SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colegrove*, 2022 NSSC 33

Date: 20220111
Docket: *Hfx*, No. 500238
Registry: Halifax

Between:

Her Majesty the Queen
v.
Jeffrey Colegrove

-and-

Phillip Hickey

Decision
Third Party Records Application
Voir Dire # 5

Judge:	The Honourable Justice Christa M. Brothers
Heard:	November 30, December 3, 13, and 17 2021, in Halifax, Nova Scotia
Oral Decision:	January 11, 2022
Counsel:	David Schermbrucker, Jill Hartlen and Maile Graham-Laidlaw, Counsel for the Crown Lucie Joncas, Ad. E, Jacques Normandeau, and Jennifer MacDonald, Counsel for Mr. Colegrove Eugene Tan and Heather Mills, Counsel for Mr. Hickey

By the Court:

Overview

[1] The applicant, Jeffrey Colegrove, is charged in a two-count indictment as follows:

> That he, between the 23rd day of March, 2018 and the 14th day of November, 2018, both days inclusive, at or near Halifax Regional Municipality and elsewhere in the Province of Nova Scotia, at or near Montréal, Québec and elsewhere in the Province of Québec, did unlawfully conspire with Steven Sarti, Sherrie Colegrove, Phillip Hickey, Erik Young, Frank Osso, and Sean Howarth, and with others unknown, to traffic cocaine, a substance included in Schedule I of the Controlled Drugs and Substances Act, SC 1996, c. 19, contrary to section 5(1) of the said Act, and did thereby commit an indictable offence contrary to section 465(1)(c) of the Criminal Code, RSC 1985, c. C-46;
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> and further
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> That he, between the 23rd day of March, 2018 and the 14th day of November, 2018, both days inclusive, at or near Halifax Regional Municipality and elsewhere in the Province of Nova Scotia, at or near Montréal, Québec and elsewhere in the Province of Québec, did unlawfully conspire with Steven Sarti, Sherrie Colegrove Erik Young and Sean Howarth, and with others unknown, to traffic methamphetamine, a substance included in Schedule I of the Controlled Drugs and Substances Act, SC 1996, c. 19, contrary to section 5(1) of the said Act, and did thereby commit an indictable offence contrary to section 465(1)(c) of the Criminal Code, RSC 1985, c. C-46.

[2] On an earlier date, the Crown called no evidence in relation to five of the co-accuseds. Their matters were dismissed for want of prosecution. Mr. Colegrove's remaining co-accused, Phillip Hickey is charged pursuant to section 5 (2) of the *Controlled Drugs and Substances Act* (*CDSA*). Mr. Hickey is taking a watching brief in this third party records application which he has not joined in advancing.

[3] In March 2018, while the applicant was serving a sentence at Donnacona Institution, his private communications were intercepted for a period of 30 days. Two subsequent 15-day extensions of that authorization were then obtained by Stéphane Deschênes, Security Intelligence Officer (SIO), and from Jérôme Poulin, Deputy Warden of Donnacona Institution, pursuant to s. 94(1) of the *Corrections and Conditional Release Regulations* (SOR/92-620).

[4] The intercepted communications were then sent to the RCMP, who were conducting an investigation that allegedly related to the applicant. Based on information that was communicated verbally by SIO Deschênes to RCMP Constable Peter Hurley, the RCMP obtained a production order in May 2019 for the applicant's communications in SIO Deschênes' possession at Donnacona Institution.

[5] In an application filed May 17, 2021, amended August 30, 2021, the applicant seeks an order pursuant to s. 24(1) of the *Charter* staying the proceedings against him. In the alternative, he seeks an order pursuant to s. 24(2) of the *Charter* excluding evidence that he says was obtained in a manner that breached his s. 7 and s. 8 *Charter* rights.

[6] The Charter applications commenced with *viva voce* evidence on October 25, 2021 and continued until October 29, 2021. During the course of the evidence, the applicant learned of the existence of potentially relevant materials in the possession of Correctional Services Canada (CSC). On November 4, 2021, the applicant filed a Notice of Application for Disclosure of Third Party Records to obtain those materials.

[7] In the *Charter* application, the applicant alleges that CSC did not have reasonable and probable grounds to intercept his private communications, nor were there sufficient grounds to justify two 15-day renewals of the authorization.

[8] Connected to these allegations, the applicant has referred to a 2018 audit conducted by the Internal Audit Sector of CSC concerning the interception of inmate communications. The audit concluded that a lack of guidance and limited training has caused institutional management and SIOs to have an incomplete understanding of the legal and policy requirements for intercepting inmate communications, which has resulted in compliance issues. Specifically, the auditors found examples where reasonable grounds were not adequately documented and/or supported by intelligence information. Furthermore, authorizations to intercept inmate communications were not always provided in writing and communications (including those classified as privileged) were sometimes intercepted without approval.

[9] In their respective testimonies on the hearing of the *Charter* application, Deputy Warden Jérôme Poulin and SIO Stéphane Deschênes affirmed that they received training and were given a PowerPoint presentation on how to demonstrate reasonable grounds without risking exposure of sensitive information. The objective of the training seemed to be to ensure compliance with established and existing law,

regulation, and procedure, which the internal investigation found to be a central deficiency.

