Kyle Cater is tied into the intercepts as well by the phone numbers that are used. This speaker consistently receives and makes calls on a cell phone with the number 229-4400. Kyle Cater's mother confirmed that she subscribed to this phone for Kyle's use. She did not

program the phone with any of the contact numbers found in it. I also accept Det/Cst. Pepler's evidence that he did not find any indication in all the intercepts he listened to of anyone else using the phone with this number. And many of the numbers that 229-4400 called to or was called from were numbers that Kyle Cater had listed as contacts in his cell phone. These contacts include: Paul Cater ("Dad"), D.M. ("D***"), R.S. ("R***"), I.E. ("I***"), and K.M. ("My Baby"). The contacts were located on the cell phone with the number 229-4400 (Exhibit 9) that Kyle Cater claimed a reasonable expectation of privacy in when he asserted that its seizure had violated his *Charter* rights.

[20] On the basis of the evidence I have just reviewed, I am satisfied on a balance of probabilities that Det/Csts. Pepler and Mansvelt have accurately identified the speakers on the intercepts. The voices are consistent throughout the intercepts and particularly in respect of Kyle Cater, Paul Cater and Torina Lewis, readily recognizable. At this stage, and for the purposes of this application I can say it is more probable than not that the speakers are who the investigators say they are. Nothing raised by Ms. Cooper in her submissions displaces the well-founded opinions of the investigators or my own conclusions. This disposes of the threshold voice identification issue in the context of this application.

What is Hearsay?

[21] Sopinka, Lederman & Bryant "The Law of Evidence", 3rd edition provides a working definition of the rule against hearsay:

> Written or oral statements…made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements…are tendered either as proof of their truth or as proof of assertions implicit therein. (*paragraph 6.2)*

[22] Very simply put, an out-of-court statement which is admitted for the truth of its contents is hearsay. An out-of-court statement offered only as proof that the statement was made is not hearsay, and is admissible as long as it has some probative value. (*R. v. Evans, [1993] S.C.J. No. 115, paragraph 16*)

[23] Hearsay is objectionable because it is understood to be unreliable and untrustworthy. As Sopinka, Lederman and Bryant explain: "…its evidential value

rests on the credibility of an out-of-court asserter who is not subject to the oath, cross-examination, or a charge of perjury. (*paragraph 6.9*)

[24] The Supreme Court of Canada had the following to say about hearsay in its decision in *R. v. Khelawon, [2006] S.C.J. No. 57*:

> **2** As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gate-keeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

[25] To address this hearsay issue I am taking a broadly inclusive approach. That is to say, I am treating the statements made in the intercepts on the basis that they could be tendered for the truth of their contents, therefore qualifying as hearsay. I have determined it is unnecessary for me to closely analyze all the statements in the intercepts although it is clear from the Crown’s submissions that they intend to use certain conversations for the non-hearsay purpose of proving the nature of business being engaged in. The non-hearsay character of such evidence has been explained by the Ontario Court of Appeal in *R. v. Edwards, [1994] O.J. No. 1390*

where the police took calls from prospective drug purchasers on a cell phone freshly seized from a suspected drug dealer:

> …the real issue is not whether such requests contained truth or falsehoods, but whether they were in fact made. In this case the fact that the requests were made can only be relevant to determining the nature of the activities of [the accused], who was intended to respond to the requests. *(paragraph 22)*

[26] The British Columbia Court of Appeal in *R. v. Williams, [2009] B.C.J. No. 1518* has also found such "nature of the business" calls not to be hearsay. Statements in the intercepts relied on for narrative and context would also be non-hearsay evidence.

The Intercepted Statements of Kyle Cater as Admissions

[27] Admissions "in the broad sense refer to any statement made by a declarant and tendered as evidence at trial by the opposing party." (*R. v. Violette, [2008] B.C.J. No. 2781(S.C.), paragraph 63)* An admission by an accused is admissible as a recognized exception to the hearsay rule, provided that its probative value outweighs its prejudicial effect. (*R. v. Terry, [1996] S.C.J. No. 62, paragraph 28*) Statements made or adopted by an accused in an intercepted communication are admissible against that accused person as evidence of the truth of their contents. (*Violette, paragraph 65*)

[28] Intercepted private communications are highly probative, most significantly because "they largely emanate from the mouths of the accused themselves." (*Violette, paragraph 101*) This view is echoed in *R. v. Niemi*, a decision of the Ontario Court of Justice describing the: "enormous weight that is the evidentiary value of contemporaneous declarations, recorded as uttered in…intercepted communications." (*[2008] O.J. No. 4619 (S.C.J.), paragraph 29)*

