

CANADA / JUDGMENT

McCormack v. Evans

2025 ONCA 767

COURT

Court of Appeal for Ontario

DECIDED

13 November 2025

Source: norma.lexum.com · Research copy typeset by Esheria. Not court-issued or certified.

McCormack v. Evans

Collection

Decisions of the Court of Appeal

Date

2025-11-13

Neutral citation

2025 ONCA 767

Docket numbers

COA-23-CV-0948

Judges

Gillese, Eileen E.; Gomery, Sally A.; Pomerance, Renee M.

Subject

Civil

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: McCormack v. Evans, 2025 ONCA 767

DATE: 20251113

DOCKET: COA-23-CV-0948

Gillese, Gomery and Pomerance JJ.A.

BETWEEN

William McCormack

Plaintiff

(Appellant)

and

Bryce Evans*, Cam Durham*, Kim Derry*, The Toronto Police Services Board*, (Former) Chief of Police Julian Fantino* and the Attorney General of Canada

Defendants

(Respondents*)

Hedy Epstein and Natalie Simpson, for the appellant

Kevin McGivney, Natalie Kolos, and Alexandra Moser, for the respondents

Heard: April 10, 2025

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated July 26, 2023, with reasons reported at 2023 ONSC 4340, 533 C.R.R. (2d) 60.

Pomerance J.A.:

I. OVERVIEW [1] Wiretaps can generate compelling evidence of crime. Suspects, unaware that they are being recorded, may say things that are highly incriminating. This evidence is most often introduced in criminal trials. However, it can also play a role in civil proceedings, particularly those arising from failed prosecutions. This is one such case.

[2] In 2004, the appellant was working as a plainclothes officer with the Toronto Police Service (“TPS”). His duties included Liquor Licence Act, R.S.O. 1990, c. L.19,[1] investigation and enforcement in Toronto’s entertainment district. During an investigation into organized crime, police uncovered evidence that incriminated the appellant in bribery and corruption offences. He became a target of “Project Bar District”.

[3] Police obtained an authorization to intercept the appellant’s communications (the “authorization”). As a result of his incriminating utterances, he was charged with various crimes. The charges were never tried on the merits. Some were stayed for delay and others were withdrawn by the Crown.

[4] The appellant launched a civil action against the respondents alleging malicious prosecution, negligent investigation and other civil wrongs. The appellant asserted in his pleadings that he was factually innocent, and that the police did not have reasonable and probable grounds to lay charges against him.

- [5] The appellant's claim centered on a deception carried out by the lead investigator, the respondent Bryce Evans ("Evans"). Evans caused two individuals to be misdescribed as confidential informants ("CIs") in the affidavit to obtain the wiretap authorization. The appellant argued that, because of the deception, his intercepted communications should be excluded from his civil trial. The appellant further alleged that the charges were based, not on proper grounds, but on investigators' animus toward him.
- [6] The trial judge rejected these arguments. He found that the intercepted communications were admissible; that police had reasonable and probable grounds to lay the charges against the appellant; that the evidence did not establish animus or malice; and that the civil claims had not been proved.
- [7] The appellant challenges these conclusions on appeal. I see no basis for appellate interference with the trial judge's analysis. I will explain why in the reasons that follow.

II. BACKGROUND AND EVIDENCE a. PROJECT ORA AND PROJECT BAR DISTRICT [8] In October 2000, an association of police forces was investigating organized crime in Toronto through a project named "Project Ora". This investigation revealed that bar owners in the entertainment district of Toronto were making payments to plainclothes members of the TPS. These payments were allegedly made in order to obtain liquor licences, and to prevent or forestall detection of liquor licence infractions.

- [9] As a result, a new project – "Project Bar District" – was initiated to investigate allegations of police corruption. The appellant was its central target.

- b. THE MISDESCRIPTION OF CONFIDENTIAL INFORMANTS [10] The lead investigator of Project Bar District was the respondent Evans. He authored a 10-page document titled "'Project Bar District' Operational Plan." It purported to rely on information provided by two CIs. In October 2003, Evans provided the document to an RCMP officer named Antimina Alborino ("Alborino"). In December 2003, Alborino swore an affidavit to request an authorization to intercept the appellant's private communications, relying on information from Evans' report. Her affidavit repeated that TPS had received information from two CIs. It was later discovered that the two individuals were not CIs at all. Evans deliberately misdescribed their status as part of an investigative ruse.
- c. INTERCEPTION OF THE APPELLANT'S COMMUNICATIONS [11] The first wiretap authorization was granted in December 2003. The authorization was subsequently extended to cover interceptions up until April 2004. The intercepted communications pertained to five licensed establishments in the Entertainment District: (i) the Peel Pub, (ii) Distrikt Nightclub ("Distrikt"), (iii) Club Lotus, (iv) Hotel Bar, and (v) Easy and The Fifth, and Money (two establishments with the same owners).
- [12] For present purposes, a full recital of the intercepted communications is unnecessary. It will suffice to offer a few examples regarding each establishment.