[10] In this application, the applicant is seeking disclosure of the following material:

1. Any PowerPoint presentation(s), and any other training provided by CSC, as referred to in the testimonies of Jérôme Poulin, Stéphane Deschênes and Michel Thériault, relating to the interception of inmate communications (including the basis upon which an authorization may be justified, the recording and handling of intercepted communications, and documentation requirements and practices), as a result of the audit undertaken in 2018; and,
2. Any materials used in providing training to support the discharge of responsibilities of CSC SIOs and Deputy Wardens, with respect to Directive 701 and 568 and the interception of inmate communications, developed because of the audit undertaken in 2018.

[11] The applicant relies on the common law regime for third-party records disclosure established in *R. v. O'Connor*, [1995] 4 S.C.R. 411.

> 138 At the trial, when the accused applies for an order for production of the records, the judge should follow a two-stage approach. First, the accused must demonstrate that the information contained in the records is likely to be relevant either to an issue in the proceedings or to the competence to testify of the person who is the subject of the records. If the information does not meet this threshold of relevance, then the analysis ends here and no order will issue. However, if the information is likely relevant to an issue at trial or to the competence of the subject to testify, the court must weigh the positive and negative consequences of production, with a view to determining whether, and to what extent, production should be ordered. At each stage counsel for all interested parties should be permitted to make submissions.
>
> *(1) Relevance*
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> 139 At the outset, the accused must establish a basis which could enable the presiding judge to conclude that there is actually in existence further material which may be useful to the accused in making full answer and defence, in the sense that it is logically probative (*Chaplin*, supra,at pp. 743–45). In other words, the accused must satisfy the court that the information contained in the records is *likely to be relevant* either to an issue in the proceeding or to the competence of the subject to testify (*O'Connor No. 2*, supra).
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> …

> 151 If the trial judge concludes that the records are not likely to be relevant to an issue in the trial or to the competence to testify of the subject of the records, the application should be rejected. If, on the other hand, the judge decides that they are likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, the trial judge must balance the salutary and deleterious effects of ordering the production of the records to the court for inspection, having regard to the accused's right to make full answer and defence, and the effect of such production on the privacy and equality rights of the subject of the records. If the judge concludes that production to the court is warranted, he or she should so order.

[12] During the Charter application, when defence counsel became interested in the training material in question as a result of the examination and cross-examination of witnesses Jérôme Poulin and Stéphane Deschênes, defence counsel asked if Crown counsel could request the training material from CSC. Crown counsel advised the court that he had called advisory counsel to CSC and was advised that the material was protected from production by solicitor-client privilege. At that point, all questioning about the material ceased and the court and counsel took steps to ensure that any privilege, if it existed, was not inadvertently waived by witnesses.

[13] Counsel for the applicant and the Crown agreed that if the applicant wanted the documents, the proper course of action was to file an *O'Connor* application. On October 29, 2021, after being contacted by Crown counsel, Victor Ryan, counsel for CSC appeared as a courtesy to the court and participated in scheduling that application and setting filing dates.

Background

[14] The factual background to this application is important. In April 2021, CSC issued an internal audit report covering the phases of the audit conducted over years concerning the interception of inmate communications The audit began in 2018 and consisted of a follow-up to the audit performed in February and March 2020. The audit was conducted as part of CSC's 2017-2020 Risk-Based Audit Plan. One of the main objectives of the Audit was to provide assurance that key activities have been implemented in compliance with legal requirements.

[15] Amongst the elements examined by the auditor were whether:

- CSC provides training to support the discharge of responsibilities;
- CSC conducts monitoring on a regular basis and documents and reports on results to the required management level;

- Reasonable grounds are adequately documented and supported by intelligence information;
- Approval to intercept is given in writing, by an individual with the appropriate authority, prior to the start of related intercept activity; and,
- Interception is carried out in compliance with approvals.

[16] The first phase of the audit assessed three methods of communications (telephone, mail, and in-person communication during visits), through a sample of communications intercepted between January 2017 and June 2018.

[17] Following Phase 1, an action plan was initiated to immediately address the most significant preliminary findings. The action plan was to:

- Provide updated guidance to institutions;
- Provide training to institutional management and Security Intelligence Officers on the legal and policy framework as well as on the voice logger; and
- Implement oversight and quality assurance processes over authorizations to intercept.

[18] The second phase of the audit was national in scope and included an assessment of reasonable grounds, approvals to intercept, and compliance with approvals. File review focused solely on the interception of telephone communication and included a sample of communication intercepts that were approved and completed from November 2018 to April 2019.

[19] Phase 2 assessed whether management actions were effective in addressing the most significant issues that were uncovered in Phase 1, namely an assessment of reasonable and probable grounds, approvals to intercept, and compliance with approvals. Phase 2 included a visit to Donnaconna Institution in March-April 2019.

[20] According to Deputy Warden Jérôme Poulin, during this visit, the audit team verified whether intercept documentation and the recording system were compliant, and whether the period of authorized interception was respected. The audit concluded that a lack of clear guidance and oversight combined with limited training resulted in a lack of adequately documented reasonable grounds across CSC institutions, which in turn limited CSC's ability to demonstrate what information was considered to ensure that the standard of proof had been met.