[29] Exceptions to the rule against hearsay were created by the courts to ensure the court's truth-seeking function was not impeded by excluding evidence that would contribute to accurate fact finding. In an intercept-dependent case, a court's ability to accurately find and assess the facts is imperiled if an accused person could shelter his or her intercepted words behind the prohibition against hearsay. All an accused person would have to do is exercise his or her right to remain silent

and not testify. It would create a ridiculous result if highly incriminating and lawfully obtained intercepted communications of an accused were off-limits as inadmissible hearsay. If an accused's lawfully intercepted wiretap statements were inadmissible hearsay then obtaining Part VI intercepts would be pointless, at least insofar as using them as evidence.

[30] There is not a lot more to be said about the admissions exception to the prohibition against hearsay. The admissions exception is a complete answer to the issue of the admissibility of Kyle Cater's statements on the intercepts. I do not agree with Ms. Cooper's submission that for an accused's out-of-court statements to be accepted into evidence, they must not only qualify as admissions, they must also satisfy the requirements of the principled approach to hearsay. Obviously the accused, being non-compellable and entitled to remain silent, cannot successfully argue that the intercepted statements are not necessary. Nor can an accused complain about the unreliability of his or her own statements. (*Evans, paragraph 24*)

[31] I will make a few passing comments about the co-conspirators' exception to the hearsay rule. Application of this exception can admit the statements of an accused into evidence. While I find it could be successfully relied upon by the Crown in this case to secure admission of statements in the intercepts before me, I have concluded it is not necessary to resort to this alternative ground for admissibility. I will however briefly touch on the components of this exception.

[32] Admissions made by an accused may emerge in the form of statements made in the context of a common illegal design or conspiracy. Hearsay in this context may be admissible under the co-conspirators' exception to the hearsay rule: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made toward the accomplishment of the common object." (*R. v. Mapara, [2005] S.C.J. No. 23, paragraph 8*) It is a well-settled principle that words spoken in furtherance of a common criminal design are admissible against an accused even where no conspiracy charge has been laid. (*R. v. Koufis, [1941] S.C.J. No. 28; R. v. Falahatchian, [1995] O.J. No.1896 (C.A.), paragraph 28*; *R. v. Eiswerth, [1998] S.J. No. 798 (Q.B.),*

paragraph 14)) It is not essential that the common design constitute a conspiracy. (*R. v. Munro, [2001] S.J. No. 172 (Q.B.), paragraph 8, citing Koufis*)

[33] The British Columbia Court of Appeal in *R. v. Oliynyk, [2008] B.C.J. No. 524*, articulated the basis for admitting the evidence of what co-conspirators say to each other in lawfully intercepted telephone conversations:

> **42** Telephone conversations between participants in a conspiracy furnishes cogent and reliable evidence of the very essence of the conspiracy. It is undeniably the best evidence that exists concerning what is occurring between the conspirators. The ability to record conversations and communications between parties engaged in a conspiracy greatly altered the evidentiary landscape in conspiracy prosecutions. Unlike the situation in earlier times where the evidence had to be adduced from participants who may have been granted immunity or inferred from observations of the actions of alleged participants, in the wiretap era, the whole framework and details of the criminal enterprise can now be exposed to view. It is difficult to see how one could obtain evidence of similar quality by calling unindicted co-conspirators or parties not charged to testify to what they said at an earlier time. As observed by the Chief Justice in ***Mapara***, the conversations between the conspirators possess a *res gestae* quality. The Chief Justice also said:
>
> > [34] [...] Indicia of reliability are found in the requirements of the *Carter* rule for a conspiracy proved beyond a reasonable doubt, membership of the accused in it on a balance of probability, and the rule that only statements made in furtherance of the conspiracy are admitted. It therefore becomes difficult to conclude that evidence falling under the *Carter* rule would lack the indicia of reliability and necessity required for the admission of hearsay evidence on the principled approach. In all but the most exceptional cases the argument is spent at the point where an exception to the hearsay rule is found to comply with the principled approach to the hearsay rule.

