IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Re: section 487.02 of the Criminal Code*, 2019 NLCA 6
Date: January 25, 2019
Docket Number: 201801H0043

IN THE MATTER OF an application in the Supreme Court of Newfoundland and Labrador for an order in the nature of *certiorari* and *mandamus* seeking to quash the refusal by a Provincial Court Judge to issue a section 487.02 *Criminal Code* assistance order, sought by the Crown to give effect to a section 492.2(1) *Criminal Code* transmission data recorder warrant;

AND IN THE MATTER OF an *Ex Parte* appeal by Her Majesty the Queen from the order of a Justice of the Supreme Court of Newfoundland and Labrador made on April 13, 2018 denying the application.

Coram: Green, Welsh and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador General Division 201801G2045

Appeal Heard: June 21, 2018
Judgment Rendered: January 25, 2019

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Welsh J.A.
Dissenting reasons by: Green J.A.

Counsel for the Appellant: Mark Covan and Andrew Brown
***Amicus Curiae*:** Robby Ash

Hoegg J.A.:

INTRODUCTION

[1] In today's world much communication happens through technology, including cellular, digital, analog and other forms of messaging. Canadian criminal law recognizes this fact by Parliament's provision of authority to police to capture information respecting communications in appropriate circumstances to assist in their investigations. One way of capturing such information is through the use of a transmission data recorder (TDR) warrant issued under section 492.2(1) of the *Criminal Code.* This appeal requires interpreting sections of the *Code* to ascertain the extent to which a TDR warrant can be assisted by an assistance order under section 487.02. The interpretation involves balancing legislated police powers to investigate crime and the privacy interests of individuals.

BACKGROUND

[2] Section 492.2(1) of the *Code* provides that police, on grounds of reasonable suspicion that "an offence has been or will be committed […] and that transmission data will assist in the investigation of the offence", may obtain a warrant to obtain transmission data through a transmission data recorder (TDR). The TDR captures the transmission data in "real time" so that suspected crime can be investigated as it is being committed or soon thereafter (*Legislative Summary of Bill C-13* (Ottawa: Library of Parliament, 2013) Publication No. 41-2-C13-E, at 14).

[3] In this case, a Royal Canadian Mounted Police (R.C.M.P.) officer involved in an investigation of serious drug crime swore an Information to Obtain (ITO) a TDR warrant under section 492.2(1) to authorize the police to obtain transmission data to facilitate the investigation. The police were seeking information respecting unknown telephone communications with an identified

mobile phone number. A TDR warrant would only capture the numerical digits of the as yet unknown telephone numbers which were communicating with the identified mobile phone number and not the names and addresses associated with the as yet unknown telephone numbers (subscriber information). Accordingly, the officer also swore an ITO to obtain an assistance order under section 487.02 requiring telecommunications service providers (telcos) to provide to the police the subscriber information associated with the telephone numbers that were communicating with the identified cell phone once those telephone numbers were captured.

[4] A Provincial Court Judge (PCJ) granted the section 492.2 TDR warrant but refused to grant the section 487.02 assistance order, on the basis that subscriber information was outside the scope of section 487.02 in conjunction with a TDR warrant. As such, he concluded that he did not have jurisdiction to grant the assistance order. Consequently, the Crown applied to the Supreme Court of Newfoundland and Labrador, General Division (SCGD) for *certiorari* to quash the PCJ's decision and *mandamus* to compel him (or another PCJ) to reconsider the application on a proper jurisdictional basis.

[5] The SCGD Justice denied the Crown's application. In agreeing with the PCJ she said:

> … The powers to police granted under s. 492.2 of the *Code* are limited to obtaining that which falls within the definition of "transmission data." Subscriber information is not transmission data. To interpret s. 487.02 as giving effect to a s. 492.2 warrant by allowing […] the police to simultaneously access subscriber information along with the transmission data is tantamount to expanding the scope of the definition of "transmission data" under s. 492.2. In my view, the words "assistance" and "to give effect," as contained in s. 487.02 cannot reasonably be interpreted to permit expansion of the scope of the definition of "transmission data" under a s. 492.2 warrant. Surely, such an interpretation would require clearer statutory language.
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> In the absence of such clearer statutory language, I do not accept that a reasonable interpretation of s. 487.02 expands the express definition of "transmission data" in s. 492.2. In other words, under s. 487.02, any assistance order to be provided to give effect to a TDRW is, in my view, for the purpose of assisting in fulfilling the objective of obtaining transmission data as defined under s. 492.2. It is not for the purpose of obtaining subscriber information, which, as stated, is not encompassed by the definition of "transmission data."

She summarized her reasoning as follows:

> In summary, I therefore find that the subscriber information cannot be accessed through an assistance order for a TDRW. Rather, in my view, such can be subsequently accessed under a production order or orders. I have concluded that the Crown did not establish that s. 487.02 should be interpreted to expand the scope of the definition of "transmission data" under s. 492.2 of the *Code*.
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> Based on the foregoing analysis and after carefully considering the submissions and the authorities, I dismiss the Crown's application for *certiorari* and *mandamus*. The sealed packages are to be returned to Provincial Court. Order accordingly.

[6] The Crown appealed the SCGD Justice's decision.

[7] The matter proceeded to this Court on an *ex parte* basis. While the Crown gave notice of its appeal to four different telcos, none sought to intervene. On May 18, 2018, the Crown applied for directions on how to proceed, and on June 6, 2018, this Court ordered the appointment of *amicus curiae* to oppose the Crown's position so that both sides of the issues raised in the appeal could be fully argued.

THE FRESH EVIDENCE APPLICATION

[8] Also on June 6, 2018, the Crown applied to have this Court hear fresh evidence. The application for fresh evidence and the appeal were heard together on June 21, 2018.

[9] The proposed fresh evidence comprised affidavit and *viva voce* testimony from Constable David Emberley of the R.C.M.P. Federal Services and Organized Crime Division and Ms. June Dawe, an administrator in the same R.C.M.P. division. The proposed fresh evidence focused on police use of TDR warrants and assistance orders, what is captured by the TDRs, and why, from the R.C.M.P.'s perspective, assistance orders are necessary to give effect to TDR warrants.

[10] The Crown argued that it was in the interests of justice for the Court to receive the proposed fresh evidence, saying that it would inform "a purposive, remedial interpretation of the assistance order provision" and would "expose the interpretative errors in the courts below".

[11] *Amicus* counsel argued that the proposed fresh evidence should not be admitted because it was not relevant to interpreting the statutory provisions in issue. *Amicus* also maintained that any clarification respecting the use of

assistance orders in conjunction with TDR warrants would not have made any difference to the decisions below.

[12] The Court agreed to hear the fresh evidence and to reserve its decision respecting its admission and use.

[13] The Crown's application is made under section 683 of the *Code* which provides for the admission of fresh evidence in a court of appeal:

> 683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
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> (a) order the production of any writing, exhibit or other thing connected with the proceedings;
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> (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
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> (i) to attend and be examined before the court of appeal, or
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> (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purposes.

[14] Section 683 was preceded by section 610(1), which was interpreted by the Supreme Court of Canada in *R. v. Palmer*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212. In *Palmer* the Supreme Court observed that the section gives judges a broad discretion to admit fresh evidence. It set out four factors to be considered in exercising that discretion, but made clear that the overriding consideration in deciding whether to admit fresh evidence is whether it is in the interests of justice to do so (page 775). This approach was confirmed twenty years later in *R. v. Lévesque,* 2000 SCC 47, [2000] 2 S.C.R. 487 at para. 17.

[15] Rules 37 of this Court's *Court of Appeal Rules* and 19 of its *Criminal Appeal Rules* also pertain. An application for prerogative relief in a criminal law matter involves both civil and criminal law, and so either rule arguably applies. However, it is not necessary to resolve which rule governs, for the considerations set out in both rules and the jurisprudence are all subject to the overriding question of whether it is in the interests of justice to admit the proposed fresh evidence, as section 683(1) states. In this regard I refer to *R. v. Thorne*, 2015 NLCA 27, 367 Nfld. & P.E.I.R. 286 wherein Welsh J.A. of this Court admitted fresh evidence that had not been tendered at trial due to an error of counsel. In so doing, she relied on the Supreme Court's statement at

paragraph 15 of *Lévesque* that "failure to meet the due diligence criterion should not be used to deny admission of fresh evidence if that evidence is compelling and it is in the interests of justice to admit it".

[16] In this case, the proposed fresh evidence is not factual in the sense that it is material to a decision or verdict in a criminal prosecution. Rather, it is contextual evidence respecting how and why police use assistance orders to give effect to TDR warrants. One could almost say the evidence of Constable Emberley and Ms. Dawe is more in the nature of argument.

[17] In any event, the modern principle of statutory interpretation focusses on the value of context to the interpretative exercise, and the value of seeing the provisions in issue as part of a larger scheme or system (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140).

[18] The fresh evidence in this case relates directly to context and to an appreciation of how assistance orders work in combination with other provisions in Part XV of the *Code* and its overall scheme, and within the criminal law system. Why a section 487.02 order is necessary and how one works in relation to a TDR warrant goes to the heart of the issue before the Court, and evidence in this regard could only serve to assist the Court.

[19] Also important is that the evidence provided by Constable Emberley and Ms. Dawe is not proposed to be admitted in adversarial proceedings. The considerations set out in *Palmer* and the subsequent jurisprudence were developed and have been largely applied in adversarial contexts — like criminal prosecutions — where fairness concerns arise. In this case, there is no party to a prosecution or other action who could be prejudiced by the fresh evidence.

[20] For the above reasons, I would admit the fresh evidence.

ISSUES

[21] The central issue is whether the SCGD Judge erred in finding that the assistance order sought in this case was not reasonably required to give effect to the issued TDR warrant. Resolution of the issue requires determining whether assistance orders under section 487.02 of the *Code* are available to require telcos to provide the subscriber information associated with particular telephone numbers captured by the lawful use of a TDR pursuant to a section 492.2 warrant. Whether subscriber information can be considered "transmission data" for the purposes of a section 492.2 warrant is also in play.

THE POSITIONS OF THE PARTIES

[22] The Crown argued the importance of this case to police investigations, explaining that TDR warrants are sought in order to acquire data that will assist in the investigation of an offence, emphasizing that they are prospective tools used to build investigations into suspected crime. This argument was supported by the fresh evidence. The Crown says that telephone numbers captured as data by a TDR recorder are, in and of themselves, virtually useless to an investigation. The subscriber information associated with the captured telephone numbers is the information that is actually useful to an investigation. Thus, section 487.02 assistance orders that enable police to obtain this subscriber information from telcos are necessary to "give effect to" issued TDR warrants.