[21] The audit found that reasonable grounds were neither adequately documented nor supported by intelligence information, authorizations to intercept were not always provided in writing, and communications, including privileged communications, were at times intercepted without approval. The internal audit recommended that guidance be provided on the legal definition of "intercept" and how "reasonable grounds to believe" should be documented and supported.

[22] The applicant alleges that his s. 8 Charter right has been breached as a result of these deficiencies identified by the internal auditor, which existed at the time of the interception of the applicant's private communications.

[23] In cross-examination, Deputy Warden Jérôme Poulin was clear that his training was entirely on the job. He indicated that, prior to the audit, he had not received any formal training on obtaining authorizations to intercept. In his testimony, Poulin confirmed that they received training on how to file the documentation correctly and modified the authorization form and documentation to make them compliant. He acknowledged that he was provided with a PowerPoint presentation from regional security, explaining issues and providing solutions on how to demonstrate grounds on the authorization form without risking exposure of sensitive information. Poulin also affirmed that the training they received taught them that information gathered from confidential sources had to be corroborated.

[24] In an e-mail sent by Deputy Warden Poulin to Crown counsel on June 16th, 2021, Poulin affirmed that their procedure completely changed in 2018 following two cases from Quebec which made them aware, that the way authorizations to intercept were being filled out and documented was not compliant.

[25] Furthermore, Poulin said that CSC provided in-house training to its personnel while waiting for new training to be provided by CSC following the internal audit.

[26] SIO Stéphane Deschênes told the court that there were two or three training sessions in addition to the PowerPoint.

Position on Solicitor-Client Privilege

[27] The first appearance in this application was on November 30, 2021. The CSC did not, as directed on October 30, 2021, provide the court with a sealed package containing the documents over which it was claiming solicitor client privilege. Counsel for CSC filed only a brief on solicitor-client privilege in advance of this initial hearing. There was no affidavit evidence indicating what number or type of

documents over which CSC was claiming privilege and the court was not furnished with the documents under seal.

[28] Counsel for the Crown initially agreed that, as a matter of procedure the issue of solicitor-client privilege asserted by CSC in respect of the records in question should be decided first, before the question of "likely relevance."

[29] The leading case in Nova Scotia on this point is *R v Clarke*, 2014 NSSC 441. There, in a prosecution for fraud, the defence sought the production of third-party records in the possession of the Nova Scotia Securities Commission. The Commission responded by claiming that various privileges, including solicitor-client privilege, protected the material from production. The Crown and the Commission said that it would be more efficient for the trial judge to first decide the issue of "likely relevance," and then proceed to decide the issue of privilege. The Honourable Justice Kevin Coady rejected that proposal and ruled that the correct procedure on an *O'Connor* application is to decide privilege first, then address likely relevance.

[30] In the case at bar, the Crown initially supported determining privilege first, followed by "likely relevance". However, given that CSC counsel failed to provide sealed documents as requested by the court in advance or even at the hearing set for the determination of solicitor-client privilege, all parties asked that the court deal with the "likely relevance" argument first, so as not to waste court time and counsel's appearance. Therefore, with all counsel's agreement and at the urging of the applicant's counsel, I agreed to depart from the usual *O'Connor* process so there would be no further delay in this matter.

[31] Initially, at the hearing, CSC indicated that there was a total of 23 records, three of which were covered by solicitor-client privilege. These three records were said to be PowerPoint slides created by Department of Justice counsel. Mr. Ryan argued on behalf of the CSC that the rest were not likely relevant. However, in the course of this appearance, he corrected his representations and stated there were 22 documents in total, three of which CSC was claiming were covered by solicitor-client privilege. I suggested we take a break for counsel to discuss next steps. After those discussions, counsel for the applicant indicated they were ready and wished to argue the issue at stage one of application – that is, the "likely relevance" test – when we resumed on December 3, 2021.

[32] On December 3, 2021, after having been provided with a sealed envelope containing the documents CSC contended were privileged, the court heard arguments from all parties on this issue. Counsel for CSC neither provided affidavit

evidence nor *viva voce* evidence, but relied on the documents themselves, saying it was clear on the face of them that solicitor-client privilege applies.

Position on Stage One Likely Relevant

[33] Counsel for Mr. Colegrove argued that the materials held by CSC are not only likely relevant but actually relevant. They argue that the documents go to the heart of the testimony of Deputy Warden Jérôme Poulin and SIO Stéphane Deschênes, the individuals who authorized the intercepts of the applicant's conversations. The way the intercepts proceeded and were justified at the time is said to be crucial to the applicant's defence. The defence argues that the legal principles in relation to authorizing interceptions have not changed, but the way in which they were implemented at Donnacona has. The opinion of witnesses at Donnaconna evolved over time as the audit was performed and training was being delivered. The defence submits that evidence of the timing and content of the training is essential to the court's understanding the testimony of Deputy Warden Poulin and SIO Deschênes, and to assessing the credibility of that evidence. The defence maintains that this information is necessary for the applicant to make full answer and defence. The defence argues that timing is important in relation to the training and when the officers came forward in emails to indicate their changed position. In addition, the defence references evidence given by Stéphane Deschênes at the Preliminary inquiry concerning knowledge and training. Jérôme Poulin's testimony was that he was sure Stéphane Deschênes would let the court know the problems with the intercepts.