- [13] Communications intercepted in connection with the Peel Pub include a call in which the appellant complained to one of the owners that he had not received a call from the other owner and had not yet received his payment for assisting them with licensing issues. The appellant said to the owner, “I’m fucking kind of dependant on that fucking something he has for me ... not even a fucking call to let me know like, should I make other arrangements should I fucking go to the bank and grab a loan like you know what I mean”. At another point, the appellant said, “I’m not using a pressure tactic or anything ... like I told him. I said whenever you guys need something you fucking call me, I come fucking running you know... I want us all to make some fucking money but you know what I mean, I’m not gonna nickel and dime guy kind of thing you know, you know what I’m saying?”
- [14] On a call with the owners of Distrikt, the appellant warned them “to be careful this weekend, because [I’m] gonna be off,” and to “make sure they’re really good”. Later, he demanded money from Distrikt’s owners, at one point asking them to “front [him] something” after his wife told him that she was having trouble paying the household bills.
- [15] With respect to Club Lotus, the appellant’s superior officer told him to conduct a “surprise inspection”. The appellant knew that a fellow police officer owned the establishment. The appellant called the owner and warned him of forthcoming inspections on two different nights. He reported his findings during these “surprise” inspections to his superior officer without mentioning these advance warnings.
- [16] As for Hotel Bar, an officer had advised the owners that charges would be laid for overcrowding. In the days following, the doorman at Hotel Bar called the appellant and said: “I don’t know if they’re going to get charged, or not. Um, do you know anything about that?” The appellant responded that he did not know, but that he would “take a look and see”. In an interception two nights later, the appellant told the doorman that he “looked into that thing” and asked the door man “are you going to be around and I’ll tell you what kind of deal I got for you later?” The appellant arranged a meeting between the doorman and a third party, whom the appellant described as a guy “that could take care of the whole thing.”
- [17] The appellant’s friend, Owen Geddes (“Geddes”), owned Easy and the Fifth as well as Money. Geddes would pay for the appellant’s food and drinks at these establishments, and he lent the appellant money several times. On the intercepts, the appellant can be heard offering to assist with the disposition of charges laid against these establishments, and following through on the offer in discussions with other officers. For example, in one call, Geddes asked the appellant whether he should retain legal counsel for a court appearance. The appellant responded, “No buddy, ...don’t worry about it. ... I’m gonna go to [Detective Bell], ‘cause it’s his team ... And, I’m gonna see what I can do... I’m pretty sure, I can look after it, for ya”. On another call, the appellant told Detective Bell about his conversation with Geddes, and then asked, “should I just tell them, to talk to you and, you’ll work out a deal with him or...”. Detective Bell responded, “Yeah, yeah, tell him to give me a shout”, and later states, “I’m sure... we’ll work something out”.

- d. THE SEARCH WARRANTS [18] On the strength of evidence obtained as a result of Project Bar District, including the appellant's intercepted communications, investigators obtained search warrants for various locations, including the appellant's clothing locker and his residence. The respondent Cam Durham ("Durham") was the officer who swore the informations to obtain ("ITOs") the search warrants. His ITOs, dated April 14, 2004, set out his grounds for believing that the appellant had committed conspiracy to commit breach of trust, conspiracy to commit obstruction of justice, possession of property obtained by crime, and conspiracy to commit bribery of officers. Durham relied upon the content of the appellant's intercepted communications.
- [19] On April 15, 2004, police executed the warrant to search the appellant's home. They seized a .22 calibre rifle, and loose .38 and .40 calibre ammunition, which were improperly stored. The appellant did not have a proper licence for the rifle.
- e. CHARGES ARE LAID AGAINST THE APPELLANT [20] On May 5, 2004, Durham swore an information charging the appellant with four firearm and ammunition offences, asserting that he believed on reasonable grounds that the offences were committed.
- [21] On October 15, 2004, Durham swore a further information charging the appellant with 20 counts alleging corruption, asserting that he believed on reasonable grounds that the offences were committed. The appellant was charged with 4 counts of conspiracy to commit an indictable offence; 5 counts of breach of trust by a public officer, 4 counts of official demanding benefit; 3 counts of official offering influence, 3 counts of attempt to obstruct justice, and one count of official accept or demand commission.
- [22] On June 13, 2005, Durham swore a third information charging the offence of fraud under five thousand dollars, attesting that he believed on reasonable grounds that the appellant had committed the offence. This too was based on intercepted communications. The appellant had organized a fundraiser to pay for his daughter's insulin pump. Upon discovering that the pump was covered by insurance, the appellant advised donors that their contributions would be donated to Sick Kids Hospital. An intercepted conversation between the appellant and his wife, in December 2003, established that they kept some of the charitable proceeds rather than donating the full amount.
- [23] On the same date, Durham swore a fourth information charging the appellant with an assault with a weapon, attesting that he had the requisite grounds to believe that the appellant had committed the offence. This charge was based upon an intercepted communication in which the appellant bragged to a fellow officer that he had assaulted a detainee with his hand-held radio.
- [24] As a result of these charges, the appellant was suspended from TPS, and faced charges under the Police Services Act, R.S.O. 1990, c. P.15.[2] However, those charges were stayed when he resigned on March 10, 2009.

- f. THE CRIMINAL PROCEEDINGS i. The Preliminary Inquiry [25] Following a lengthy preliminary inquiry, Beatty J. committed the appellant to stand trial on 18 of the 20 corruption charges, two having been withdrawn at the request of the Crown because they were duplicates. The committal did not include the firearms-related charges, the assault with a weapon charge, or the fraud charge, which proceeded separately.
- [26] During the preliminary inquiry, the appellant challenged the status of one of the individuals identified as a CI in the wiretap affidavit: *R. v. McCormack et al.*, 2006 ONCJ 320 (“Privilege Decision”). It was revealed at that time that “CI #1” was, in fact, a police agent named Aniello “Neil” Peluso (“Peluso”). Peluso was suspected to be a member of a criminal organization. He was, himself a target of investigation under Project Ora. During subsequent cross-examination, Evans testified that misdescribing Peluso was a deliberate “ruse”: *R. v. McCormack*, 2009 CanLII 76382 (Ont. S.C.) (“Delay Decision”), at para. 9.
- [27] Peluso was unaware that he was being investigated himself for criminal activities: *Privilege Decision*, at p. 4. Evans met with Peluso alone and did not advise him that discussing his CI status with others or assisting the police by taking action to further their investigation could result in loss of his privilege: *Privilege Decision*, at p. 3; *Delay Decision*, at para. 8. The purpose of misleading Peluso as to his CI status was to cause Peluso, a target of Project Ora, to generate communications, or “heat up the wires”, as Evans put it: *Delay Decision*, at paras. 8-9. Evans directed Peluso to “go into the field” and recruit other individuals to assist the police with their investigation: *Delay Decision*, at para. 9. Peluso provided information as to various bar owners making payments to the police, and he also offered to recruit an owner who would allow an undercover officer to observe the payments: *Privilege Decision*, at p. 4.
- [28] These circumstances rendered Peluso a police agent, rather than a CI. In his *Privilege Decision*, at p. 6, Beatty J. described the police’s misconduct:

The defence has established that CI#1 was a target in other investigations and the police anticipated he would be charged. Although an informant may be granted confidentiality, the privilege must have some meaning, i.e. that the informant cannot be so notorious that there can be no confidentiality, or so entangled in related offences that disclosure is inevitable. Further, the police did not make the offer of confidentiality with the intent that the informant simply provide observations but that he recruit others as agents and facilitate the placement of an undercover officer. The police viewed the informant as an agent and used him to generate telephone calls to advance other investigations. As an investigative technique, he was not warned that his status would be lost if he did tasks on behalf of the police or talked to others about his status. The informant discussed police procedures and investigative techniques and made suggestions as to how the investigation should proceed. He was not told that his conversations were already being recorded.

- [29] In his reasons for committal, Beatty J. criticized the police for misrepresenting Peluso’s status. As he put it:

Further, misleading an informant as to his status as a confidential informant characterized as an investigative technique causes substantial harm to the course of justice. Those actions also damage the reputation of Toronto Police Services as Toronto's finest.

ii. Proceedings in the Superior Court of Justice Remaining Confidential Informants Waive Privilege

[30] Following the appellant's committal to stand trial, the two other confidential informants referred to in Crown affidavits ultimately waived privilege.

[31] While the original affidavit only relied on information from CIs #1 and #2, CI #3 was referred to in subsequent affidavits: *R. v. McCormack*, 2009 CarswellOnt 7019 (S.C.) ("Disclosure Decision"), at para. 71. Before a voir dire could be held on the status of CI #3, he waived informer privilege: *Delay Decision*, at para. 17.

[32] CI #3 was an associate of Peluso: *Disclosure Decision*, at para. 71. Evans eventually admitted that the description of CI #3 as an informant was intended to facilitate the "same type of ruse" that he used in connection with Peluso: *Delay Decision*, at para. 14.

[33] A voir dire with respect to CI #2's status was commenced. However, it was resolved without need for a court ruling when CI #2 also waived informer privilege, revealing that she was a civilian member of TPS: *Delay Decision*, at para. 18.

Proceedings Before Croll J.

[34] When the matter came before Croll J. in the Superior Court of Justice, the appellant brought an application for additional disclosure from the Crown: *Disclosure Decision*, at para. 4. He also sought and obtained a stay of the corruption charges, based on an infringement of his right to be tried within a reasonable time under s. 11(b) of the Charter of Rights and Freedoms: *Delay Decision*, at para. 137.

[35] Evans' conduct was at issue in both hearings, and, like Beatty J., Croll J. was critical of the police for misdescribing agents as CIs. She found that Evans' misdescriptions impacted the pace of disclosure and was at the root of much of the delay: *Delay Decision*, at paras. 4, 82. She also noted that a common thread in the intercepted communications was a connection to Peluso: *Disclosure Decision*, at para. 75. This was a man whom Alborino described as having considerable influence within a criminal organization and the man who was heard to say that he wanted the appellant to fry "like a fried fish in Italy": *Disclosure Decision*, at para. 75; *Delay Decision*, at para. 104. Croll J. found that there existed a "certain animus" between Peluso and the appellant: *Disclosure Decision*, at para. 69.

Crown Withdrawals

- [36] Over the eight months following the Delay Decision, the Crown gradually withdrew the remaining charges. On February 8, 2010, the Crown withdrew the fraud charge, stating that there was no reasonable prospect of conviction. On June 9, 2010, the Crown withdrew the assault charge for the same reason. On August 3, 2010, the remaining charges relating to firearms offences were also withdrawn.
- [37] Upon withdrawing the firearms charges, the Crown opined that the appellant's intercepted communications would likely be excluded on a Charter motion. As the Crown explained on the record:

The Crown has carefully reviewed the file, the authorizations and the extensive evidence called at the preliminary hearing and we've also reviewed the law with respect to informer privilege and with respect to wiretap authorizations and the interaction of these issues with section 8 of the Charter. We've also evaluated the impact of the Supreme Court of Canada cases such as Grant and Harrison on the admissibility of this evidence under the necessary analysis under section 24(2) of the Charter. [...] In the end we have determined that the status of the person said to be a confidential informant and his role in the investigation were not properly described in the affidavits in support of the authorizations and extensions. As a result, the Crown has concluded that were this Garofoli application to proceed on this evidence, a finding of a section 8 Charter violation would be inevitable.

Further, considering the nature of the Charter breach and the effects on Charter rights and on the administration of justice, we've concluded that the impugned wiretap evidence would be excluded.

- g. CIVIL PROCEEDINGS ARE COMMENCED [38] On December 7, 2011, the appellant launched a civil action against the respondents, alleging misfeasance in public office, malicious prosecution, negligent investigation, negligence and/or intentional infliction of emotional distress. The appellant sought special damages and punitive damages. In the alternative, he sought Charter damages pursuant to s. 24(1) of the Charter.

- [39] The focal point of the civil action was Evans' misdescription of individuals as CIs. It was argued that this established the civil wrongs, and further, that it rendered the intercepted communications, obtained pursuant to the authorization, to be inadmissible at the civil trial.

- [40] The trial judge dismissed the civil action. He concluded that the intercepted communications were admissible at the instance of the defendants, and further, that the intercepted communications established reasonable and probable grounds to lay the charges. The trial judge also found that the appellant had failed to demonstrate animus or malice on the part of the respondents. These findings were fatal to the civil claims and the action was dismissed.