[23] I divert momentarily to note, as the SCGD Judge stated, that it is possible that raw transmission data in the form of a telephone number could possibly be of use to an investigation. For example, if a captured telephone number was already known to an investigator or known to be associated with criminal activity, the number itself may be useful in that it could confirm suspicions and thereby advance an investigation. However, such a situation would be rare, as Constable Emberley testified. Almost invariably the presenting situation in an investigation is that the subscriber information associated with a captured telephone number is in fact the information that is being sought for the investigation. The subscriber information can then inform further investigation and may be able to be used for the purpose of seeking a further warrant. Obtaining subscriber information in a timely fashion is especially important to investigations of serious drug crime, where cell phones and numbers are changed frequently so as to avoid leaving a detection trail.

[24] The Crown further argues that use of a production order or a general warrant to obtain subscriber information, as the SCGD Judge suggested, is not a reasonable alternative to an assistance order. The Crown says that a production order or warrant requires a higher standard of grounds to obtain, and obtaining either is a time-consuming, and retrospective, exercise. Moreover, the Crown says it is questionable whether a general warrant would be available given the Supreme Court of Canada's decision in *R. v. Telus Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3 at para. 80.

[25] In sum, the Crown's position is that refusal of assistance orders in cases like this makes obtaining TDR warrants a futile exercise in almost all cases, thereby defeating Parliament's intention to provide police with real time

information to investigate crime. Narrowing and limiting the availability of assistance orders reflects, in the Crown's submission, an outdated approach to statutory interpretation which would produce an absurd result.

[26] *Amicus curiae* argues that the language in section 492.2 limits the information able to be obtained through the use of a TDR warrant to the raw transmission data captured by the TDR, which in this case would be only the captured telephone numbers with which the identified telephone number is communicating. *Amicus* counsel's position is that "transmission data" in section 492.2 does not include subscriber information. He says that when a section 487.02 order is requested to assist a TDR warrant, that order must be limited to providing assistance of a technical or operational nature to enable the "installation, activation, use, maintenance, monitoring and removal" of a TDR. *Amicus* counsel argues that the words in section 487.02 "may reasonably be required to give effect to" cannot be interpreted in a manner which broadens the scope of a TDR warrant by interpreting transmission data to include subscriber information. To do so would, in his submission, broaden the scope of section 492.2 warrants, and thereby go beyond what Parliament intended.

[27] For the reasons that follow, I am of the view that section 487.02 assistance orders for subscriber information are "reasonably required to give effect to" section 492.2 TDR warrants and are therefore available to require telcos to provide the subscriber information associated with lawfully captured telephone numbers pursuant to the lawful execution of a section 492.2 TDR warrant.

ANALYSIS

The Principles of Statutory Interpretation

[28] The principles of statutory interpretation are not in dispute. Nevertheless, it is useful to be reminded of them.

[29] As the Supreme Court of Canada explained in *Rizzo Shoes*, the meaning of statutory provisions cannot be determined from their simple wording. Rather, the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act (paragraphs 21-22). In *ATCO Gas*, the Supreme Court confirmed this modern principle, emphasizing that a statutory provision is a component of a larger legislative scheme which cannot be ignored (paragraph 49). Both *Rizzo Shoes*

and *ATCO Gas* relied upon the provision in the respective provincial *Interpretation Acts* to support their reasoning.

[30] In *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865 the Supreme Court was interpreting federal legislation respecting airport and navigation services. In so doing, the Court noted Parliament's express direction in section 12 of the *Interpretation Act* R.S.C. 1985, c. I-21 that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (paragraph 84).

[31] This Court's decision in *Archean Resources v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, a case involving interpretation of provincial legislation, further explained the modern principle. In referencing the "remedial" direction of section 16 of this province's *Interpretation Act*, which is the same remedial direction as that found in section 12 of the federal *Interpretation Act*, Green J.A. stated at paragraphs 22 and 23:

> … s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise. …
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> In truth therefore, s. 16 enunciates a principle of harmonization in which the courts are directed … to adopt and apply an interpretation that fairly reconciles the language used in the enactment with the broader objects of the legislation so as to achieve the general goal, or to rectify the mischief, to which the legislative act appears to have been directed. …

(See also *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795 at para. 45 and *R. v. Nabis* (1974), [1975] 2 S.C.R. 485, 48 D.L.R. (3d) 543 at 493-494.)

[32] *Amicus* counsel does not disagree with the law as stated above, although he advocates that in this case the language in sections 492.2 and 487.02 is plain on its face and should be strictly construed.

[33] A word about strict construction. Before the Supreme Court of Canada's adoption of the modern principle, the interpretation of penal statutes was guided by the principle of strict construction. The difference in application between the modern principle and the principle of strict construction was considered in *Canada 3000 Inc*. The Court resolved the difference in favour of the modern principle applying to all statutory interpretation, saying at paragraph 28:

> … only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as "strict construction". The applicable principle is not "strict construction" but section 12 of the *Interpretation Act,* which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"; see *Bell ExpressVu,* at para.28 …

This state of the law was confirmed, and emphasized, by the Supreme Court of Canada in *R. v. Jaw,* 2009 SCC 42, [2009] 3 S.C.R. 26 at para. 38:

> … I have reservations about the proposition that any uncertainty in a charge *must,* as a matter of course, be resolved in favour of the accused. This proposition seems to be based on the strict constructionist approach to interpreting penal legislation that developed in the eighteenth century, when criminal law sanctions were especially severe. By the mid-1980s, however, the presumption of a restrictive interpretation of penal statutes had started to wear thin. A restrictive interpretation *may* be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation. But it is a principle of last resort that does not supersede a purposive and contextual approach to interpretation. Even if the impugned statement in the instant case *did* disclose a true ambiguity, an attempt would first have to be made to resolve it by resort to general principles and methods of interpretation. …
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> (References removed, emphasis in original.)

Accordingly, the governing approach to the interpretation of all legislation, including the provisions of the *Criminal Code*, is application of the modern principle.

The Legislation

[34] In pertinent part, section 492.2 reads:

> 492.2 (1) A justice or judge who is satisfied by information on oath that there are reasonable grounds to suspect that an offence has been or will be committed against this or any other Act of Parliament and that transmission data will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain the transmission data by means of a transmission data recorder.
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> (2) The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the transmission data recorder, including covertly.
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> (Emphasis added.)

[35] "Data" and "transmission data" are defined in section 492.2(6):

> *data* means representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device. (*données*)
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> *transmission data* means data that
>
> (a) relates to the telecommunication functions of dialling, routing, addressing or signalling;
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> (b) is transmitted to identify, activate or configure a device, including a computer program as defined in subsection 342.1(2), in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
>
> (c) does not reveal the substance, meaning or purpose of the communication. (*données de transmission*)

[36] Section 487.02 of the *Code* provides that a judge may order a person to provide assistance respecting warrants and specific authorizations upon being satisfied to do so:

> If an authorization is given under section 184.2, 184.3, 186 or 188 or a warrant is issued under this Act, the judge or justice who gives the authorization or issues the warrant may order a person to provide assistance, if the person's assistance may reasonably be considered to be required to give effect to the authorization or warrant.

[37] I would first observe that section 487.02 states that orders are available to assist "when reasonably required to give effect to" warrants and specific wiretap authorizations issued under the *Criminal Code*. The warrant at issue in this case is a section 492.2 warrant, which is available for the purpose of enabling police to obtain transmission data that will assist in an investigation. Whether a section 487.02 assistance order can be used to give effect to a TDR warrant in the manner requested by the Crown must therefore be determined in consideration of the purpose for the section 492.2 warrant issued in this case, as well as the other and varied circumstances in which assistance orders can be lawfully used. A "fair, large and liberal interpretation" of the statutory provisions in issue that will best ensure the attainment of the objects of the *Code* is required in any event, but such an interpretation is especially important in this case so as not to unduly restrict or conflict with lawful uses of assistance orders in other situations. At the same time, however, such an interpretation cannot serve as a guise to expand the scope of a predicate authorization or warrant.

[38] The legislative history of statutory provisions is a legitimate consideration in applying the modern principle to an interpretation of their meaning (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at para. 33). The Supreme Court stated this point succinctly a few years later in *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, saying at paragraph 30:

> Legislative evolution and history may often be important parts of the context within which to conduct the modern approach to statutory interpretation. …

[39] In this regard consideration of the previous section 492.2 is helpful. It read:

> 492.2(1) A justice who is satisfied by information on oath in writing that there are reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed and that information that would assist in the investigation of the offence could be obtained through the use of a number recorder, may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
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> (a) to install, maintain and move a number recorder in relation to any telephone or telephone line; and
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> (b) to monitor, or to have monitored, the number recorder.

> Order re telephone records
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> (2) When the circumstances referred to in subsection (1) exist, a justice may order that any person or body that lawfully possesses records of telephone calls originated from, or received or intended to be received at, any telephone [to] give the records, or a copy of the records, to a person named in the order.
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> (Emphasis added.)

[40] As noted above, subsection 492.2(2) provided that a judge could order telcos to produce telephone records to a named investigator. The Crown submits and *Amicus* agrees that the words "telephone records" were held to include subscriber information in *R. v. Mahmood*, 2011 ONCA 693, 107 O.R. (3d) 641 at paras. 34, 50, 52 and 100 to 117.

[41] While I am dubious that *Mahmood* decided that an order for production of "telephone records" could include subscriber information, I do not take issue with the underlying proposition that former section 492.2(2) could be interpreted that way. The former section 492.2(2) allowed for the production of "records", and I accept that the term was sufficiently broad that it could include subscriber information. I accept that the *Mahmood* court ruled that there was a reasonable expectation of privacy, albeit minimal, in subscriber information.

[42] When the current section 492.2 was enacted in 2014, former subsection 492.2(2) was repealed. The Crown argues that given that the objective of the new section was to provide police with the ability to capture real time information to assist in investigations of offences already committed or that will be committed, Parliament could not have intended to make subscriber information more difficult to obtain by enacting the current section with no specific replacement of the former subsection 492.2(2). Rather, the Crown maintains, Parliament relied on the availability of section 487.02 assistance orders to order telcos to provide subscriber information in order "to give effect to TDR warrants."

[43] Statements of purpose found in extra-legislative sources are recognized as providing legitimate insight into legislative intent (*Canadian National Railway Co. v. Canada (Attorney General),* 2014 SCC 40, [2014] 2 S.C.R. 135 at para. 47).

[44] In this case, clause 2.1.6 of The Legislative Summary of Bill C-13 referred to above directly states Parliament's intention that the new legislation is

for the purpose of allowing police officers to more quickly investigate past or possible future offences.

[45] The Legislative Summary of Bill C-13 also refers to assistance orders being available to further the objectives of the new legislation, stated to "allow police officers to more quickly investigate past or possible future offences". In light of this stated objective, it would be illogical to conclude that Parliament intended to limit investigatory powers that not only had previously existed, but had intended to enhance. I would therefore conclude, on a purposive analysis, that Parliament intended for assistance orders to be available to obtain subscriber information (the purposive analysis is discussed in *Sullivan* at 255, and endorsed by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10).