[34] CSC counsel argues that the materials are not likely relevant because the training was provided after the event in question and would not be of assistance to either the court or the accused. The argument is that the materials are not probative. In essence, the CSC says there is no relevance to the materials because they were delivered after the authorization was approved.

[35] The Crown says the relevant point in time for assessing the actions of authorization is March 23, 2018, and again thirty days later in April 2018. That is true.

[36] The Crown further said in its brief:

> The applicant makes a reasonable case for having met the "likely relevant" threshold at paras 58-72 of his November 15 2021 brief on this issue. The Crown's only comment would be that it is not clear how CSC training provided after the initial Authorization was signed on March 23 2018 could assist the applicant in

> making full answer and defence. It has been the Crown's consistent position that whether SIO Stéphane Deschênes or Deputy Warden Jérôme Poulin had objectively reasonable grounds to believe, sufficient to justify the Donnacona Intercepts, is a question of law for this Court to decide.

[37] While the Crown is correct about the test to intercept as explained later in detail, this is not the end of the analysis.

Stage Two – Relevance

[38] The third party records application continued on December 13, 2021, when the parties provided their respective arguments on the second stage of the *O'Connor* test - relevance. At this point, and for the first time, CSC brought forward an additional claim – of public interest privilege. Counsel for CSC made no reference to case law or the test to be applied in relation to this claim. I required counsel to brief this issue if they were advancing and relying on the doctrine. A brief was to be filed on December 14 which, in addition to public interest privilege, claimed litigation privilege over the documents. Counsel for Mr. Colegrove submitted that they were not seeking any information which would be covered by public interest privilege. They were not seeking technical details of any system or names of companies or any other such information.

[39] Arguments were heard in relation to relevance and CSC was to provide written submissions in relation to this newly made claim and oral arguments on the issue were heard on December 17, 2021. At the resumption of the hearing, the CSC withdrew their claim of litigation privilege over any of the requested materials.

Law and Analysis

[40] I will first address the claim by CSC of solicitor-client privilege in relation to these documents.

Solicitor-Client Privilege

[41] Solicitor-client privilege attaches to communications between a lawyer and a client where:

1. A client seeks advice from a lawyer;
2. A lawyer provides advice in his or her professional capacity;

3. The communication between the lawyer and client relates to legal advice; and

4. The communication is confidential.

(*R. v. Basi* 2008 BCSC 1858)

[42] The protection of solicitor-client privileged documents from production and disclosure is a fundamental and substantive rule of law. There is a *prima facie* presumption that such communications should not be disclosed. Since a claim of privilege results in the exclusion of potentially relevant evidence for the opposing party, the onus of establishing a privilege lies with the party claiming it.

[43] In *Foster Wheeler Power Co. v. Societe intermunicipale de gestion et d 'elimination des dechets (SIGED) inc.*, [2004] 1 S.C.R. 456, the Supreme Court held that a court cannot be satisfied by the mere claim by a party that solicitor-client privilege exists. The party claiming solicitor-client privilege must provide evidence enabling the court to conclude that the conditions for the application of the privilege exist for each document.

[44] Privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege invoked, to assist other parties in assessing the validity of the claimed privilege.

[45] Therefore, to support a claim of solicitor-client privilege, CSC must describe each of the documents sought to be disclosed in a manner that indicates that it contains communications between a client and a legal advisor related to seeking or receiving legal advice. CSC did not do this originally and was afforded an opportunity to do so.

[46] The purpose of solicitor-client privilege is to provide clients with the freedom and protection to engage in frank and candid conversations with counsel regarding the request and provision of legal advice. Solicitor-client privilege permits our legal system to properly function. (*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31). In *Pritchard, supra*, Major J., for the court, stated at para. 19:

> …In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers

> give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.

[47] Solicitor-client privilege is broadly interpreted (*Blank v. Canada (Department of Justice)*, 2006 SCC 39). However, the privilege does not extend to business advice or policy advice (*R. v. McClure*, 2001 SCC 14).

[48] I have now had an opportunity to review the sealed documents which CSC claims are protected by solicitor-client privilege. I have only the documents themselves and the submissions of counsel; no sealed affidavit or viva voce evidence was adduced by CSC to add further context to my analysis.

[49] There are three documents. They are all PowerPoint presentations or portions of PowerPoint presentations. They are undated. It is clear on the face of the documents that they were all prepared by the Federal Department of Justice for the purpose of providing legal advice to CSC in relation to the interception of inmate communications. The presentation slides were clearly intended to deal with legal implications and risks associated with interceptions. The documents contain advice on how to lawfully perform certain actions. That legal advice was being communicated by the Department of Justice to its client, CSC. The advice provided in the presentation slides does not stray into the realm of policy advice or departmental know-how that characterizes non-privileged solicitor-client communications. The documents promote and expect free discussion between lawyer and client.

[50] It is noteworthy that each page of one document is marked with the following direction: “Protected by solicitor-client privilege. Do not share outside CSC”. While a statement like this is not dispositive, it does provide some indication as to a document’s purpose. The author clearly intended for the documents to be kept confidential.