[41] I will outline the trial judge's reasons as they relate to each of the issues in my analysis of each ground of appeal.

III. ISSUES [42] The appellant alleges various errors on the part of the trial judge. It is only necessary to deal with the following issues in disposing of the appeal:

1. Did the trial judge err in holding that the intercepted communications were admissible at the civil trial?
2. Did the trial judge err in finding that the police had subjective grounds to charge the appellant with the offences?
3. Did the trial judge err in finding that there were objectively reasonable grounds to lay the charges against the appellant?
4. Did the trial judge err in finding that the alleged wrongs had not been proved?

IV. ANALYSIS a. THE WIRETAP EVIDENCE WAS PROPERLY ADMITTED [43] This appeal largely turns on the admissibility of the appellant's intercepted communications. The police relied upon that evidence in charging the appellant with criminal offences. Once admitted at the civil trial, it readily established that police had reasonable and probable grounds to commence the prosecution against the appellant. This, in turn, was fatal to the appellant's civil claims, which required him to show the absence of reasonable and probable grounds for the charges: see e.g. *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339 at para. 3; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 ("Hill (2007)"), at para. 55.

[44] For the reasons to follow, I see no error in the trial judge's determination that this evidence was admissible at the civil trial.

- i. The Trial Ruling [45] The appellant called, as his first witness, his criminal lawyer, Jay Naster ("Naster"), to testify at the civil trial. Naster was a fact witness and was not permitted to express any opinions. However, several documents were introduced through Naster, including the informations in support of the charges, in which Durham asserted his belief that the appellant had committed the offences charged.

[46] After Naster's testimony, the appellant moved pre-emptively for a ruling that the intercepted communications, and the derivative physical evidence, be excluded from the civil trial.

[47] Before the trial judge, the appellant contested admission of the intercepted communications on the following bases:

- (a) The admissibility of the wiretap intercepts was an issue already determined during the criminal proceedings;
- (b) The interests of justice required deference to the determination of that issue, which would require their exclusion in the civil action;

- (c) Relitigating the issue would be a collateral attack on the prior decision, and so an abuse of process; and
- (d) The evidence permitted the trial judge to find that the material was so unreliable as to be inadmissible.

[48] The appellant argued that the trial judge was bound to conclude that the communications were inadmissible in light of the comments made by Beatty J. at the preliminary inquiry, Croll J. at the s. 11(b) application, and Crown counsel in withdrawing the firearms charges.

[49] The trial judge held otherwise. First, he explained, “[t]here is... no authority of which I am aware that establishes that I am bound to adopt as factual findings at a civil trial the statements made by Crown counsel in prior criminal proceedings explaining the Crown’s reasons for exercising prosecutorial discretion in a certain way.” As for Beatty and Croll JJ.’s comments, no species of *res judicata* was made out, because there was no mutuality of issue: their comments were made in the context of criminal proceedings, not “the admissibility at this civil trial of the wiretap intercepts.” As he explained, at para. 47 of his admissibility ruling:

In respect of the decisions of Justice Beatty and Justice Croll, I am not bound by the doctrine of issue estoppel, the rule against collateral attack, or the doctrine of abuse of process (as explained by Arbour J. in *Toronto (City) v. C.U.P.E.* 2003 SCC 63) to decide that the wiretap intercepts are inadmissible in this trial based on those decisions. The findings and conclusions made by Justice Beatty and by Justice Croll in support of their decisions (to the extent that such findings and conclusions are more than simply commentary on the evidence before them) do not determine the issue before me, that is, the admissibility at this civil trial of the wiretap intercepts.

[50] The trial judge also considered the fact that the police conduct in this case had attracted negative comment from the Supreme Court of Canada in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at paras. 33, 37. In that case, Binnie J. explained that “discovery of the identity of a source, and the circumstances under which his or her information was obtained by the police, may legitimately play a role in making out a full answer and defence”: *Barros*, at para. 37. He referred to the appellant’s case as an example “where the ‘source’ turned out to be non-existent, wholly unreliable, or had participated in an entrapment”: *Barros*, at para. 37. But this comment, the trial judge held, “was made in a different case and does not concern the issue before me, that is, the admissibility at this trial of evidence of the wiretap intercepts.”

[51] The trial judge observed that the wiretap authorization first issued back in 2003 had not been set aside and accordingly benefited from a presumption of validity. While a hearing as to admissibility – a “Garofoli” hearing – was scheduled, it never proceeded given that some charges had been stayed and others withdrawn. The trial judge further found that on the evidentiary record before him, he could not conclude that exclusion of the evidence would have been inevitable.

[52] Finally, the trial judge held that, even if the evidence would inevitably have been excluded from the criminal trial, different considerations governed admissibility at a civil trial. As he noted, “I would still need to decide the question of admissibility of the wiretap evidence at this trial of a civil action where different considerations than those in criminal proceedings must be addressed.”

ii. No Determination During the Criminal Proceedings [53] The appellant argues that the trial judge erred in admitting the intercepted communications at the civil trial. While acknowledging that there was no judicial determination of admissibility during the criminal proceedings, he says that the trial judge erred in law and fact by admitting and relying upon the intercepted communications. The appellant says that the intercepted communications were found to have been illegally obtained and that the respondents were not entitled to benefit from illegal activity.

[54] I agree with the trial judge that, absent a judicial determination, it could not be said that the validity of the authorization was vitiated by the deception, or that the intercepted communications would have been excluded from a criminal trial.