[34] As the Court in *Oliynyk* went on to say:

> **44…** The participants in this drug conspiracy are overheard on the tapes planning and implementing the conspiracy. There is no motivation for them to falsify evidence. That distinguishes this situation from cases such as ***R. v. Starr***, [2000] 2 S.C.R. 144, 2000 SCC 40. What better evidence could be obtained than the conversations of the parties to the conspiracy occurring in furtherance of the plan? Neither logic nor experience is indicative of any reliability concerns about the sort of evidence here under consideration.

[35] The principles I have just extracted from *Mapara* and *Oliynyk* are relevant to the principled approach to hearsay. It is that principled approach that admits into evidence all the third-party statements in the intercepts before me that are to be relied on for the truth of their contents. I do not find any need to assess the admissibility issue on the basis of a common criminal purpose or joint venture analysis. In simple terms I am saying this: anything in the intercepts in Exhibit 4 that is hearsay is admissible under the principled approach. What follows are my reasons for concluding this.

A Principled Analysis – Necessity and Reliability

[36] Intercepted private communications are routinely admitted into evidence notwithstanding arguments that they constitute hearsay. (*R. v. Eiswerth, [1998] S.J. No. 798 (Sask. Q.B.), paragraphs 12 – 15; R. v. Violette, paragraph 10, R. v. Shea, [2011]N.S.J. No. 653 (C.A.), paragraphs 54 – 57, 66 – 67, 74, 80 – 83)* The value of such evidence is incontrovertible.

[37] The principles from *Khelawon* could be about intercepts even though they are not so narrowly focused: "…a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth." (*Khelawon, paragraph 2*)

[38] The application of the principled approach to intercept hearsay is plainly set out in the recitation of the trial judge's reasons by the British Columbia Court of Appeal in *Oliynyk*. I reproduce the *Oliynyk* trial judge's words as I cannot improve on them:

> …the evidentiary value of spontaneous and contemporaneous declarations made in furtherance of the alleged conspiracy…is sufficient in the circumstances to meet the necessity requirement of the principled approach. The very high degree of reliability and the quality of spontaneous declarations that are contemporaneously recorded is recognized as a most significant part of the "necessity" rationale. There is no issue about whether the declarant's memory is accurate. The recording of the spontaneous and contemporaneous declarations is thus the best evidence. It is much better than that of a likely unreliable and uncooperative witness whose memory almost five years later at the trial of

> this case would not approach the accuracy of the res gestae like declarations. *(paragraph 37)*

[39] More than three years have passed since the intercepts were recorded in this case. I am in the *Oliynyk* camp about the quality of the evidence that might be elicited from witnesses years after the events freshly captured on the intercepts. I also agree with the Crown's point, which is supported by the content of the wiretaps, that the speakers on the intercepts with Kyle Cater would all be subject to a *Vetrovec* instruction.

[40] In *Oliynyk* the British Columbia Court of Appeal described the "cogent and reliable evidence" obtained from telephone conversations between participants in a conspiracy. In the Court's words, "It is undeniably the best evidence that exists concerning what is occurring between the conspirators." The Court found it "…difficult to see how one could obtain evidence of a similar quality by calling unindicted co-conspirators…" and noted the observation in *Mapara* that these types of conversations possess "a *res gestae* quality." (*Oliynyk, paragraph 42; Mapara, paragraph 24*) As the Crown has noted, there are no memory, perception, observation, or motive to fabricate problems in the evidence captured on intercepts. I will repeat what I said earlier in these reasons, these principles apply notwithstanding the fact that no conspiracy has been charged in this case.

[41] Ms. Cooper has relied heavily on the Ontario Court of Appeal decision in *R. v. Simpson, [2007] O.J. No. 4510*. Simpson is readily distinguishable. It is not an intercept case. It concerned the utterances to an undercover police officer by a drug dealer fingering Simpson as his drug supplier. The utterances, recorded in notes only some time after they were made, were recalled by the undercover officer at Simpson's trial. Williams, who sold the drugs to the undercover officer and made the utterances, was not called as a witness. The evidence of the utterances was excluded on the basis of falling short of satisfying the necessity and reliability requirements for admission. The Court observed: "This is not a case where the Crown is faced with the situation of either tendering the hearsay evidence or having no evidence at all." (*paragraph 43*) Nor, noted the Court, was it "…a case where the out-of-court statements were entirely recorded using a wiretap." (*paragraph 49*) The Court was of the view that the Crown could not rely solely on

the out-of-court statements and should call Williams to give the incriminating evidence. (*paragraph 54*)