[51] The nature of the relationship between the parties, the subject matter of the contents, and the circumstances all lead me to find that each of the three documents is protected by solicitor-client privilege.

Waiver

[52] Lastly, there has been no waiver of the solicitor-client privilege in relation to the three documents.

[53] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege.

[54] The applicant submits that the solicitor-client privilege claimed over the PowerPoint presentations, if it exists, was waived in three instances:

1. By the reference to legal training in the publicly available Audit;
2. By the reference to the training in the *viva voce* evidence provided by CSC staff in this pre-trial application; and
3. By the reference to the training in an email from CSC staff to the Crown.

[55] With respect, none of these passing references to the legal advice provided by Department of Justice counsel to CSC constitutes a waiver of solicitor-client privilege, whether express or implied. I accept that references to training contained within the Audit are limited to internal training, not legal advice presented by Department of Justice counsel. For instance, the Audit states that "[u]pon completion of Phase 1 in autumn 2018, CSC provided training to IHs and DWs that included guidance on legislative requirements for approving the interception of communications and the manner in which these approvals are to be given." The Audit seems to refer to internal CSC training, not Department of Justice legal advice.

[56] Further, the references to training provided by CSC staff in testimony, and in writing to the Crown, are also limited to CSC's internal training. It is clear that SIO Deschênes, in informing the Crown that "CSC did a lot of work to upgrade everything around the interception of communication", was referring to the CSC training and not to specific Department of Justice legal advice. In addition, all actors in the courtroom took steps to ensure no waiver was made once the issue was raised.

[57] In the circumstances of this application, the legal advice provided by Department of Justice counsel has not been disclosed in a manner that evinces an intention to waive the solicitor-client privilege attached to the three presentation slides. Accordingly, the solicitor-client privilege still protects the documents from their production and disclosure in this application.

First Stage - Likely Relevance

[58] I have already decided that the materials are likely relevant. On December 3, 2021, in order to move ahead efficiently and quickly resume the Charter applications

and in keeping with *R. v. Jordan,* 2016 SSC 27 and *R. v. Cody*, 2017 SCC 31, I provided a bottom-line decision. I found the applicant met the first stage "likely relevant" threshold in relation to the CSC documents – aside from those that were potentially subject to the claim for solicitor-client privilege . I indicated that my reasons would follow. These are those reasons.

[59] As stated in *R. v. McNeil*, [2009] 1 S.C.R. 66, the Crown's disclosure obligation extends to include "any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence" (para.17). The disclosure of third party records is subject to the *O'Connor* regime.

[60] To obtain disclosure of such records, an accused must show that the record is likely relevant. Information will be likely relevant where there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify.

[61] When the accused has discharged its burden of showing that the information sought is likely relevant, the court then moves to the second stage of the *O'Connor* analysis and assesses the actual relevance of the record sought by considering competing interests.

[62] In *O'Connor, supra*, the "likely relevance" standard was described as "an initial threshold to provide a basis for production" (para. 19). In *McNeil*, *supra*, the Supreme Court elaborated on that threshold as follows:

> "Likely relevant" under the common law *O'Connor* regime means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (*O'Connor*, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (*O'Connor*, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

[63] In *R. v. Jackson*, 2015 ONCA 832 the court reviewed the meaning of likely relevance, stating:

> 117. In the third party/O'Connor production setting, the phrase "likely relevant" designates the standard or threshold to be met at the first stage or step. Satisfaction of it entitles the applicant to have the records produced for review by the trial judge. Production to the applicant follows only where and to the extent that the trial judge considers it warranted after balancing several competing factors.
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> …
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> 127 The standard "likely relevant" imposes a significant, but not an onerous, burden on an applicant: *O'Connor*, at para. 24; *McNeil*, at para. 29. This threshold plays a meaningful role in screening applications to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production*: R. v. Chaplin* (1994), [1995] 1 S.C.R. 727 (S.C.C.), at para. 32; *O'Connor*, at para. 24; *McNeil*, at para. 29.
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> 128 The "likely relevant" threshold is not onerous because an applicant cannot be required, as a condition of accessing information that may assist in making full answer and defence, to demonstrate the specific use to which they might put information that they have not seen: *R. v. Durette*, [1994] 1 S.C.R. 469 (S.C.C.), at p. 499; *O'Connor*, at para. 25; *McNeil*, at para. 29. The trial judge does not balance competing interests to determine whether the "likely relevant" threshold has been met under *O'Connor: McNeil*, at para. 32.
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> 129 Under the third party/O'Connor production regime, "likely relevant" means that there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify: *O'Connor*, at para. 22; *McNeil*, at para. 33. An "issue at trial" includes not only material issues concerning the unfolding of the events which form the subject-matter of the proceedings, but also evidence relating to the credibility of witnesses and the reliability of other evidence: *O'Connor*, at para. 22; *McNeil*, at para. 33.

[64] This is a low burden, as the information need only be “likely” relevant, and considerations of privacy or admissibility do not enter the analysis at this stage.

[65] The materials sought by the applicant will assist in assessing the credibility of the witnesses on whose testimony the Crown relies on to dispute the alleged violation of the applicant’s *Charter* rights.