[46] This was the conclusion arrived at by Nordheimer J. (as he then was) in *R. v. Telus*, 2015 ONSC 3964, 122 W.C.B. (2d) 281. At paragraph 54, Justice Nordheimer stated:

> … Parliament also knew that an assistance order existed under section 487.02. It is a provision of general application to all warrants issued under the *Criminal Code*. There is no reason to believe that Parliament did not intend to leave the issue, whether subscriber information was needed in any particular instance, to be addressed under that general provision. …

[47] To the extent that former section 492.2(2) allowed for the production of subscriber information it would be strange indeed for Parliament to take away this tool without another option to fill the gap. This would be inconsistent with the objective of providing investigators with tools to obtain real time information to assist in investigations. I do not accept that Parliament would neuter the use of TDR warrants by amending section 492.2 in a manner that frustrates its objective. It is much more likely that section 487.02 was always available to assist in providing subscriber information to police in appropriate cases.

[48] The record before the Court does not disclose the practice for obtaining subscriber information prior to 2014. It could be that section 487.02 was relied on then to obtain subscriber information. Or, as the Court observed at paragraph 7 of *R. v. Wong* 2016 B.C.S.C. 1834, prior to the Supreme Court's decision in *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, telcos routinely provided subscriber information upon police request.

[49] When amending or drafting new legislation, Parliament is "presumed to know all that is necessary to produce rational and effective legislation," which includes a "mastery of existing law, both common law and statute law, and the case law interpreting statutes" (Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed. (Markham, ON: LexisNexis, 2008) at 205. To my mind this would include knowledge respecting the ability to obtain subscriber information under the former legislation and the availability of assistance orders to obtain subscriber information under the new legislation. Again, an assistance order under section 487.02 is available to realize the objective of a section 492.2 warrant. To make a TDR warrant effective – or useful – its objective must be realized. Its objective is to obtain transmission data that will assist in an investigation.

[50] Another important consideration in this interpretative task is the standard on which section 492.2 TDR warrants can be obtained. A TDR warrant can be obtained on reasonable grounds to suspect. By contrast, the standard on which a general warrant or a production order can be obtained is reasonable grounds to believe. Reasonable suspicion is a lower standard than reasonable belief (see the concurring reasons of Binnie J. in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456).

[51] Parliament provided that a TDR warrant, as an investigatory tool directed at providing real time information to "allow police officers to more quickly investigate past or possible future offences", was to be made available on the lower standard of reasonable suspicion. Parliament must be presumed to have known what it was doing in deliberately setting the lower standard for obtaining a TDR warrant. As well, it is noteworthy that obtaining a TDR warrant does not engage the rights of an individual in the way that obtaining a search warrant would, which may explain or justify the lower standard.

[52] Appreciating the difference between the two standards brings the interpretive task into focus. TDR warrants are different than production orders and general warrants in that they work prospectively by enabling the investigation of serious crime in real time. Production orders and general warrants are obtainable only after information is already known and believed to exist, and then only if a judge is satisfied that the affiant seeking the order or warrant has reasonable grounds to believe that an offence has been or will be committed, that the information sought is in a particular person's possession or control, and that it would assist in the investigation. In other words, production orders and general warrants are retrospective tools used to obtain known information; a TDR warrant is a means to discover information not only not

known, but perhaps not yet in existence. It is the potential availability of current subscriber information respecting who the identified telephone number is communicating with that is valuable to the investigation. Obtaining subscriber information is what can lead to the identification of suspects and provide grounds to obtain a production order. Without subscriber information, the investigation is no further ahead, no matter how many communications take place between an identified telephone number and an unidentified one. The grounds to obtain a production order are not elevated by knowing telephone numbers, they are elevated by knowing with whom the telephone numbers are associated.

[53] Also important is the fact that the process of obtaining a production order or general warrant is time-consuming. By the time a general warrant or production order could be obtained, a captured telephone number may well have been changed or disconnected, as Constable Emberley testified, making obtaining a TDR warrant a futile exercise.

[54] The SCGD Judge ruled that subscriber information is not included in the definition of transmission data found in section 492.2. I am of a different view.

[55] As previously stated, data and transmission data are defined in section 492.2(6):

> "data" means representations including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device.
>
> "transmission data" means data that
>
> (a) relates to the telecommunication functions of dialing, routing, addressing or signaling;
>
> (b) is transmitted to identify, activate or configure a device, including a computer program as defined in subsection 342.1(2), in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
>
> (c) does not reveal the substance, meaning or purpose of the communication.

[56] In defining transmission data, Parliament specifically considered what information could be revealed through the use of a TDR warrant. Subsection 492.2(6) limits the information a section 492.2 warrant can obtain by

specifically stating that "the substance, meaning, or purpose of the communication" cannot be revealed. The "substance, meaning, or purpose" of the communication is for all intents and purposes the content of the communication—the actual conversation between the caller and the recipient of the call. Conspicuously absent from the definition of transmission data in subsection 492.2(6) is a provision addressing subscriber information; subscriber information is not mentioned at all. The fact that obtaining subscriber information is not precluded by section 492.2 is an indication that Parliament did not intend to prevent the police from requiring telcos to produce it and that Parliament expected or assumed that it could be lawfully obtainable by means of an assistance order. More to the point, if Parliament intended that only raw data could be obtained by use of a TDR warrant, there would have been no need to enact section 492.2(6)(c) to explicitly exclude content from the definition of transmission data.

[57] Other parts of subsection 492.2(6) also inform the interpretative analysis. In the definition of transmission data, subsection (a) states that transmission data means data that relates to routing and addressing. Subsection (b) speaks to identifying a device (which in this case would be any of the telephones in communication with the identified telephone) and to identifying or purporting to identify the "… destination or termination of the communication". To my mind the digits of a captured telephone number do not identify the telephone in any meaningful way. Neither do the digits of a telephone number identify the destination or termination of a communication in any meaningful way. Identification of the devices and the destinations or terminations of the communications are what is being sought through the use of a TDR warrant. Simply put, raw transmission data is not, without subscriber information, meaningful. In this regard I echo the words of Nordheimer J. (as he then was) in *R. v. Telus Communications Co.,* 2015 ONSC 3964, wherein he said, at paragraph 46, that "phones do not commit crimes, people do". I would also say, following the reasoning of the Supreme Court in *R. v. Lyons,* [1984] 2 S.C.R. 633, 14 D.L.R. (4th) 482 at p. 668, that Parliament has defined transmission data broadly so as to authorize, "by necessary implication and unavoidable inference", a court to grant an assistance order requiring telcos to reveal subscriber information.

[58] Accordingly, it is my view that the definition of transmission data in section 492.2(6) contemplates that raw transmission data obtained by a TDR can be made meaningful through the use of an assistance order requiring telcos to

reveal the subscriber information associated with lawfully captured telephone numbers so as to give effect to the TDR warrants.

[59] The issue before the Court is whether the names and addresses associated with telephone numbers lawfully captured by a transmission data recorder can be obtained with the use of an assistance order. This decision pertains only to the availability of subscriber information associated with telephone numbers lawfully captured by a TDR. It does not pertain to subscriber information associated with an internet protocol (IP) address. Subscriber information associated with an IP address could reveal a subscriber's core biographical data, which was the concern in *Spencer* (see paragraph 24). Revealing core biographical data is a more intrusive invasion of privacy and is akin to revealing the purpose of a communication, which is very different from revealing the subscriber information sought in this case, and in any event is specifically prohibited by section 492.2(6)(c). As well, I offer no opinion on the constitutionality of obtaining such information on a reasonable suspicion standard in light of the comments of the Supreme Court of Canada in *Spencer*.

[60] In the result, it is my view that Parliament's purpose of providing police with the power to fight crime with real time information by enacting the 2014 amendments to the *Code* is realized by enabling police to obtain assistance orders to require telcos to reveal the subscriber information associated with the lawfully captured telephone numbers through the use of a TDR warrant, so as to give meaning to the captured data and thereby give effect to the purpose of obtaining a TDR warrant.

[61] Finally, to the extent that the privacy rights of callers can be said to be affected by this interpretation, I say that Parliament has considered this point, and "rationally" determined, that its objective in enacting section 492.2 is substantially important to society's well-being and sufficiently important to warrant limiting, "proportionally" certain rights and freedoms (*Lyons* at page 339).

[62] In the result, a PCJ has jurisdiction to grant a section 487.02 assistance order requiring telcos to reveal the subscriber information associated with telephone numbers lawfully captured by a TDR pursuant to the lawful execution of a TDR warrant. The approach of the SCGD Judge, and that of the PCJ, was narrow and limiting, and in conflict with the objectives of Part XV and the overall scheme of the *Criminal Code*. Accordingly, this matter is remitted to Provincial Court for a determination of whether an assistance order is appropriate on the specific facts of the Crown's application.

[63] The Court wishes to thank all counsel for their submissions on this important case. We particularly thank *Amicus curiae* for his submission which was prepared and delivered on short notice.

L. R. Hoegg J.A.

I concur with the reasons of Hoegg J.A.: _____

B. G. Welsh J.A.

Green J.A. (Dissenting):

[64] The fundamental question at issue in this appeal is what is the meaning and effect of the phrase "to give effect to" in section 487.02 of the *Criminal Code*, relating to assistance orders, as applied in relation to the operation of a transmission data recorder warrant granted under section 492.02.

[65] The choice facing the Court is to adopt an interpretation that limits the scope of an assistance order to facilitating the effectiveness of the *warrant* or one that facilitates the police *investigation* to which the warrant relates. The latter interpretation would enable information to be obtained that goes beyond the scope of the information that is available under the warrant itself.

[66] A Provincial Court Judge as well as a superior court judge who reviewed the Provincial Court Judge's decision on an application for *certiorari* and *mandamus*, both concluded that the court had no jurisdiction to grant an assistance order in conjunction with a transmission data recorder warrant (TDRW) where the purpose of the assistance order was to require telecommunications companies to provide customer name and address (CNA)

information associated with the raw telephone numbers that would be disclosed as a result of the installation and use of the transmission data recorder (TDR) pursuant to the warrant.

[67] They reasoned that inasmuch as this was additional information that would not be available from the transmission data that was to be intercepted, it was outside the scope of the warrant and could not therefore be considered "assistance" with respect to giving effect to the warrant. They found that assistance orders are not amiable to assist the police investigation generally. I am fully in agreement with the clear, concise and well-articulated position of the two lower court judges. I would therefore dismiss the appeal.