[55] To be sure, Evans’ conduct, in misdescribing individuals as CIs, attracted negative judicial comment and influenced the Crown’s decision to withdraw the charges. This is not surprising. The misidentification of sources as CIs was improper. It represented a breach of the duty on the affiant in an ex parte process to make full and frank disclosure of material facts: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 44, citing *R. v. Araujo*, [2000] 2 S.C.R. 992, at para. 46. Describing someone as a CI shields them with a cloak of privilege – one of the few class privileges recognized in Canadian law: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 42; see also *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, [2017] 2 S.C.R., at para. 11. Police have an obligation to protect CIs’ identities, but they must not abuse the privilege by invoking it where it does not exist.

[56] It is instructive to clarify the scope of the deception carried out by Evans. The edited affidavit, disclosed to the defence, did not disclose that CI#1 was Peluso. That is because the identity of the CI was redacted from the document before it was disclosed. Significantly, however, the issuing judge was aware that CI#1 was Peluso. As noted by the trial judge in his ruling, the unedited affidavit, placed before the issuing judge, disclosed that: (1) CI #1 was Peluso; (2) Peluso was a target of the investigation; and (3) Peluso was involved in other criminality. What it did not disclose was that Peluso was a police agent rather than a CI.

[57] The record does not allow me to determine whether the identities of the other CIs were disclosed to the issuing judge. As it relates to Peluso, however, the deception related to his status, not his identity.

[58] The deception as to Peluso’s status, and the misdescription of a civilian witness as a CI, was improper, but it does not follow that the wiretap evidence was unconstitutionally obtained, or that it would have been excluded at a criminal trial.

Presumption of Validity

- [59] First, the trial judge was correct to observe that, absent a judicial declaration of invalidity, the authorization was, and is, presumed to be valid authority for the interception of the appellant's communications.

Crown Comments Not Binding

- [60] The appellant relies upon Crown counsel's comments, a public official, at the time the final charges were withdrawn. It is trite to observe that the trial judge was not bound by those comments. They were submissions made by a lawyer to the court. To be clear, the decision to terminate the criminal prosecution was appropriate, and undertaken in the highest traditions of Crown counsel as a quasi-minister of justice: *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 25-26; *Miazga*, at para. 47. It could be said that the criminal case unfolded precisely as it should, once the Crown determined it was not in the public interest to pursue criminal convictions.
- [61] The termination of the criminal proceedings was an effective remedy for wrongdoing by the police. The appellant did not have to litigate the admissibility of the wiretap evidence or any other issue, for that matter, in the criminal courts. He was spared the exigencies of a full prosecution and all that it entails, including the potential loss of liberty.
- [62] While appropriately undertaken, the termination of the prosecution did not invalidate the authorization pursuant to which the appellant's communications were intercepted. The Attorney General, through his delegates, enjoys a broad sphere of discretion over the commencement and termination of proceedings: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 47; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 20; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 40; and *R. v. Varennes*, 2025 SCC 22, 449 C.C.C. (3d) 427, at para. 48. This discretion allows for decisions to be made in the public interest, based, not only on legal principles, but on principles of fairness and equity: *Anderson*, at para. 37; *Varennes*, at para. 44. In this case, the Crown discontinued the prosecution before the Charter hearing could proceed. The Crown opined that a finding of a s. 8 breach was inevitable. That opinion, however, was not binding on the court.

Judicial Commentary

- [63] As for the judicial commentary of Beatty J. at the preliminary inquiry and Croll J. in the Superior Court of Justice, these must also be seen in context. First, as noted by the trial judge, issue estoppel did not govern because the parties to the respective criminal and civil proceedings were different: *National Industries Inc. v. Kirkwood*, 2023 ONCA 63, 30 C.C.L.I. (6th) 248, at para. 21, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 23.

[64] Perhaps more importantly, issue estoppel presumes that there exists a potentially binding ruling. Here, there were no rulings, just commentary. The commentary did no more than affirm what everyone already accepted: that the deception in the affidavit should not have occurred. Neither Beatty J. nor Croll J. purported to predict the outcome of a Charter voir dire. Nor could one expect that level of prescience, given the multi-factorial analysis that governs Charter review of warrants and authorizations. Nor could they anticipate this civil lawsuit.

The Steps in a Garofoli Hearing

[65] There is rarely a straight line between police deception in an ITO or affidavit, and the exclusion of evidence obtained under the ensuing warrant or authorization. The road is more aptly described as long and winding. Deception in an affidavit may or may not invalidate an authorization to intercept communications: *R. v. Bisson*, [1994] 3 S.C.R. 1097; *R. v. Paryniuk*, 2017 ONCA 87, 134 O.R. (3d) 321, at para. 44, leave to appeal refused, [2017] S.C.C.A. No. 81. Even if the authorization is invalidated, leading to a violation of s. 8, the intercepts might not be excluded under s. 24(2) of the Charter.

[66] The Garofoli hearing proceeds in steps. Where inaccuracies are discovered in an ITO or affidavit, the reviewing court must determine whether, absent the inaccuracies, the ITO or affidavit would contain sufficient information to allow the order to issue. The reviewing judge must not substitute his or her opinion for that of the issuing judge. The question is whether the order could have, rather than would have, issued.

[67] The evidentiary hearing may include defence cross-examination of the affiant and sub-affiants. The defence must seek leave to cross-examine, but the threshold is not onerous: *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 40. It is met when the defence can establish that such cross-examination “will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds” *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1465; *R. v. Pires*, at para. 10. The Crown may also call evidence from officers involved in the investigation.

[68] Upon completion of the evidentiary hearing, the court is to modify the affidavit or ITO through a process of excision, addition, and in some cases, amplification. Inaccurate information is removed from the stated grounds. Missing information is added. The Crown may seek to amplify the grounds with information that could have supported issuance of the order but was omitted through technical or inadvertent oversight: see *Morelli*, at para. 41; *Araujo*, at paras. 57-58.