[66] In cross-examination, Deputy Warden Jérôme Poulin affirmed that although legal requirements surrounding the interception of private communications have not changed since at least the year 2016, these requirements were not being followed. Deputy Warden Jérôme Poulin therefore described the trainings they received as warnings to do things right.

[67] The materials sought by the applicant would be likely relevant to an assessment of the witnesses’ reliability and credibility. Furthermore, pursuant to an

admission made by the parties on October 29th, 2021, the entire grounds as set out in the ITO of John Maillet, sworn on May 19th, 2018, were provided entirely by Peter Hurley, who obtained the recordings and calls logs from SIO Stéphane Deschênes. Agent Maillet did no independent verification.

[68] Credibility being a central issue, the documents sought are likely relevant to the objective standard that authorizations to intercept were required to meet, and whether the conduct and decisions of SIO Stéphane Deschênes and Deputy Warden Jérôme Poulin were consistent with that standard.

[69] Furthermore, the audit, which refers to training received by CSC personnel, was submitted to this court jointly by the parties, thus demonstrating their recognition of the likely relevance of this material.

[70] Finally, the materials sought would be likely relevant under the s. 24(2) analysis. In his testimony, Deputy Warden Jérôme Poulin mentioned that there were multiple stages of training in 2020. Evidence of the content and extent of such training may demonstrate a systemic issue and would be relevant for the Court's analysis on the remedy sought by the applicant.

[71] I find this threshold of "likely relevant" has been met.

Second Stage – Relevance – Balancing full answer and defence and privacy

[72] In *O'Connor*, the Supreme Court clarified that the first stage of the test requires the applicant to satisfy a judge that the information sought is likely to be relevant. Once likely relevance is established, the applicant must show that the salutary effects of ordering the documents produced to the court for inspection outweigh the deleterious effects of such production.

[73] The right to disclosure is a principle of fundamental justice and a component of the accused's constitutional right to make full answer and defence.

[74] The applicant's argument is that this goes to the remedy in s. 24(2) that the materials are relevant to an understanding and decision on a systemic issue. The Crown agreed that the audit and materials concerning training that resulted from it would be relevant to issues of a systemic nature.

[75] What is meant by relevant here? In *R. v. Jackson, supra*, the court stated

> 119 The terms "relevant" and "relevance" are old friends of the law of evidence. Familiar faces. Constant companions. We know them well enough to say several things about them without being critical in any way.
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> 120 Relevance is not a legal concept. It is a matter of everyday experience and common sense. It is not an inherent characteristic of any item of evidence. Some have it. Others lack it.
>
> 121 Relevance is relative. It posits a relationship between an item of evidence and the proposition of fact the proponent of the evidence seeks to prove (or disprove) by its introduction. There is no relevance in the air: R. v. Luciano, 2011 ONCA 89, 267 C.C.C. (3d) 16 (Ont. C.A.), at paras. 204-5.
>
> 122 Relevance is also contextual. It is assessed in the context of the entire case and the positions of counsel. Relevance demands a determination of whether, as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence or non-existence of another fact more probable than it would be otherwise: R. v. Cloutier, [1979] 2 S.C.R. 709 (S.C.C.), at p. 731.
>
> 123 The law of evidence knows no degrees of relevance, despite the frequent appearance of descriptives like "minimally, marginally or doubtfully", "tangentially" and "highly" that tag along for the ride from time to time.

[76] In balancing the salutary and deleterious effects of production, the Court must consider the following factors:

(a) the extent to which the record is necessary for the accused to make full answer and defence;

(b) the probative value of the record in question;

(c) the nature and extent of the reasonable expectation of privacy vested in that record;

(d) whether production of the record would be premised upon any discriminatory belief or bias; and,

(e) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question.

(R v. O'Connor, *supra* at para 31.)

[77] The factors set out in *O'Connor* should not be applied mechanically. Rather, what is required "is a balancing of the competing interests at stake in the particular circumstances of the case" (*MacNeil*, *supra* at para. 35).

[78] In the present case, the applicant is disputing the authorization to intercept his private communications, as well as the extension periods that followed, on the basis of a lack of reasonable grounds, a failure to follow legislative requirements relating to the authorization form, as well as the unlawful interception of solicitor-client communications. The deficiencies raised by the applicant are alleged to be corroborated by the internal audit, with some of the issues being discussed in the training received by SIOs, deputy wardens and wardens. The prosecution has also announced that the exclusion of evidence would "gut" its case, such that it would have no evidence to tender at trial. Therefore, the evidence sought is probative and essential to the applicant's ability to make full answer and defense.

[79] In reviewing the relevant factors c) to e) are neutral in the present case, considering that the respondent and the record holder have advanced no claims concerning privacy interests.

[80] Where the claim of likely relevance is borne out upon inspection at the first stage of the inquiry, the accused's right to make full answer and defence will, with few exceptions, tip the balance in favour of allowing the application for production.

[81] As such, a finding of true relevance following production at the second stage renders the materials sought akin to "fruits of the investigation" governed by the first party disclosure regime. The question therefore becomes: "If the third-party record in question had found its way into the Crown prosecutor's file, would there be any basis under the first party *Stinchcombe* disclosure regime for not disclosing it to the accused?" The answer here is no.