[68] My colleagues, on the other hand, would allow the appeal. Their position, boiled down to its essence, is that because allowing access to CNA information would significantly enhance the effectiveness of the raw data obtained from the TDRW, it can be considered "assistance" to "give effect to" the warrant. With all due respect to my colleagues, this conclusion does violence to the proper principles of statutory interpretation and, what is more, allows for an unwarranted and uncontrollable extension of the type of information that the police would be able to obtain in the course of executing a TDRW. It would extend it to obtaining any information that is not merely transmission data that is authorized by the warrant but to *additional* information that is not transmission data but which may provide assistance in interpreting the data obtained. If Parliament wanted to allow for this additional intrusion, it could have said so in unmistakable terms. It did not. The effect of the position of my colleagues is to leave no principled basis for determining the type of, and the circumstances when, "assistance" can be provided by use of an assistance order.

Scope of Appeal and Standard of Review

[69] This appeal is brought under section 784(1) of the *Criminal Code*, which allows an appeal to this Court "from a decision granting or refusing the relief sought in proceedings by way of *mandamus, certiorari* and prohibition."

[70] Although section 784 does not limit the grounds of appeal, this Court in *R. v. A.B.*, 2014 NLCA 8, 346 Nfld. & P.E.I.R. 218 at para. 20 held that appellate review under section 784 should consist of review for errors of law or jurisdiction.

[71] The appeal is this case engages a determination of the jurisdiction of a judge to issue an assistance order under section 487.02 of the *Code* which in

turn involves interpreting the legal scope of such an order as provided for in section 487.02. These matters attract a standard of review of correctness.

Analysis

(a) General Approach

[72] Freedom from unwarranted searches, along with freedom of speech and the rule of law, are at the top of the list of values protected in a democracy. The use of TDRWs and assistance orders involves intrusions into citizens' affairs that would not be countenanced unless Parliament authorized them. In assessing the degree of intrusion that Parliament was prepared to authorize in this case, one must situate the discrete issue in the broader principled context.

[73] I start with the proposition that the police are not permitted to interfere with the liberty of any citizen or intrude on a citizen's life, and in particular to have access to an individual's personal information, except through public observation or in respect of which there is no reasonable expectation of privacy, unless they are authorized by law and in a *Charter*-compliant way.

[74] It is true that there have been cases that have held, in the circumstances there considered, that there can be no reasonable expectation of privacy in CNA information (see for example, *R. v. Khan*, 2014 ONSC 5664; *R. v. Morrison*, 2014 ONCJ 774). There are, however, other cases where a reasonable expectation of privacy in such information though, depending on the circumstances, perhaps diminished in scope in comparison to some other types of information, has been held to exist (*R. v. Mahmood*, 2011 ONCA 693, 107 O.R. (3d) 641; *R. v. Nguyen*, 2004 BCSC 72, 20 C.R. 6th 135 (BCSC)).

[75] The Supreme Court of Canada decision in *R. v. Spencer*, 2014 SCC 43 makes it clear that whether there is a reasonable expectation of privacy in a given case must be determined by consideration of the "totality of the circumstances", weighing a number of interrelated factors, including the claimant's interest in the subject matter, the claimant's subjective expectation of privacy in the subject-matter and whether that expectation was objectively reasonable. Each case will turn on its own facts. In *Spencer*, where the issue was whether the police needed a judicial authorization to obtain subscriber information from an internet service provider, the Court, in the course of its analysis, concluded that in the circumstances of that case "there is a reasonable expectation of privacy in the subscriber information" (per Cromwell J. at para. 66).

[76] The Court recognized that the concept of privacy encompassed the notion of anonymity and that keeping CNA information private is an important aspect of "guarding the link between the information and the identity of the person to whom it relates" (paragraph 46).

[77] Thus, in some cases, CNA information will attract a reasonable expectation of privacy and in others it may not. For example, where a telephone subscriber has a private name-private number listing, it could be said that he or she has a subjective expectation of privacy that could be considered to be objectively reasonable. Further, the very fact that name and address information is not publicly available for cell phones through white pages listings, as it would be for land line phones, enhances the ability to conclude that such numbers, in the case of cell phones, attract some level of privacy. It is also possible that the nature of the telephones or their locations targeted by a TDRW could also reveal biographical information about the individuals calling in. The use of assistance orders to acquire CNA information therefore engages consideration of their potential impact on issues of invasion of privacy.

[78] (That said, it should be remembered that, in any event, whether there is or could be a reasonable expectation of privacy in CNA information on the part of subscribers is not directly in issue in the current case except to the extent that its presence may highlight some of the important issues at stake when considering the extent of the intrusion into citizens' lives that Parliament could, on a proper construction of the authorizing legislation, be said to have authorized. This is not a case where a specific search is being challenged as being unreasonable.)

[79] The notion of limiting unwarranted intrusion into citizens' affairs goes back at least to the great privacy cases of the eighteenth century. In *Huckle v. Money* (1763), 2 Wils K.B. 205, 95 E.R. 768, an action for trespass, assault and false imprisonment was brought by a printer who was arrested under a warrant issued by the Secretary of State. The warrant authorized a King's messenger to arrest the authors, printers and publishers of a publication, without naming or identifying any of them, and to seize all their papers and to bring them to the Secretary to be examined by him. A jury award of exemplary damages was upheld and a new trial refused. Sir Charles Pratt, Chief Justice of the Court of Common Pleas stated:

> … I think they have done right in giving exemplary damages. To enter a man's home by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring attack made upon the liberty of the subject

[80] In *Entick v. Carrington*, (1765) 2 Wils K.B.275, 95 E.R. 807, it was held that the Secretary of State had no right to issue a warrant to enter Entick's house to search for seditious papers and thus found the Secretary guilty of trespass. Lord Camden, Chief Justice of Common Pleas observed:

> … he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such justification can be maintained by the text of the statute law, or by the principles of the common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant and the plaintiff must have judgment.
>
> (Emphasis added.)

[81] While these cases dealt with physical entry into residential premises, the principle extends beyond that today. See, for example, the comments of McLachlin C.J. and Fish J., dissenting, but not on this point, in *R. v. Gomboc*, 2015 SCC 55, [2010] 3 S.C.R. 211:

> [102] … When we subscribe for public services, we do not authorize the police to conscript the utilities concerned to enter our homes, physically or electronically, for the purpose of pursuing their criminal investigations without prior judicial authorization. We authorize neither undercover officers nor utility employees acting as their proxies to do so.

[82] The issue in the current case is whether Parliament has, by its enactment of section 487.02, manifested an intention to authorize the type of intrusions into citizens' affairs that are at issue in this case thereby reducing the rights that they would otherwise have or, if not, whether, to borrow the words of Lord Camden in *Entick v. Carrington*, the "silence of the books is an authority against" the Crown in this instance.

(b) The Authorized Intrusion in this Case

[83] Parliament has provided the police with a number of investigative tools to assist them with the investigation of crime by means of acquisition of information from or about individuals. One such tool is the TDRW under section 492.02. If granted on reasonable grounds to suspect that an offence has been or will be committed and that transmission data will assist in the investigation of the offence, a TDRW authorizes a peace officer to obtain "transmission data" by means of a TDR. A TDR is defined as "a device, including a computer program … that may be used to obtain or record transmission data or to transmit it by a means of telecommunication" (section

492.2(6)). "Computer program" is itself defined by section 342.1(2) as "computer data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function."

[84] The scope of a TDRW that may be issued is limited by section 492.2(2) as follows:

> (2) **Scope of Warrant** – The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the transmission data recorder, including covertly.

[85] The scope of the police authority to act pursuant to the warrant is therefore limited to installing, using, maintaining, monitoring and removing the TDR. The purpose of those activities is to obtain "transmission data". That term is defined by section 492.2(6) as:

> "transmission data" means data that
>
> (a) relates to the telecommunication functions of dialing, routing, addressing or signaling;
>
> (b) is transmitted to identify, activate or configure a device, including a computer program as defined in subsection 342.1(2), in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
>
> (c) does not reveal the substance, meaning or purpose of the communication.

[86] As will be explained more fully later in these reasons, the assistance order is not a stand-alone provision authorizing the obtaining of information. It is dependent upon another authorization, order or warrant and is designed, as its name suggests, to "assist". It cannot by its operation extend the authorization of the warrant. If information is not within the scope of the TDRW then resort cannot be had to an assistance order to obtain it, because that would extend the reach of the TDRW beyond that which it authorizes the police to collect.

(c) Approach to Statutory Interpretation

[87] The meaning and legal effect of a statutory enactment is discerned "by examining the words of the statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's scheme and

object" (per Brown J. in *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 at para. 17). In short, a court must consult all relevant sources of meaning. The inference drawn from those sources of meaning, reconciled to the extent possible, is conveniently referred to as the intention of the legislature.

[88] The approach to be taken is buttressed by section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, per Iacobucci J. at para. 26), which reads:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[89] The emphasis on regarding the enactment as "remedial" requires an inquiry into the problem or mischief that the statute was attempting to rectify. That will give insight into the purpose or object of the legislative act. The requirement to give each enactment a "fair, large and liberal" construction and interpretation directs a focus not only on the actual words used and how they would ordinarily be understood but also on the statutory context in which the words are used and with reference to the perceived purpose of the provision. The requirement that the process be conducted in a manner that best ensures the attainment of the objects of the provision emphasizes that, although an examination of the words may be the starting point, the final result is not to be dictated by an abstract dictionary definition of the bare words. Rather, the legislation should be interpreted in a manner that will allow the words to be read, if possible, in a way that achieves the underlying object of the legislative exercise.

[90] It is therefore not simply an exercise in "interpretation" of the words (an exercise in reading and understanding) but it also involves "construction" as well (a decision reached by the court, not dictated by the legislature). Construction is a process that is much more nuanced and contextualized than merely reading words and phrases. It not only requires giving meaning but also legal effect to the act of the legislature in a manner that is perceived as fair and just by the court.

[91] The court must, then, consider (a) the words used; (b) their statutory context; (c) the problem or mischief to which the enactment was directed; (d) the legislative history of the implementation and modification of the provision in question; and (e) the legislative record to determine what the proponents of the bill were attempting to achieve. Each of these sources must be reconciled to the extent possible to arrive at the best defensible construction possible.

[92] The starting point, however, is the language chosen by the legislator. It is that language, used in context, which is the chief instrument used to convey meaning and intention.

(d) Interpretative Analysis

(i) Language

[93] It is accepted that the operation of the TDR will not produce CNA information, which is what the police are seeking in this case. To get that information, the police sought the assistance order directing the telecommunications companies to supply it in conjunction with the electronic data that was being accessed by the TDR.

[94] The scope and limits of an assistance order are governed by section 487.02:

> **487.02 Assistance Order** – If an authorization is given under section 184.2, 184.3, 186 or 188 or a warrant is issued under this Act, the judge or justice who gives the authorization or issues the warrant may order a person to provide assistance, if the person's assistance may reasonably be considered to be required to give effect to the authorization or warrant.

[95] The key words or phrases are "assistance", "to give effect to" and "authorization or warrant." The first thing to note is that the assistance is limited by and tied to giving effect to the warrant, in this case the TDRW. The assistance order does not exist on its own; it is parasitic upon the thing it is designed to assist. It can do nothing more.