[69] These steps having been taken, the reviewing judge is to ask whether, based on the modified grounds the order could have issued. In *Araujo*, the Supreme Court of Canada explained, “[T]he function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be

satisfied that a search warrant should issue”: at para. 57, citing *Re Church of Scientology and The Queen* (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), at pp. 528-29 (emphasis omitted); see also *Paryniuk*, at para. 45.

- [70] If the authorization could have issued, it will be valid even though the underlying affidavit contained erroneous, inaccurate or incomplete information. If the authorization is held to be valid, there is no violation of s. 8 of the Charter because the invasion of privacy was authorized by a valid court order.
- [71] A reviewing judge has a narrow discretion to invalidate an order based on deception even if, absent the deception, the order could still have issued. However, this is reserved for a small category of cases in which the deception is so subversive as to meet the threshold for an abuse of process: *Paryniuk*, at para. 62.
- [72] If an order is invalid, the invasion of privacy will be unauthorized and will be found to violate s. 8 of the Charter. Of course, that does not mean that the evidence will be excluded. Section 24(2) of the Charter commands consideration of whether the admission of the evidence would bring the administration of justice into disrepute. This discretionary determination hinges on three limbs of inquiry: the seriousness of the Charter infringing conduct; the impact of the breach on Charter protected interests; and the societal interest in effective prosecution of crime: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Beaver*, 2022 SCC 54; *R. v. McGregor*, 2023 SCC 4, 422 C.C.C. (3d) 415; *R. v. McColman*, 2023 SCC 8, 423 C.C.C. (3d) 423; and *R. v. Zacharias*, 2023 SCC 30, 431 C.C.C. (3d) 421. Relevant factors include the good or bad faith of the police, the degree of intrusion, the reliability of the evidence obtained, and the seriousness of the charges before the court.
- [73] The above illustrates that Evans’ deception began, but did not end, the inquiry into admissibility at the appellant’s criminal trial. It is impossible to predict the outcome of a full evidentiary hearing. However, it is certainly conceivable that the authorization might have been upheld as valid, on the basis that it could have issued based on a corrected affidavit. Moreover, this is not a case in which the deception was likely to meet the high threshold for an abuse of process. Peluso’s identity was disclosed to the issuing judge. While sources’ statuses were misdescribed, there was no suggestion that the content of their evidence had been altered.
- [74] In short, as found by the trial judge, the appellant’s Garofoli application might have succeeded at a criminal trial, but success was not inevitable. Even if it was, this would not dictate admissibility in civil proceedings. I will turn to that issue now.

iii. The Rules of Admissibility at Civil Trials are Different [75] The same subject matter can give rise to criminal, civil and administrative proceedings. These juridical contexts have elements in common but are also fundamentally distinct. Because they involve different legal, policy and public interest considerations, exclusion of evidence in one context does not imply exclusion in another. This is particularly so where the Charter is concerned. As Rosenberg J.A. observed in *P. (D.) v. Wagg*, 71 O.R. (3d) 229 (C.A.), at para. 77: “the analysis of whether or not to exclude

evidence for a Charter breach is entirely different in the civil context than in the criminal context.”

- [76] The coercive power of the state is most prominently on display in criminal proceedings. A person charged with a criminal offence faces jeopardy, stigma and a potential loss of liberty. It is here that the state stands as the singular antagonist of the individual and it is here that constitutional principles are most directly and forcefully engaged. The pursuit of truth is an objective of all judicial proceedings, but it is not absolute. In the criminal context, it may yield to other objectives, such as the recognition and enforcement of constitutional rights and freedoms. This is the compromise dictated by the edicts of a free and democratic society.
- [77] Civil trials are different. An individual who sues police for malicious prosecution or negligent investigation does not face a risk of jeopardy or a potential loss of liberty. Within this context, the state does not wield coercive authority. Rather, the individual is the protagonist of the piece, having commenced an action for monetary compensation for alleged wrongdoing.
- [78] That is the case here. It was the appellant who initiated the civil action, and it was the appellant who bore the persuasive onus of proof. The intercepted communications were introduced, not for the purpose of attaching criminal liability to the appellant, but to prevent erroneous findings of civil liability from attaching to the respondents.
- [79] In this context, the Charter did not determine admissibility. Admissibility was governed by the rules of evidence, as defined by statute and common law, and as informed by Charter values: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 91-97. The overarching calculus was one that balanced probative value against prejudicial effect. This equation facilitates the pursuit of truth, while allowing for exclusion of evidence that would undermine the integrity of the fact-finding process.
- [80] The pursuit of truth is the cardinal principle in civil proceedings. As it was put in *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 24:

Nearly 20 years ago, Cory J. observed that “[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth”. Although the parallel objectives of proportionality and efficiency have become increasingly important in the civil procedure context, seeking the truth remains the cardinal principle in civil proceedings. Informed by this objective, the rules of the law of evidence in civil matters allow judges “to find out the truth, and to do justice according to law”. [Citations omitted.]

- [81] In this case, the intercepted communications were critical indicia of truth, necessary to allow the trial judge to “find out the truth and do justice according to law”. Where, as here, the plaintiff alleges malicious prosecution and negligent investigation, evidence of factual guilt or innocence is directly relevant to the inquiry. As explained in *Hill* (2007), at para. 64:

Any suspect suing the police bears the burden of showing that police negligence in the course of an investigation caused harm compensable at law. This means that the suspect must establish through evidence that the damage incurred, be it a conviction, imprisonment, prosecution or other compensable harm, would not have been suffered but for the police's negligent investigation. Evidence going to the factual guilt or innocence of the suspect, including the results of any criminal proceedings that may have occurred, may be relevant to this causation inquiry. [Emphasis added.]