[82] In *R. v. Stipo*, 2019 ONCA 3, the court ruled that rolling logs, training manuals, and related documentation, produced by a drug recognition expert in a case of impaired driving, were subject to first party regime, as they were relevant to the reliability of the expert's conclusion, informing defences, and determining whether the expert had sufficient experience to reach its conclusions. The training manual used or relied upon by the drug recognition expert in carrying out his duties in the investigation was also disclosed.

[83] Similarly, the training materials sought by the applicant are relevant to assessing the credibility and reliability of the testimonies of Deputy Warden Jérôme Poulin and SIO Stéphane Deschênes with respect to the procedure adopted when authorizing the interception of the applicant's private communications and when their respective views changed. The documents may also be relevant to the accused's request for a remedy under s. 24(2).

[84] The materials are therefore relevant, and no countervailing privacy interests prevent disclosure of this information.

[85] CSC also proposed redactions of the relevant materials that would protect the following categories of information from disclosure:

- Information that is irrelevant to the scope of the applicant's request but is contained in the records sought by the applicant;
- Information that should be protected from production by public interest privilege because the deleterious impacts of production outweigh the salutary impacts;
- Information that is related to third party interests that would not assist the applicant and, in certain cases, could damage the security of third parties and federal institutions by revealing the name and locations of contracting companies; and,
- Information that should be protected from production by litigation privilege because it refers to another claim.

[86] The accused agreed that he was not seeking any proprietary information about a company or software application. Nor is he seeking email addresses or anything of that nature. Consequently, any email addresses will be redacted, as are references to confidential aspects of CSC's interception scheme that do not engage the underlying issues in this application and are not sought by the accused. I accept the arguments of CSC that the disclosure of this information may impact the safety and security of its facilities by disclosing techniques and capabilities of CSC. The accused did not disagree and did not argue that this information is necessary for him to make full answer and defence. CSC's position, which was agreed to by the parties, was set forth in its brief as follows:

> 10. CSC's ability to complete interceptions could be compromised by disclosing information about the interception system that could be used to avoid interception. Any capacity for individuals to avoid interception at federal institutions endangers the safety and security of inmates, correctional staff, and the general public by providing an opportunity to shield illegal activity that would jeopardize the security of the penitentiary from CSC.
>
> 11. Furthermore, the public maintains an interest in keeping references to the name and identifying information of the company that operates the interception systems confidential, as the public disclosure of that information could create a risk

> of interference or attack to that company. As stated in *R. v. Le*, even information that might appear neutral may require a greater level of protection.
>
> 12. In the balancing of the public's interest in maintaining the integrity of CSC's interception scheme with the Applicant's right to make full answer and defence, this Court should consider the little probative value, if any, of the proposed redacted portions. These portions will not assist the accused or the Court in determining any issues raised in the pre-trial Application.

[87] Other than these redactions which I have agreed to, I find the rest of the information has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice or by harm to the privacy rights of witness.

[88] I have provided a chart below which includes the document as it appears in the CSC production, the estimated dates provided by the CSC, and my decision.

Document	**Relevance**	**Proposed Redactions**
Volume 1, Tab 1a – ACCOP Memo re National Training (September 2018)	This document is relevant. It concerns the suppression of telephone numbers pertaining to communication including privileged communication.	The redactions proposed are appropriate because they remove irrelevant information such as the proprietary information of a contracting company.
Volume 1, Tab 1b – Company name and SIO training. (February 2019)	This document is not relevant. It gives a detailed background of the company, the team, its history, clientele, what they do and how they do it. This is not relevant, and it is also proprietary information.	
Volume 1 – Tab 2 – Memo-Guidelines for Managing user accounts for audio recording devices (February 14, 2019)	Guidelines implemented after the audit in relation to audio recordings. These are relevant	The redactions proposed are appropriate as they relate to company information and proprietary information.
Volume 1 – Tab 3 – Intercept of Inmate Communications (April 2019)	This is training information created and disseminated as a consequence of the audit. It is relevant to the credibility of the witnesses as well as to the s. 24(2) claim and whether the issues were systemic.	The proposed redactions are appropriate. They are in relation to email addresses.
Volume 1, Tab 4 – Intercept Authorization National Assessment Tool (June 2019)	This is a summary checklist for intercepting calls. It bears potentially on issues relating to credibility and systemic issues.	The redaction is appropriate because it relates to an irrelevant email address.