[96] The assistance order provision applies to all warrants and authorizations to which it refers, not just the TDRW. It is not contained in the same section dealing with TDRWs and does not refer specifically to assisting TDRWs. By its nature it must perform a uniform function wherever it applies. It suggests a legislative scheme designed to ensure that the various wiretap authorizations and warrants to which it applies can be carried out once authorized. It is designed "to give effect to the *authorization or warrant.*" It is a power designed to prevent police investigations being thwarted by third parties or natural circumstances who or which might have the ability to stand in the way between police and the information the court has authorized them to obtain.

[97] For example, in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 a search warrant authorized police to search for and obtain certain forged bank

records in the custody of a newspaper. Statements made by certain representatives of the newspaper suggested that the documents had been deliberately hidden. The warrant was accompanied by an assistance order requiring the editor-in-chief to assist in locating and producing the concealed document. The assistance was directed to facilitating seizure of the very information to which the underlying warrant was directed. In the context of TDRWs, the information that has been authorized to be obtained is "transmission data" and only transmission data. The assistance should, on this analysis, be directed to capturing *that* information, not *additional* information that may make the transmission data itself more useful.

[98] As a matter of logic, therefore, based on the structural relationship between the assistance order and the warrant, its function is to make the warrant operative and is tied to the scope and function of the TDRW.

[99] This is confirmed by the key words in section 487.02. The word "assistance" is defined by the *Canadian Oxford Dictionary,* 2nd ed. (Don Mills, ON: Oxford University Press, 2004) as "an act of helping." The *Random House Webster's Unabridged Dictionary,* 2nd ed. (New York: Random House, 2001) defines it as "the act of assisting; help; aid; support." The act of assistance (helping) must therefore be in relationship to someone or something else, in this case the TDRW.

[100] Furthermore, it is not assistance in the abstract that is authorized. It must be assistance that may be reasonably considered to be required to "give effect to" the warrant. That phrase is defined in the *Canadian Oxford Dictionary* as "make operative or put into force." The *Webster's New World College Dictionary*, 5th ed. (2014) defines it as "put into practice; make operative." The word "effect" itself is defined in *Black's Law Dictionary,* 9th ed. (St. Paul, MN: Thomson Reuters, 2009) as:

> Effect, *n.* something produced by an agent or cause; a result, outcome or consequence.

[101] On the ordinary usage of the words, therefore, the nature of the assistance is tied to making the *TDRW* operative.

[102] This analysis is consistent with the approach to the use of assistance orders in other contexts. The availability of an assistance order has existed long before the *Criminal Code* was amended in 2014 to provide for the use of TDRWs. A review of reported cases dealing with or referring to assistance orders in such other contexts is therefore of some use to determine the

understanding that has generally existed as to the proper role and scope of assistance orders.

[103] In *R. v. TD*, 2018 ABPC 231 the Crown sought an arrest warrant for an accused who was in custody on an unrelated matter. It also sought an assistance order under section 487.02 directing prison officials to secure transfer of the accused to the RCMP detachment for arrest and interview. In a ruling on an *ex parte* application, reminiscent of the application in the current case, the justice refused to issue the assistance order because it was designed to achieve something more than to simply give effect to the arrest warrant, which was to bring the accused before the court. E. A. Johnson, P.C.J. ruled:

> [44] … What assistance is required in order to give effect to the arrest warrant?
>
> [45] The form of warrant (Form 7) requires that the peace officers acting on it arrest an accused and bring that accused before the court. Thus, any assistance required to give effect to the warrant should be directed to arresting an accused and getting that individual before the court.
>
> [46] The Crown has been clear that the order sought is … to direct the RCMP be given custody of her so that she can be taken to the RCMP detachment to effect the post arrest interview.
>
> [47] Thus, the order sought by the Crown is not directed to bringing TD before the Court.
>
> [48] The Crown acknowledges in its submissions that "the police interview is not a part of the arrest process but is a part of the investigative steps that police can take and those steps can take place during the time period when a person is arrested."
>
> [49] Thus, the order sought by the Crown is not necessary in order to give effect to the arrest warrant and accordingly does not fall within the language of section 487.02. The Court is not given the power under section 487.02 to grant the order.

[104] As the words of section 487.02 required him to do, the judge in *TD* tied the scope of the assistance order to the authority granted by the warrant in respect of which the order was to provide assistance. The power to allow something to be done beyond giving effect to making the originating warrant operational did not exist. It did not extend to assisting the general police investigatory process.

[105] In a number of other cases, although the scope of an assistance order was not specifically dealt with, reference to assistance orders granted in those cases

gives an indication of how such orders are regarded and used in practice. No authority has been located where an assistance order was used to obtain information separate from and not included within the scope of the main originating warrant. Instead, they appear to have been used as a tool to enlist others to assist in obtaining the information *sought to be obtained in the main warrant*.

[106] See, for example, *R. v. Lam*, 2015 ONSC 2131 (assistance order directed courier companies to provide the assistance necessary to implement a warrant which authorized the police to search packages couriered by persons under investigation); *R. v. Larson* (1996), 194 A.R. 161 (Alta. Prov. Ct.) (assistance order required telecommunications companies to provide information and technical assistance to implement a warrant to intercept telephone communications "unobtrusively and with minimum interference"); *R. v. Millard*, 2016 ONSC 348 (assistance order directed cellphone provider to bypass the passcode on a phone and copy data thereon, the search of which phone having been authorized by a search warrant); *R. v. Chang*, 1998 CarswellOnt 1849, [1998] O.J. No. 1789 (Ont. Gen. Div.) (assistance order required all necessary assistance in *implementing* an intercept order respecting telecommunications relating to certain individuals); *R. v. Doiron*, 2005 NBQB 89, 748 A.P.R. 8 (assistance order directed telecommunications companies to provide information, facilities and technical assistance necessary to accomplish interception of private communications unobtrusively and with minimal interference, in relation to an authorization to intercept telecommunications and oral communications of an in-custody individual; *Canada Post Corp. v. Canada (Attorney General)* (1995), 95 C.C.C. (3d) 568 (Ont. Gen. Div.) (assistance order required employees of Canada Post to record postal information, sender information and addressee information on mailable matter delivered to a post office box number, which was the very information authorized to be recorded by the warrant that had been granted); and *R. v. National Post*, *supra* (assistance order required editor-in-chief of newspaper to assist police in locating documents and making them available pursuant to a search warrant).

[107] The use of assistance orders in each of these cases is consistent with the notion of facilitating the effectiveness of the underlying warrant or authorization to obtain information that was already authorized to be obtained by the warrant itself, rather than obtaining additional information that could not be obtained pursuant to the warrant or authorization.

[108] I conclude, therefore, that the logical result flowing from the statutory structural relationship of the assistance order to the TDRW, together with the

ordinary dictionary meaning of the key words in section 487.02 and their use in other contexts, points to the scope of the assistance order being limited to making the *operationalization* of the warrant effective. It does not extend to providing assistance to the police investigation generally or to make it more meaningful or efficacious outside of the provision of the information allowed to be accessed by the underlying warrant.

[109] To get around this distinction, the Crown submitted that the phrase "to give effect to" means to make the TDRW efficacious *in the context of an investigation*. Relying on the evidence submitted pursuant to their fresh evidence application, the Crown emphasized the benefit to the police of having real time access to CNA information when they are executing a TDRW. I accept that in many (maybe most) situations, supplementing the investigatory record with CNA information received at or shortly after accessing the raw transmission data would augment the effectiveness of a particular investigation that is employing a TDRW as part of its overall police operation. There is, however, a fundamental difference between "giving effect to" the functional operation of a TDRW (i.e. making it effective to enable *transmission data* to be accessed and recorded) and making a TDRW a more effective investigatory tool, in the sense of advancing the investigation generally by allowing something more than transmission data to be accessed.

[110] In my view, the Crown's argument in this regard is merely an attempt to avoid the fact that, no matter how one looks at it, an assistance order cannot be used to expand the search power obtained by the police through a TDRW.

(ii) Statutory Context: The scheme of the Act and interrelationship of relevant sections

[111] While the words of an enactment, in their ordinary sense, are the starting point of statutory construction, they are not the end point. They must be read and given appropriate meaning in, amongst other things, their broader statutory context and in light of the discerned overall purpose of the statute in which the specific provision resides.

[112] Because the structure of section 487.02 ties the assistance order to helping the TDRW's operability, it is important to consider the scope and role of the TDRW itself. The sole function of the warrant is to authorize the use of a TDR. A TDR is defined in section 492.2(6) as "a device, including a computer program … that may be used to obtain or record transmission data or to transmit it by means of telecommunication". Thus the warrant's role is to enable the

police to obtain, record or transmit "transmission data" (and only transmission data) that a justice or a judge is satisfied will assist in the investigation of an offence for which there are reasonable grounds to suspect has been or will be committed: section 492.2(1).

[113] The *operational* scope of the warrant is set out in subsection 492.2(2):

> **(2) Scope of warrant** - The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the transmission data recorder, including covertly.

(Emphasis added.)

[114] An assistance order that facilitates the *installation, activation, use, maintenance, monitoring or removal* of a TDR could reasonably be considered to be authorized by section 492.2 because it assists in the operation of the warrant. It "gives effect to" the warrant by making it operative in the sense of enabling it to do its job of obtaining, recording or transmitting transmission data. Thus, an assistance order that allows for forced surreptitious entry on property which would otherwise be a trespass for the purpose of covertly installing a TDR would be covered, as would the process of connecting wires or plugging into an electrical system to make the TDR operative.

[115] The *informational* scope of the warrant is determined by reference to the notions of "data" and "transmission data" which are defined in subsection 492.2(6):

> **(6) Definitions –** The following definitions apply in this section.
>
> "data" means representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device.
>
> "transmission data" means data that
>
> (a) relates to the *telecommunication functions* of dialing, routing, addressing or signaling;
>
> (b) is transmitted to identify, activate or configure a device, including a computer program as defined in subsection 342.1(2), in order to establish or maintain access to a *telecommunication service* for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies

> or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
>
> (c) does not reveal the substance, meaning or purpose of the communication.
>
> (Emphasis added.)

[116] The type of data that a TDR is allowed to capture is thus related to telecommunication functions. "Telecommunications" is defined by the *Interpretation Act*, RSC 1985, c. I-21, section 35 as follows:

> "Telecommunications" means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system.

[117] The information that a TDR is designed to access and record is therefore digital/electronic information (including "signs, signals or symbols") relating to "dialing, routing, addressing or signaling" connected with "creation, transmission or reception of a communication" and it is not of the type that will reveal the "substance, meaning or purpose" of the communication. The information must also be limited to information that identifies or purports to identify the "type, direction, date, time, duration, size, origin, destination or termination" of the communication. This is information that enables a person, from an electronic point of view, to determine the nature of the digital transaction that occurred so that it can be analyzed and tracked. How that analysis and tracking is achieved will depend on what other investigative tools are at the investigators' disposal.