- [82] In his statement of claim, the appellant expressly pleaded that he was factually innocent and that police acted without reasonable and probable grounds when they charged him with the offences. The intercepted communications stood as a powerful rebuttal of both assertions. They belied the notion of factual innocence and readily established the existence of reasonable and probable grounds. This evidence was critical to an understanding of how and why the criminal charges came to be. The intercepted communications informed the respondents' subjective grounds to believe that the appellant had committed the offences. Those same communications established that the respondents' beliefs were objectively reasonable.
- [83] The probative value of this evidence fell at the high end of the range. Conversely, little, if any, prejudice flowed from its admission. This evidence was reliable. It captured precisely what it purported to capture: the appellant's direct involvement in corrupt activities. Evans' deception did not cause the appellant to say what he said. He incriminated himself through his own words and actions. Nor is there any evidence to suggest that Peluso, or Evans' wish to "heat up the wires", influenced the appellant's words. The appellant's incriminating conversations took place with persons other than Peluso. While Croll J. found that Peluso had a personal animus against the appellant, there is no indication that Peluso's views had any material impact on the investigation.
- [84] Against this backdrop, it is difficult to imagine a proper basis for excluding the intercepted communications from the appellant's civil trial. Such exclusion would have marked a departure from factual reality, common sense, and the pursuit of justice. It would have generated a record that was intolerably distorted. It would have potentially permitted recovery of damages in the absence of civil wrongdoing. It would have been to overshoot the purpose of the Charter by permitting its use as a sword, rather than a shield.
- [85] I would dismiss this ground of appeal.
- b. THE CHARGES WERE SUPPORTED BY REASONABLE AND PROBABLE GROUNDS [86] The trial judge found that investigators had subjective grounds to charge the appellant with the offences and that those grounds were objectively reasonable. The appellant challenges this finding on various bases.
- i. General Principles [87] It is helpful to begin with a discussion of the standard of care imposed on investigators in relation to those that they investigate. In Hill (2007), at para. 73, the Supreme Court of Canada held that the standard of care "is the overarching standard of a

reasonable police officer in similar circumstances.” Writing for the majority of the court, McLachlin C.J. held that the standard is to exercise discretion in a manner that falls within the range of reasonable decisions available at the time the decision was made: *Hill* (2007), at para. 73; see also *Upchurch v. Oshawa (City)*, 2014 ONCA 425, 27 M.P.L.R. (5th) 179, at para. 21. The standard is not one of perfection, as she explained, at para. 73:

The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results. Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere “errors in judgment” which any reasonable professional might have made and therefore, which do not breach the standard of care. [Citations omitted.]

- [88] In laying charges, “the standard [of care] is informed by the legal requirement of reasonable and probable grounds to believe the suspect is guilty; since the law requires such grounds, a police officer acting reasonably in the circumstances would insist on them”: *Hill* (2007), at para. 68.
- [89] An investigator’s personal belief that there are reasonable and probable grounds is not sufficient: a reasonable person standing in the shoes of the investigator must believe there are reasonable and probable grounds that the person charged committed the offence: *Payne v. Mak*, 2018 ONCA 622, 78 M.P.L.R. (5th) 179, at para. 31, citing *R. v. Storrey*, [1990] 1 S.C.R. 241, at p. 250.
- [90] In determining whether there are reasonable and probable grounds to lay charges, the investigator need not “evaluate evidence to a legal standard or make legal judgments” as “[t]hat is the task of prosecutors, defence lawyers and judges”: *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656, 132 O.R. (3d) 241, at para. 51; see *Hill* (2007), at para. 50.

ii. Subjective Grounds for Belief [91] The appellant argues that the trial judge erred in finding that police had subjective grounds to believe that he had committed the offences. He points to Evans’ deception regarding CIs, arguing that Evans would not have had to lie about this if he genuinely had grounds. The appellant argued before the trial judge that the charges were based, not on proper grounds, but rather, Evans’ animus and malice toward the appellant, and his desire to ruin the appellant’s life.

- [92] The appellant relied, in part, on a meeting that Evans had with the appellant's siblings. According to the appellant's brother and sister, Evans suggested that the appellant should plead guilty, asserting that, if he did not do so, other intercepted communications would be released, further embarrassing their family. The appellant testified that Evans made similar comments to him in courthouse bathrooms and at police headquarters.
- [93] The trial judge concluded that neither the meeting, nor any other evidence, detracted from Evans' subjective grounds for belief. First, the trial judge was unpersuaded that Evans bore the appellant any ill-will. As for Evans' suggestions that the appellant should plead guilty, the trial judge found that these comments did not demonstrate that Evans intentionally charged the appellant in bad faith, or that he lacked a subjective belief that charges were justified. The appellant's other allegations of bad faith were similarly rejected as unsupported by the evidence.
- [94] The trial judge similarly found that Evans' resort to deception did not signal an absence of subjective grounds. I agree. Logically, deception can co-exist with a belief that a suspect is guilty. The nature of the deception also matters. Evans misstated the status of sources as CIs, but did not alter what those sources had to say. It was the content of their evidence that supported the investigators' grounds.
- [95] Perhaps most significantly, the grounds in the wiretap affidavit were not the grounds at issue in the civil trial. The wiretap affidavit summarized the investigation up to a certain point. It led to the issuance of the authorization. However, the charges were based on the fruits of the authorization: the appellant's incriminating utterances. The respondent Durham swore the informations charging the offences. He not only asserted that he had such grounds when swearing the informations, he outlined those grounds in the ITOs sworn in support of the search warrants.
- [96] The informations charging the offences stand as uncontradicted evidence of the officers' subjective grounds for belief.
- [97] The appellant argues against this conclusion. He says that, if a sworn information was sufficient to establish subjective grounds, a breach of rights could never be established. He says that it "was not logically open to the Trial Judge to make the findings that he did." The appellant further argues that an adverse inference should have been drawn from "the Respondents' silence".
- [98] I do not agree. First, the respondents were not silent. Durham spoke through the informations that he swore. Those documents had the testimonial value of affidavit evidence.