[42] It should be obvious that the exclusion of the utterances in *Simpson* affords no comfort to Kyle Cater. The evidence he wants excluded is entirely different from the evidence that was found to be inadmissible in *Simpson*. Such a distinction was recognized by the Ontario Court of Appeal in *Niemi*:

> The nature of the declaration [in *Simpson*] was to implicate much like any other accusation that must be tested by cross-examination, quite unlike the recorded intercepted discussions among persons planning a crime whose comments are not made for the purpose of implicating anyone. The Simpson hearsay implication has none of the evidentiary value of contemporaneous declarations to weigh against the traditional strong reluctance to admit out-of-court evidence… (*paragraph 15*)

[43] Ms. Cooper has argued that the intercepts should be excluded on the *Simpson* finding that the Crown was required there to call an available declarant. Ms. Cooper submits that the Crown could have called the individuals speaking with Kyle in the intercepts to give evidence about what was being discussed. The failure to do so, in Ms. Cooper's submission, should result in the intercepts being excluded, the principled approach requirements not having been met. Ms. Cooper said this even as she asserts that the police have not established who the speakers are. The upshot of this contradictory argument is that the prosecution has failed to correctly identify the speakers on the intercepts but should be required to call them as witnesses. Leaving aside this muddled thinking, I refer to *Niemi* where it was held that the availability of a declarant does not automatically give rise to the requirement that a voir dire be conducted to determine necessity and reliability. Such voir dires in the context of intercepted communications hearsay should be rare. For an accused to trigger the need for a voir dire to determine necessity and reliability in the admissibility calculus for intercepted hearsay, he or she must be "able to point to evidence raising serious and real concerns about reliability emerging from the circumstances in which a declaration was made, which concerns will not be adequately addressed by use of the *Carter* approach." (*R. v. Chang, [2003] O.J. No. 1076 (C.A.), paragraph 132*) As the Ontario Court of Appeal found in *Chang*: "the *Carter* process itself is a reliability-discerning

exercise that assists the court in separating declarations that are safe to be considered by the trier of fact from those that are not…"

[44] I find the Defence has utterly failed to identify any evidence that raises "serious and real concerns" about the reliability of the intercepted declarations made in this case.

[45] I am satisfied that all the declarations in the intercepts can be admitted on the basis that they meet the requirements of reliability and necessity; in other words that they are admissible as a principled exception to the hearsay rule. (*Mapara, as cited in Shea, paragraph 67*)

[46] In the case of any declarants whom the Crown have identified and could have compelled to testify, such as Paul Cater and Torina Lewis, the necessity requirement should be given the broad interpretation that is permitted by the Supreme Court of Canada's analysis in *R. v. Smith, [1992] 2 S.C.R. 915; R. v. K.G.B., [1993] 1 S.C.R. 740;* and *R. v. Starr, [2000] S.C.J. No. 40*. Necessity has not been limited to situations where a potential witness is unavailable: here necessity is established by the fact that the recorded words of Paul Cater and Torina Lewis are the best evidence available of their conversations with Kyle. Evidence obtained from their testimony at this trial could not be of equal or superior quality to that captured by the intercepts at the moment when the words were spoken.

[47] And as a final point on the necessity aspect, lawfully intercepted communications are inherently characterized by necessity: investigative necessity is a legislated consideration in Part VI authorizations. (*sections 185(1)(h); 186(1)(b)*) It is obvious that intercepted communications will provide evidence that would not otherwise be available to the police. *(Edwards, paragraph 23)*

[48] As should be clear from what I said earlier in more general terms about all the intercepts, I find the words of Paul Cater and Torina Lewis in the intercepted communications with Kyle also clear the reliability hurdle. I have no concern about the hearsay form of the words because of the circumstances in which they came about. These circumstances, spontaneous utterances in telephone conversations that neither Paul nor Ms. Lewis not Kyle realized were being intercepted, where the speakers had no reason to fabricate or misrepresent what was being discussed,

afford me sufficient comfort in the truth and accuracy of what was said. *(Shea, paragraph 78 (N.S.C.A.))*

[49] There is nothing to remotely suggest that Paul or Torina were fabricating anything they said to Kyle in any of the intercepts nor is there anything to indicate they were motivated to do so. The same can be said for all the speakers in the intercepts.