[118] It is accepted for the purposes of this appeal that the transmission data that can be accessed and retrieved by the operation of a TDR does not include actual CNA information. It was suggested, however, that the insertion of "addressing" in the list of telecommunication functions mentioned in the definition of transmission data and "destination" in the list of items that are included in list of types of communication information covered by the definition could include the actual names and addresses of recipients of a telecommunication and that, therefore, an assistance order could authorize the production of that information.

[119] This argument makes no sense. It is accepted that CNA information is not transmission data. That is reinforced by the fresh evidence submitted on the appeal. If it were, there would be no need to obtain an assistance order because

it would automatically be produced as part of the transmission data that is captured by the TDR.

[120] It is precisely because CNA information is not transmission data that an assistance order was sought. It therefore follows, as night follows day, that the provision of CNA information must be outside the informational scope, as well as the operational scope, of the TDRW.

[121] Even if one were to conclude that CNA information could be considered to be "transmission data" because of the references to "addressing" and "destination" in the definition, it does not follow that CNA information can be accessed through the TDRW process aided by an assistance order. Section 492.2(1) does not authorize the issuance of a warrant to obtain transmission data in the abstract. It only authorizes a warrant to obtain transmission data "*by means of* a transmission data recorder." In other words it only allows the installation of a TDR which only captures certain types of digital information. Thus, even if the definition of transmission data can be said to include CNA information, it is only the type of information that can be captured by a TDR that is authorized. It would therefore be only that information that the granting of an assistance order can "give effect" to.

[122] Furthermore, and in any event, the words "destination" and "addressing" must be interpreted within the subject-matter context: electronic/computer data. All of the terms used in the definition of transmission data relate to words with meanings in the digital world. "Addressing" and "destination" should also be so interpreted. *Webster's New World Computer Dictionary*, 9th ed. (New York: Hungry Minds Inc., 2001) defines "address" as:

> 1. the precise location of some type of resource (such as a file, a Web site, or storage space) in a computer system or network. See memory address. 2. In e-mail, an e-mail address. 3. In the Internet, the location of a host on the network. See IP address.

[123] That does not include physical names and addresses of specific locations. "Destination" is defined as "the record, file, document or disk to which information is copied or moved, as opposed to the source." It is a digital location of information that is being transmitted.

[124] These words do not refer to specific geographical addresses and the personal names of those who may occupy those addresses. If they did it would be out of character with the other language employed. *Noscitur a sociis.*

[125] The statutory scheme dealing with obtaining information relating to telecommunications provides other means whereby CNA information can be obtained. Production orders under section 487.014 can be, and have been, used to obtain CNA information. The Crown in this case points out, however, that a production order can only result in production of historical information. It cannot capture CNA information in "real time" as the digital information is being accessed by the TDR. The time lag in having to use a production order procedure to access the information after the fact, in the Crown's submission, seriously hampers police investigations and in some cases may render them of little or no assistance. The Crown says, therefore, that the production order is no substitute for a "real time" assistance order providing for the production of that information as the digital information is being recorded.

[126] But that begs the question whether Parliament nevertheless intended to allow assistance orders to be used as a more effective substitute. Certainly, the language chosen does not point in that direction. Convenience is no basis for interpreting statutory language contrary to ordinary statutory contextual meaning, unless applying the language, even in its statutory and purposive context, would lead to an absurdity. It cannot be said that applying the provision in the manner chosen by the Provincial Court Judge and the superior court judge on judicial review would lead to an absurdity.

[127] Consequently, even read in its broader statutory context, the language used in sections 487.02 and 492.2 does not support an interpretation that would allow the use of assistance orders to obtain information that is not of the type that could be obtained by a TDR, i.e. transmission data, as defined in the *Code*. To do so would give life to assistance orders that go significantly beyond their nature of being parasitic on the scope and role of the warrant to which they relate.

(iii) Legislative Record

[128] The parties did not provide the Court with any extracts from Hansard relative to the introduction of or debate on the provisions relating to the granting of warrants for use of TDRs when they were introduced into law in 2014. It has to be presumed, therefore for the purposes of this appeal that nothing said by proponents of the Bill in Parliament will shed any light on the purpose of the new section 492.2, and its interrelationship with assistance orders in section 487.02, when it was enacted.

[129] Counsel for the Crown, however, submitted that the purpose of the applicable provisions can be ascertained from a review of the amending legislation that included the provisions under discussion (*Protecting Canadians from Online Crime Act*, S.C. 2014, c. 31 ("PCOC Act") and the Legislative Summary associated with the related Bill (Bill C-13).

[130] The PCOC Act dealt with a large number of discrete issues, including the non-consensual distribution of intimate images, genocide and hate propaganda, theft of telecommunication services, possession of computer viruses, using certain communication technologies to make false, indecent or harassing communications, preservation of certain types of electronic evidence, new production orders to compel the production of certain types of data and modification of the scope of warrants to capture transmission data relating to telecommunications.

[131] The PCOC Act does not reference any specific grant of a means to gain prospective access to CNA information in real time upon the issuance of a TDRW, nor does it, as *amicus* points out, indicate an intention to require a free flow of information between telecommunications providers and the police following the issuance of a TDRW. In fact, the repeal of a provision in the previous legislation dealing with the precursor to the TDRW (the "number recorder") suggests the opposite intention. Under the previous legislation, as I interpret it, the judge granting the former number recorder warrant could also order the associated telephone records (containing CNA information in the form of telephone numbers and their location to or from which calls were received or sent) to be produced. That authority was removed from the *Code*. If anything, therefore, this could indicate an intention *not* to authorize provision of such information any more.

[132] The Crown nevertheless submits that Parliament intended that the assistance order in section 487.02 would provide the means of gaining access to CNA information. It relies on the *Legislative Summary of Bill C-13* (Ottawa: Library of Parliament, 2013) Publication No. 41-2-C13-E, in support for this proposition.

[133] The pertinent parts of that Summary are:

> 2.1.15 WARRANT FOR A TRANSMISSION DATA RECORDER (Clause 23)
>
> At present, section 492.2(1) of the Code allows a peace officer with a warrant to secretly install a number recorder on a telephone or telephone line, if there are reasonable grounds to suspect that an offence has been or will be committed and if it

> appears that the use of this kind of recorder could provide information that would assist in the police investigation. The law enforcement agency could thus obtain the "incoming" and "outgoing" telephone numbers for a telephone that was being tapped.
>
> Clause 23 of the bill provides for a warrant that authorizes a peace officer to install and activate a transmission data recorder [footnote to definition of transmission data recorder omitted] (new section 492.2 of the Code). As before, the warrant will allow law enforcement agencies to obtain telephonic data but also obtain data indicating the origin and destination of an internet communication, for example. Police services will thus be able to have access to this transmission data in real time. As in the case of a warrant to install a telephone number recorder, the new type of warrant is based on the requirement that there are reasonable grounds to suspect that an offence has been or will be committed. Lastly, Bill C-13 does not provide for the use of a transmission data recorder without a warrant in emergencies, contrary to the provisions set out in former Bill C-30.

[134] This generalized summary is hardly helpful in discerning the intention of Parliament as to the meaning and scope of the assistance order provision (section 487.02), a subject which is only mentioned in passing in the Legislative Summary in the context of listing a number of investigative tools that could be used to help in intercepting private communications (section 2.1.6). In fact, Bill C-13 did not purport to substantively amend section 487.02 except to remove the reference therein to assisting the old (and removed) production order for telephone records.

[135] At most, the Summary merely explains the purpose of using the transmission data recorder warrant as being to obtain "telephonic data" in real time. It begs the question as to what constitutes transmission data, which is the only data which the TDRW can be authorized to acquire. In fact, as we have seen, the definition of transmission data (to which the reader was indirectly pointed by the omitted footnote mentioned above) refers to information that does not include, by its ordinary or electronic meaning (and as conceded by the Crown), CNA information. In any event, the Summary only purports to deal with what the "warrant" purports to accomplish, not the purpose and scope of the parasitic assistance order.

[136] While one could speculate that the drafters of Bill C-13 may have had the unexpressed assumption that an assistance order might be able to supply the CNA information not otherwise directly available through the operation of a TDRW, that was not expressed in the Legislative Summary.

[137] My colleagues conclude, from a review of the Legislative Summary, that the purpose of the assistance order provision was to give "assistance" to police

investigatory methods by allowing them to acquire information in real time. They are not, however, able to tease anything more out of the record than that general observation. That, of course, adds nothing to the discussion. It still does not address the extent of the information that is contemplated as being able to be captured in real time. True, the purpose of assistance orders is to give assistance – that can be gleaned from its name. But, what type of assistance? Anything? On what principled basis is the nature of the assistance to be determined? The issue is not giving assistance in the abstract but the *nature and extent of the assistance that is statutorily authorized*. The Legislative Summary does not help in that regard. The impression one gets is that Parliament did not really consider the point in issue at all.

[138] The only fair conclusion that one can draw from the Legislative Summary, therefore, is that it is agnostic with respect to whether the purpose of the legislative amendments was to allow access to CNA information. I accept for the purpose of argument that the drafters *may* have thought that there was no need to have a specific provision in the *Code* allowing a judge to include a provision for access to CNA information in a manner similar to the power in the former section 492(2) dealing with number recorder warrants, and that an assistance order could be used for such purpose. However, that possible intention is not apparent from the legislative record.

[139] References to the legislative record therefore do not help in the interpretive process at issue here and, if anything, support my earlier conclusions reached from a contextual review of the legislative language.

(iv) Legislative History

[140] Even prior to 2014, the *Criminal Code* provided a number of investigative tools to obtain information in the pursuit of suppressing crime.

[141] Among those tools was the provision to obtain a judicial authorization to install a number recorder (section 492.2(1), as it existed in 2013). Coupled with such a warrant was the express power of the court to order the provision of certain subscriber information beyond what would actually be disclosed by the installation of the number recorder, namely, the production of "records of telephone calls originated from, or received or intended to be received at, any telephone" (section 492.2(2), as it existed in 2013). Furthermore, the provision allowing for assistance orders under section 487.02 specifically contemplated providing further assistance to give effect to an order under section 492.2(2) providing for production of telephone records of incoming and outgoing calls.

This regime changed with the legislation resulting from introduction of Bill C-13 in 2014.

[142] The tension that exists between facilitating police investigation and prosecution of crime and the protection of privacy in the area of surveillance of electronic and digital information has been ever-present. Multiple bills have been introduced for consideration over the years. See the discussion by Michael Geist in "The Policy Battle over Information and Digital Policy Regulation: A Canadian Perspective" (2016), 17 Theoretical Inquiries L. 415 at 432 – 435.