Volume 1, Tab 5 – Intercept of Communication – Legal and policy framework. (June 2019)	This is relevant to the accused's Charter motion and potentially bears on the credibility of witnesses on the remedy sought and potential arguments of systemic issues. This material was developed in response to the Audit performed.	The redactions are no longer being claimed by the CSC as they have conceded that litigation privilege does not apply. There are appropriate redactions in relation to company and proprietary information.
Volume 1, Tab 6 – MAP Preventative Security and Intelligence for Wardens and Deputy Wardens (November 2019)	This material is relevant in relation to the credibility of witnesses and the remedy sought under s. 24(2) of the Charter.	The redactions are appropriate as they relate to other activities and issues and not to interception of communication.
Volume 1, Tab 7 – Interception of inmate Communication – Legislative framework & Policy overview for Wardens and DWs. (November 2019)	This training material was developed in response to the CSC audit and has relevance to the credibility and reliability of witness testimony and the remedy being sought under s. 24(2).	I do not agree with the proposed redactions under R4 as those have been abandoned but there are other pages in relation to that proposed action which have been redacted as R1 and I disagree. These pages are potentially relevant to the remedy sought under s. 24(2) of the Charter. The other redaction relating to irrelevant topics and company information is appropriate.
Volume 1, Tab 8 – ACCOP Memo - Interception of Inmate Communications – Standing Orders/ Post Orders Requirements. (November 2019)	This document is relevant as it was prepared in response to recommendation 4 of the Audit. It is relevant to credibility and reliability assessments and the remedy being sought by the accused.	The redactions are reasonable as they contain private email addresses, The accused has agreed these details are not being sought.
Volume 1, Tab 9 - Interception of Communication Global and Individual Suppression Deck. (December 2019)	This document is relevant as it gives training on suppression of privileged communications. This could go to credibility and reliability of witnesses and the remedy being sought in the Charter application	The redactions are appropriate as they contain information of company used and contents of the software. This information is not being sought by the accused.
Volume 2 – Tab 10 – Administrator User Account and User Account Maintenance (December 2019)	This document was created in response to recommendation 5 of the audit in relation to interception of inmate calls. This is relevant to training and policies and the impact on the credibility and reliability of witnesses and the remedy being sought by the accused	The redactions proposed are proper as they remove company information which is not being sought by the accused.

Volume 2 – Tab 11 – Intercept of Communications Logger Training (February 2020)	This is relevant because it addresses call suppression of such things as privileged communications. This could be relevant to the assessment of credibility and reliability as well as the remedy being sought by the accused	The redactions all relate to the actual system and its architecture. There has been no indication that this software is relevant.
Volume 1 – 12a- Memo intercept of communications (October 2020 for all of Tab 12) 12b – New and updated forms -1454 12c – New and updated forms – 1454-1 12d – New and updated forms - 1135	Ensuring compliance with legislation re: approval and notification. This is relevant to the credibility and reliability of witnesses and remedy sought. Relevant to training and credibility and reliability of witnesses and remedy sought. (Same applies to 12c and 12d	Redactions concerning email addresses is appropriate and information not sought by accused.
Volume 2 – Tab 13 – Duplicate to Tab 7 (December 2020)		
Volume 2 – Tab 14 – Duplicate to Tab 11 2020-2021		
Volume 2, Tab 15a – DG memo – Intercept of Communications – Quick reference guide for potential privacy breaches (March 2021 for all of Tab 15) Tab 15b – Quick Reference guide for potential privacy breaches.	This memo arises form the Audit in relation to CSC and is relevant to assessing credibility and reliability of witnesses and remedy sought. This applies to Tab 15b as well.	The redactions are appropriate as they relate to the software program and that information is not sought by the accused.
Volume 1 – Tab 16 a – Interception of inmate Communications Training – Legislative Framework and Policy Overview for Institutional Heads and Deputy Wardens (March 2021) Tab 16 b Duplicate for Tab 7	This document is relevant to assessing credibility and reliability of witnesses and the remedy sought.	

Volume 2 – Tab 17 a – Memo from DG PSI – Interception of Inmate Communication – Updated Policy Framework. (June 2021) Tab 17b – Promulgation of updated Commissioner's Directive 568-10 Tab 17c – Promulgation of updated Guidelines 568-10-1	New enhanced policy framework for interception of inmate communications is relevant to credibility and reliability assessment as well as the remedy sought. This 2021 document is relevant to an assessment of credibility and reliability and the remedy sought. Similarly, the guidelines at 17c have the same relevance.	
Volume 2 – Tab 18 a – Interception of Communication (June 2021) Tab 18b – Duplicate	This presentation given in June 2021 may bear on credibility and reliability and on the remedy sought.	The redactions are appropriate as they relate to equipment and this information is not being sought by the accused.
Volume 2, Tab 19 – Interception of Communication Townhalls (June 2021)	This presentation given in June 2021 may bear on credibility and reliability and on remedy sought.	The redactions are appropriate as they relate to equipment and this information is not being sought by the accused.
Volume 2 – Tab 20 Interceptions of Inmate Communication – New and Updated Forms (October 2020)	This is relevant to assessing credibility and reliability of witnesses and the remedy sought.	The redactions are appropriate as they relate to an email address.

[89] Having provided this ruling, my expectation is that CSC will produce these documents to the defence and Crown no later than Friday, January 14, 2021, at noon. The materials are largely ready for dissemination now, aside from a few documents which I have ruled are not to be redacted.

Conclusion

[90] Three of the documents sought by the applicant meet the test for solicitor-client privilege and cannot be produced. However, given the allegations made by the applicant in the Charter motions, the other CSC documents are relevant to the court's assessment of the reliability and credibility of the witnesses and are

potentially relevant to the remedy being sought under s. 24(2). They must be produced by CSC.

[91] It is important the materials be produced so the accused can make full answer and defence.

Brothers, J.