[50] Although I have dealt extensively with the necessity and reliability components of the principled approach to hearsay evidence, I do want to address a specific submission made on the reliability issue by Ms. Cooper. It was Ms. Cooper's submission that the intercepted conversations fail the reliability requirement because they were conducted in coded language that obscures the meaning of what was being discussed. She said this reduced the intercepts to the "worst evidence" with the best evidence being the declarants themselves. In *Niemi*, the court had this to say about the submission that the declarants should be called to explain what they were talking about in the coded conversations:

> There is little reason to conclude that their description of what was meant by a phrase or code word, even if they now recall any of these conversations, would be better evidence than interpretation based on evidence of context. *(paragraph 28)*

[51] That further addresses the "declarants are the best evidence" submission. I will now dispose of the "coded language makes the intercepts unreliable" argument.

[52] Ms. Cooper's submission on coded language misunderstands the reliability requirement. As stated in *Oliynyk*, intercepted communications provide "cogent and reliable" evidence about the criminal activities being investigated. I have already quoted *Oliynyk* describing this as "undeniably the best evidence concerning what is occurring between the conspirators." (*Oliynyk, paragraph 42*) Common sense leads to no other conclusion: the speakers are unaware they are being listened to. They carry on their activities in blissful ignorance of the fact that their conversations are being recorded. Without anything to suggest otherwise, this is high quality evidence that will assist in the truth –seeking function of the trial. The court still has to determine what the conversations are about and what inferences can be drawn from the coded language but that is a separate exercise,

one that is conducted once the principled approach has been applied and the evidence had been admitted.

Res Gestae

[53] Although I do not consider it necessary to rest admissibility of the contents of the intercepts on any other basis than admissions and the principled approach to hearsay, a number of the conversations would be admissible simply under the traditional exception of *res gestae*. The "Tracey" calls, the anxious L.S. calls, the agitated D.S. calls, and the January 15 calls between Torina Lewis and Kyle, could all be admitted as conventional *res gestae*.

[54] The statements made in these calls come within what our Court of Appeal discussed in *Shea* as "arguably, the modern test for excited utterances", citing *Ratten v. R., [1971] 3 All E.R. 802 (P.C.)*:

> …As regards statements made after the event it must be for the judge, by preliminary ruling to satisfy himself [sic] that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded…if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterances can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received.

[55] Although I find the Crown does not need to rest its case for admissibility on what constitutes *res gestae*, utterances that can "safely be regarded as a true reflection of what is actually happening" is an apt description for other calls in this case including the I. E./Kyle Cater calls on December 28.

[56] The Court of Appeal in *Shea* described the key elements for determining if a statement can be described as part of the *res gestae*: "…a statement that is spontaneously declared under shock or pressure sufficient to ensure the declaration's reliability and remove any suspicion of concoction or fabrication, and made under circumstances of relative contemporaneity to the traumatic event." (*Shea, paragraph 64*) It can readily be seen of course how intercept communications generally can be characterized as having a *res gestae* quality.

Cell Phone Text Messages

[57] I will conclude by commenting briefly on the cell phone texts. These were obtained from the forensic analysis of the Kyle Cater Samsung cell phone with the phone number 229 – 4400 and are contained in Cpl. Gallagher's report (Exhibit 10). There are 22 of them, all from January 15, 2009. There is one other text message: Intercept 8 (Exhibit 4), a text message from December 3, 2008.

[58] As a preliminary matter, I am satisfied on a balance of probabilities that the "voice" of these texts, said to be Kyle Cater, is Kyle Cater. The evidence establishes that it was Kyle Cater's phone and one of the texts contains the reference to "my dad's house got raided", an event I know occurred on January 15, 2009. Some of the texts are to "My Baby" which the evidence had established was Kyle's girlfriend, Katie Mills. And the texts about the police raid on 80 Cavendish echo statements made in the January 15 wiretaps about the search, another factor in my being satisfied on a balance of probabilities that Kyle Cater is associated with the texts reproduced in Exhibit 10 and to Intercept 8, either sending or receiving them.

[59] The text messages may be intended for use as narrative and/or context: for example, the Crown has submitted that the December 3, 2008 text is being tendered for the fact that it was said, not for the truth of what was being said. In that event it is not hearsay and there is no admissibility issue. However, to the extent any of the text messages are being put before me for the truth of their contents, the same principles apply to their admissibility as I have discussed in these reasons in reference to the intercepted conversations. I am satisfied the texts sent by Kyle Cater constitute admissions and otherwise that the content of any of the text messages is admissible on a principled analysis.

[60] In conclusion therefore, all of the intercepted communications in Exhibit 4 and the text messages in Exhibit 10 are admissible in evidence before me for the truth of their contents.