[143] In 2012, the then government introduced Bill C-30 to amplify police powers, including the power of the police to require telecommunications companies to provide basic subscriber information without the necessity of obtaining a prior warrant. A "massive public outcry" (per Geist at 433-434), including a "Stop Spying" petition, against the implications of this and other surveillance provisions in the Bill suggesting the government had "overstepped" (at 434), caused the government to suspend the Bill and later acknowledge that it was dead. Minister of Justice and Attorney General Robert Nicholson was quoted as saying:

> We will not be proceeding with Bill C-30 and any attempts that we will continue to have to modernize the Criminal Code will not contain the measures contained in Bill C-30, including the warrantless mandatory disclosure of basic subscriber information or the requirement for telecommunications service providers to build intercept capability within their systems. We've listened to the concerns of Canadians who have been very clear on this and responding to that (Geist, at 343, footnote 63).

[144] Geist observes (at 434-435):

> The emphasis on responding to public concern highlights the effectiveness of the public campaign and the recognition of the need to incorporate broader perspectives into legislative and policy development. While the government ultimately introduced lawful access legislation that became law in 2015 [i.e. Bill C-13], many of the most invasive provisions were removed.

[145] In construing the TDRW and assistance provisions with a view to determining their reach into the lives of citizens, we should not be unmindful of the concerns that have been raised in the legislative and public forums that signify the importance placed on these types of issues. In particular, it cannot be said that the purpose of such legislation is to enhance police powers without at the same time acknowledging the importance of minimizing effects on privacy

interests, especially for third parties whose interests may be inadvertently affected by a police investigation.

[146] In light of the concerns about overreaching in previous legislative attempts, one would have expected a clear delineation in the language of the legislation of the nature and scope of the intrusions that were contemplated.

[147] When Bill C-13 was introduced in 2014, the Legislative Summary indicated that it arose out of the former Bill C-30 but expressly acknowledged that one of the things that it did not reproduce was "warrantless requests for subscriber information" (Legislative Summary, 1.1). Emphasis on this point appears to recognize sensitivity to the importance of protecting CNA-type information wherever possible.

[148] As noted, Bill C-13 and the legislation resulting therefrom removed the provision providing for warrants authorizing use of number recorders, together with the specific provision for ordering, along with the warrant, production of records of incoming and outgoing telephone calls. As well, section 487.02, the assistance orders provision, was amended to remove the reference to providing assistance to give effect to orders for production of telephone records. That regime was replaced by a new section 492.2 providing for TDRWs. Of note is that:

(a) the new TDRW provision did not contain an equivalent of the former supporting telephone records order in the old section 492.2(2); and

(b) unlike the former assistance order provision in section 487.02, which linked the assistance order to the former records production order used in conjunction with the now repealed number recorder warrant, the amended provision no longer contained any reference contemplating use of assistance orders specifically in relation to TDRWs.

[149] The result was that there was no specific recognition in the new legislation providing for the ordering of provision of CNA-type information as an adjunct to the granting of a TDRW. In these circumstances is it reasonable to infer that Parliament nevertheless intended that assistance orders could still be used to require provision of CNA information when a TDRW was granted? Or is it more reasonable to infer that the drafters of the Bill contemplated that the privacy sensitivities were such that such intrusions into the lives of possibly

innocent third parties, thereby drawing them into the web of a possible criminal conspiracy investigation, were sufficiently important that any such intrusions should not be part of the "real time" interceptions that were contemplated by the use of the TDRW. In other words, to get CNA information, it would be a sufficient compromise to require the police to obtain such information after the fact through a production order under section 487.014, as it had been in the past.

[150] Had the drafters wanted to ensure that the assistance order could be used in the manner contemplated by the Crown, they could easily have inserted a provision in the new section 492.2 allowing the court to make an ancillary order requiring production of CNA information in real time or immediately following the capture of the raw transmission data, along the lines of the old section 492.2(2) relating to number recorder warrants. They did not. The "silence of the statute", to harken back to the language used in *Entick v. Carrington,* is telling.

[151] It should also be remembered that the standard for issuance of a TDRW is "reasonable grounds to suspect" (section 492.2(1) whereas the standard for issuance of the general production order under section 487.014 is "reasonable grounds to believe" (section 487.014(2)), a higher threshold. It seems odd that if CNA information could only be obtained retrospectively under a production order on the basis of reasonable grounds to believe, it could nevertheless be obtained prospectively in real time on a lesser standard, where privacy safeguards may be harder to maintain and where the possibility for inadvertent intrusion into innocent third parties' lives could be greater. The opportunity for judicial oversight on a case by case basis, which would be available in respect of retrospective information being sought by a production order would not be present in relation to obtaining prospective information in real time. I agree with *amicus* when he points out that in seeking access to CNA information by an assistance order as an adjunct to a TDRW, the Crown, if its position prevails, will be obtaining access on a lower standard upon demand with no opportunity for judicial review of the request before the information is accessed.

[152] All of this points, if anything, to a conclusion that Parliament did *not* intend that the device of an assistance order could be used to acquire CNA information in real time. Instead, the more likely intent is that if police wanted *additional* information that might make that raw data more meaningful, they could and should use the production order as the means of getting it, recognizing that that higher level of specificity (and potential intrusion) would require a higher authorization threshold than access to the raw (and potentially less intrusive) data available from a TDR.

[153] My colleagues purport to draw a different inference from the legislative history. They find persuasive the Crown's submission that, given the intent to allow the capture of real time information (i.e. transmission data) in the new section 492.2, Parliament could not have intended to make subscriber information more difficult to obtain by enacting the new provision without any replacement of the former section 492.2(2). Instead, they conclude, Parliament would have relied on the availability of assistance orders to order telecommunication companies to provide subscriber information "to give effect to" TDRWs. My colleagues further reason that the interpretive presumption that Parliament is presumed to know the background common and statute law means that Parliament would have knowledge respecting the ability to obtain subscriber information under the former section 492.2(2) and the continuing availability of assistance orders.

[154] The trouble with this analysis is that it cuts both ways. Presuming Parliament's familiarity with the prior law, the question still remains what inference is to be drawn from the way in which Parliament dealt with the matter in the new legislation in the light of its knowledge of the previous legal regime. What inference can be drawn from Parliament's failure to enact a companion provision to the previous section 492.2(2) and its removal of any reference to the former section 492.2 in section 487.02? Of course, one might speculate, as do my colleagues, that the failure to enact a companion to section 492.2(2) was because Parliament assumed that use of assistance orders might do the trick. But, that is all that it is – speculation. It is equally plausible (I would say more plausible) that Parliament failed to take this obvious step because, given the past public expressions of concern about intrusions into privacy of third parties, Parliament wished to subject the acquisition of additional information not within raw transmission data to the higher standard (belief rather than suspicion) for authorization associated with obtaining retrospective production orders.

[155] Courts must be very careful in drawing inferences of intention from presumed actions (or inactions) of Parliament based on knowledge of legislative history, unless there is a high probability that the inference being drawn is the only plausible conclusion to be reached. The fact is that, in this case, there are differing possible inferences that can be drawn and they point in opposite directions. It is certainly not correct to conclude here that the only reasonable inference that can, or should, be drawn favours the Crown's position. One cannot say that the unavoidable inference from Parliament's response in light of the legislative history is that it must have intended to allow acquisition of CNA information in real time through use of assistance orders. Reference to and

reliance upon legislative history in the context of this case is therefore of very little use. Certainly, it cannot have much utility in displacing, or even informing the scope of, the actual language chosen by Parliament, considered in its statutory context.

[156] Of course, it is also possible (and perhaps most likely) that Parliamentarians did not address their minds specifically to what the implications would be of not including a companion provision to the former section 482.2(2) in the new amendments. To the extent they or the drafters thought about the issue, it might well be that it was assumed that real time CNA information could be obtained through the use of assistance orders. But an unexpressed assumption is not the same as a statement of intention. One cannot use speculative inferences drawn from an ambiguous legislative history to modify the actual language used in its context.

[157] The conundrum presented in this case may also be the result of an inadvertent oversight. Maybe with hindsight, a companion to the former section 492.2(2) should have been included in the Bill. If so, it is not for this Court to do Parliament's job for it. This is not a case of an omission leading to an absurdity.

(e) Conclusion on Construction

[158] The language employed in sections 487.02 and 492.2, the structure of the legislative regime and the broader statutory context all point to a conclusion that the legal effect of the assistance order provision is limited to giving effect to making a TDRW operative in the sense of facilitating access to the information which the predicate authorization was designed to capture. It does not extend to facilitating the police investigation generally by allowing for further intrusions into citizens' affairs to obtain additional information that might make the original information more meaningful or effective. The legislative record as presented to the Court is ambiguous in respect of possible clarification of purpose. The legislative history, if anything, suggests a desire on the part of Parliament to proceed cautiously with respect to the potential impact on privacy interests. The Crown's submissions in this case are therefore not supportable.

[159] To favour a narrower interpretation of the relevant provisions than that contended for by the Crown is not to say that the Court is necessarily impermissibly applying a presumption of strict construction of criminal statutes. Nor does a search for a clear manifestation of Parliamentary intent to intrude on citizen's lives in the manner argued for by the Crown amount to strict

construction. It merely recognizes that before citizens' expectations that there be no unauthorized state intrusion are rejected, it is reasonable to seek to be satisfied that this was intended. That is the time-honoured approach ever since *Huckle v. Money* and *Entick v. Carrington*.

[160] Counsel for the Crown suggested that the judicial review judge fell into the trap of strict construction. I disagree. She referred to the modern rule of statutory construction and to section 12 of the *Interpretation Act*. She was very much alive to the proper interpretative approach to be taken. She committed no error in this regard.

[161] The Crown relied on the decision of the Ontario Superior Court in *R. v. TELUS Communications Company*, 2015 ONSC 3964 in support of its position. On a similar factual background to the present case, Nordheimer J. held that an assistance order was available for the purpose of compelling TELUS to provide CNA information in respect of the telephone numbers revealed by a TDR that had been lawfully installed pursuant to a warrant granted under section 492.2.

[162] The Provincial Court Judge considering the Crown application for the TDRW and the assistance order in this case, as well as the reviewing justice, both considered the *Telus* case and refused to follow it. They were right to do so. In my respectful view, *Telus* was wrongly decided.

[163] On the issue of the legal scope of assistance orders, Nordheimer J. acknowledged that the use and scope of an assistance order is limited by the predicate authorization to which it relates:

> [44] TELUS submits, and I agree, that the assistance order cannot be used to expand the search power obtained by the police through the TDRW. I do not perceive the Crown to take issue with that point. In other words, the assistance order does not constitute a stand-alone authority to engage in a search. …

[164] For the reasons given earlier, I agree with this conclusion. It is hard to avoid it, given the words used and the interrelated structure of the legislative provisions. However, Nordheimer J. does not follow this finding to its logical and reasonable conclusion. It represents a fatal flaw in his reasoning. He effectively allows himself to be overwhelmed by the concern that a TDRW will be of considerably less effectiveness if the police are not able to match up the raw transmission data relating to individual phone calls with names and addresses. It causes him to muddy the distinction between making the TDR effective operationally and assisting the police investigation generally. It leads

him to give the words "to give effect to" a meaning that is much broader than they warrant, given the statutory structure and context of the relevant provisions.

[165] Supplementing the investigation with CNA information might well enhance the *efficaciousness* of the TDRW in the context of the investigation. But an assistance order, by the language employed, is not meant to assist the investigation or to improve its effectiveness. It is to assist in the operation of the warrant. A TDRW is not rendered useless or inoperative without CNA information. Such information is not required to allow the TDRW to obtain the *transmission data* sought. If the police want something other than transmission data to increase the effectiveness of their investigation, they may have recourse to other investigative tools such as production orders. Such other tools may not be as helpful to the efficiency of the police investigation but if Parliament did in fact wish to use the assistance order to increase investigative efficiency generally, it did not see fit to expressly link the assistance order to section 492.2 in a manner similar to what it had done with the previous telephone number recorder provisions.

[166] Given the important issues at stake, in particular the concern about unnecessary intrusion into citizens' lives, it cannot be said that Parliament manifested an intention, by the language it chose and the way in which it structured the relationship between assistance orders and TDRWs and the ambiguous inferences to be drawn therefrom, to authorize the acquisition, without proper safeguards, of information additional to transmission data.

[167] In my view, Nordheimer J. fell into error when he stated that the function of the assistance order was "to provide assistance to other authorizations that are obtained *so that those authorizations are effective"* (paragraph 44. emphasis added). I agree with *amicus* when he submits that the *effectiveness* of the warrant is not what section 487.02 is concerned with. By linking the idea of "giving effect to" in section 487.02 to "effectiveness" he confuses the success of the TDRW *in obtaining transmission data* with success in the *investigation* achieved by the subsequent *use* of that transmission data. One cannot say that any powers allowing for obtaining additional information *beyond* the authorized transmission data that might enhance the subsequent use of the transmission data by police are "by necessary implication and unavoidable inference" necessarily incidental to the original authorization, within the meaning of *Lyons v. The Queen*, [1984] 2 S.C.R. 633, 14 D.L.R. (4th) 482. Unlike in *Lyons*, the TDR device here could perform its function (albeit with more limited usefulness) of acquiring transmission data without an assistance order directing provision of CNA information.

Reception of Fresh Evidence

[168] The Crown made application for reception of evidence for use on the appeal under section 683(1)(b) of the *Code.* At the hearing, the panel decided to hear the evidence and to defer decision on its admissibility and use until after the oral submissions on the merits of the appeal were heard.

[169] The evidence proffered essentially dealt with the significant advantages that would accrue if the police could have access to CNA information in real time as the TDRW was being executed, as opposed to the disadvantages of having to wait, and following capture of transmission data by the TDR, make a separate application for a production order to get the information. The evidence also established that the police application for an assistance order typically (in the current case as well as in respect of all others with which the witnesses were familiar) was not limited to requiring provision of only CNA information but in fact sought an order requiring

> all necessary assistance to give effect to this warrant, including but not limited to providing all basic subscriber information (customer name and address), including both published and non-published subscribers, active service subscribers (SPID), including all telecommunications service-providers and their resellers, associated to telephone numbers identified through the transmission data recorder warrant.
>
> (Emphasis added.)

[170] The evidence also confirmed that, while obtaining CNA information in real time by an assistance order clearly has great utility and is "an important tool", its absence is not necessarily fatal to a police investigation, which can often rely on other investigative techniques such as surveillance, confidential informants and after-the-fact production orders.

[171] I agree with my colleagues that the reception of this type of evidence does not meet the specific criteria in *R. v. Palmer,* [1980] 1 S.C.R. 759 at 775. They conclude nevertheless that it should be admitted essentially as background information that would provide context in interpreting the statutory provisions under consideration. I accept that there is a residual discretion on the part of the Court to receive contextual background information for the purpose of better understanding the implications of the operation of a statutory provision when the meaning and effect of that provision is in issue. Under the circumstances, therefore, I am not prepared to dissent from my colleagues' decision to allow the proffered evidence in this case to form part of the record on this appeal.

[172] However, I would observe that such evidence should be accepted with caution and not as of course. The following matters should be borne in mind:

(i) As a general rule, judicial review hearings are conducted solely based on the record before the decision-maker whose decision is being reviewed.

(ii) Since, on appeal from a judicial review decision, what is being addressed is whether the reviewing judge erred in dealing with the record before the original decision-maker, it would be exceptional to allow evidence on the appeal when it would not be allowed to augment the record on the judicial review itself. The admissibility of fresh evidence on appeal is therefore generally contingent on the evidence being potentially admissible in the court being appealed from (*R. v. O'Brien*, [1978] 1 S.C.R. 591, 76 D.L.R. (3d) 513 at 602).

(iii) Exceptionally, where the issue on appeal is a question of law involving the meaning and application of a statutory provision, fresh evidence may be admissible if it is relevant to explain how the statutory provision operates in practice and the implications of its application, with a view to determining whether the provision has been given an interpretation that makes practical sense. Other established exceptions include: general background which might assist in understanding the issues relevant to the judicial review; evidence of procedural defects not apparent from the record; and indications of the absence of evidence supporting the original decision-maker's decision (*Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency,* 2012 FCA 22, 428 N.R. 297, at para. 20).

(iv) Such evidence, however, is most usually offered by the tribunal whose decision is under review, where that tribunal has specialized expertise in application of its constituent statute or where the evidence goes to identifying a common understanding of those who operate in a particular field. It should not be used to shore up weaknesses in the record or to provide a revisionist version of the decision-maker's reasons (*Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal*, 2018 BCCA 387 at para. 40).

(v) One must be careful not to let evidence of background as to the operation of a statutory provision mutate into assertions, by those seeking to apply the legislation or by experts, as to their understanding of the exact purpose of a legislative provision (See *Apotex Inc. v. Merck & Co.*, 2004 FCA

> 298, 134 A.C.W.S (3d) 70). While the courts now accept evidence from the legislative record as evidence of purpose and intent, that should not routinely extend to evidence from those affected by the legislation or those administering it as to what their perceptions of the purpose and intent is. That is tantamount to argument as to why a certain interpretation is better for policy reasons. This should not be generally allowed as evidence (see *R. v. Boutcher*, 2001 NFCA 33, per Marshall J.A. who described such evidence as being better suited to "totalitarian autocracies").

[173] The information offered in this case is background contextual information as to how TDRWs operate in practice. It nevertheless comes close to the line of non-acceptability by its strong emphasis on the lack of efficacy of police investigations without the help of assistance orders to acquire CNA information in real time. That is close to advocating for the Crown's preferred interpretation. That could equally have been done - as it was – in argument on the appeal.

[174] In any event, while this evidence may be helpful, it is not dispositive in this case. Even granting the correctness of the evidence in its description of how police investigations might be hampered without CNA in formation in real time, it does not, for the reasons given earlier, affect the proper interpretation of the relevant statutory provisions. It goes to the efficacy of the police investigation, not to whether an assistance order can give effect to the operative nature of the TDRW itself.

[175] Accordingly, whether or not the evidence is admitted, it does not affect the outcome of this appeal.

General Observations

[176] It is not the job of the courts to rewrite the legislation, under the guise of interpreting it, to attempt to improve its operation or to make it accord with a perceived parliamentary intent when the legislative act Parliament has put in motion does not itself do so.

[177] While statutory purpose is an important interpretive tool in giving life, meaning and scope to the words used by the legislature it cannot be used to allow the court to disregard or rewrite the legislation unless to do otherwise would result in an absurdity. As Lord Denning noted in *Seaford Court Estate Ltd. v. Asher*, [1949] 2 K.B. 481 at 499, although judges can "iron out the

creases" of legislation to make it conform with the underlying legislative purpose, they should not "alter the material of which [the law] is woven".

[178] Referring to Lord Denning's comments, Pierre-André Côté in his text *The Interpretation of Legislation in Canada,* (Toronto: Carswell, 2011) 4th ed. pp. 421-422, observes:

> … statutes should not be interpreted exclusively in the light of their objectives. The Constitution requires Parliament to express its will in a certain form, and the citizen is justified in expecting the courts to give weight to the letter of the law, because it is the favoured medium of legislative thought. In their study of the objectives of the statute, interpreters must first turn to the text itself. Moreover, the written expression serves to control the exercise of judicial discretion, limiting the range of meanings that can be given to a provision. Finally, even if Parliament's goals are well known the means to fulfill them must still be examined. And the primary guidance on such means is the drafter's choice of words.

[179] My colleagues' approach of focusing first, and primarily, on the perceived purpose of the relevant provisions, drawn from ambiguous sources, results in a failure to give sufficient emphasis to the words used in the general statutory context and in relation to the structure of the relevant legislative provisions.

[180] It is not the role of the courts to assist the police in its interactions with the citizenry any more than it is to assist citizens in avoiding the proper application of the laws to them. The courts' role is to construe and apply the written law as put in motion by the legislative actions of Parliament, in accordance with proper principles of statutory interpretation, come what may.

[181] "Justice is only incidental to the maintenance of order" is a saying that has been attributed to former United States FBI Director J. Edgar Hoover (John A. Farrell, *Richard Nixon: The Life* (New York: Vintage Books, 2017), p. 473). I prefer the words quoted by Lord Mansfield in *Rex v. Wilkes* (1768), 4 Burr 2527, 98 E.R. 327 at 347: "*Fiat justicia, ruat coelum*" (Let justice be done though the heavens may fall). If Parliament, either deliberately or even through inadvertence, adopted a less then efficacious means of assisting the police in their important work, it is not for the courts to authorize additional intrusions in peoples' lives to fix the problem. That job falls to Parliament where the balancing of privacy concerns against the interests of public safety and protection of the public can be worked out in the context of debate over what sort of regime providing for police intrusion into citizens' lives is appropriate according to Canadian values.

Summary and Conclusion

[182] For the foregoing reasons, I would dismiss the appeal. The judicial review judge committed no legal error in her interpretation of the relevant provisions of the *Criminal Code*. Consequently, she correctly dismissed the Crown's application for judicial review of the Provincial Court Judge's refusal to issue an assistance order under section 487.02 to provide customer name and address information in conjunction with the issuance of a transmission data recorder warrant.

[183] Like my colleagues, I wish to record my appreciation to all counsel and in particular Mr. Robby Ash for acting as *amicus curiae*. Mr. Ash undertook his job within a very short time frame and he did so with dedication and professionalism. I am grateful for his insight and assistance.

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J. D. Green J.A.