- [99] Second, this approach does not prevent an accused person from establishing a breach of the Charter. In the criminal context, an accused person can seek leave to cross-examine the affiant, or sub-affiant. Civil discoveries can be used to the same effect. Even where a subjective belief is established, it is open to the defence to challenge police conduct by arguing that subjective grounds were not objectively reasonable.
- [100] The trial judge's finding of subjective grounds discloses no error.
- iii. Objective Grounds for Belief [101] In finding the grounds to be objectively reasonable, the trial judge considered a number of factors, among them, the order committing the appellant to stand trial at the conclusion of the preliminary inquiry. Contrary to the appellant's submission, a committal to stand trial is a relevant, though not dispositive, consideration when evaluating the bases for charges: *Barclay*, at para. 99; *Miazga*, at para. 97. A committal reflects a judicial determination that there is evidence upon which a reasonable jury, properly instructed, could find the appellant guilty of the charged offence. This threshold determination, designed to screen out unfounded charges, is some indication that the prosecution was properly commenced.
- [102] In any event, the committals played only a modest role in the trial judge's analysis. He carried out a thoughtful and highly detailed analysis of each of the charged counts, explaining over the course of more than 100 paragraphs how each was substantiated by the evidence. As detailed above, the intercepts disclosed conversations between the appellant and various bar owners, discussing how to deal with existing charges, how to avoid new charges, and payment for favours already discharged. This evidence affirmed the reasonableness of the grounds to believe that the appellant had committed the offences.
- [103] The appellant argues that the trial judge "failed to assess all the circumstances and facts before the Court, instead focussing on isolated evidence which led to legal errors". At trial, the appellant called various witnesses and testified himself, offering alternative explanations for the conversations on the wiretaps. He argues on appeal that the trial judge placed "undue weight on some evidence and giving no or almost no weight to other uncontroverted evidence". He contends that the trial judge failed to consider the totality of the evidence, and the contextual factors that should have informed his evaluation of the intercepted communications.
- [104] Again, I do not agree. The trial judge expressly adverted to the appellant's testimony, and the testimony of other retired officers who offered "context" for the evidence. As the trial judge reasoned, even if some of this evidence could ground a defence at a criminal trial, it did not vitiate the grounds that existed for the charges when they were laid.
- [105] Finally, contrary to the appellant's argument, Crown counsel's withdrawal of the charges said nothing about the cogency of the investigators' grounds. The police are not required to "make judgments as to legal guilt or innocence before proceeding against a suspect": *Hill* (2007), at para. 50. The requirement is that the information be reliable at the time the decision was made to lay charges: *Flood v. Boutette*, 2021 ONCA 515, 460 D.L.R. (4th) 648, at para. 73; *M.W. v. Halton (Police Services Board)*, 2020 ONCA 463, at para. 20; and *Barclay*, at

para. 50.

[106] In this case, the withdrawal did not speak to the reliability of the evidence. The Crown posited that this evidence might be excluded, not because it lacked reliability, but because of how it had been obtained. The withdrawal of charges based on the potential for Charter exclusion did not, in the circumstances of this case, undermine or displace the very clear, objective and reliable bases for criminal charges to be laid against the appellant.

[107] The appellant has failed to demonstrate any error in the trial judge's assessment of reasonable and probable grounds.

c. REMAINING GROUNDS OF APPEAL [108] The appellant advanced other grounds of appeal in which he challenged the dismissal of his civil claims. However, once it is accepted that the charges were based on reasonable and probable grounds, and that investigators were not acting out of malice, those grounds must fail.

[109] As it relates to the various claims, the trial judge engaged in a careful analysis of the constituent elements of each allegation. He applied the correct principles and reached conclusions that were open to him on the evidence. I note the following by way of summary:

- (a) In evaluating the claim of malicious prosecution, the trial judge referred to the four elements set out in *Miazga*, that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect: at para. 3. This claim could not succeed given the finding that police had reasonable and probable grounds to commence the prosecution. While unnecessary, the trial judge went on to consider the requirement of malice. He found that the evidence did not establish an improper purpose on the part of the respondents, a finding readily open to him to make on the record. As he observed: “[t]here is no evidence that Mr. Evans was directed to disgrace [the appellant] or that he chose to charge [the appellant] with offences from any personal animus.”
- (b) The presence of reasonable and probable grounds was similarly fatal to the claim of negligent investigation which, like malicious prosecution, requires a showing that such grounds did not exist. In addition, there was an insufficient causal link between the state misconduct – the deception in the affidavit – and the appellant's alleged damages, given that the charges were based on the appellant's own words and conduct.
- (c) The claim of misfeasance in public office required a showing that public officials deliberately engaged in unlawful conduct. Because the respondents had reasonable grounds to charge and prosecute, and were not motivated by animus, they could not be said to have acted unlawfully.

- (d) The trial judge considered the elements of the tort of intentional infliction of emotional distress, those being: (1) the defendant's conduct was flagrant and outrageous; (2) the defendant's conduct was calculated to harm the plaintiff; and (3) the defendant's conduct caused the plaintiff to suffer a visible and provable harm. The trial judge held that although Evans' misdescription of Peluso as a CI "was improper," the appellant had "not shown that it was calculated to cause harm."
- (e) Finally, the claim for Charter damages was doomed to fail, given that the appellant failed to establish that the authorization to intercept his communications was invalid, or that the interception of his utterances, based on a presumptively valid search warrant, violated his rights under s. 8 of the Charter.

[110] I see no error in the trial judge's analyses of these claims, and no basis for appellate intervention.

[111] Given the disposition of these issues, it is unnecessary to address the trial judge's assessment of damages.

V. DISPOSITION [112] For the above reasons, I would dismiss the appeal with costs to the respondents in the agreed-upon amount of \$40,000 plus disbursements. The parties have advised the court that they will agree on the amount of those disbursements.

Released: November 13, 2025 "E.E.G."

"R. Pomerance J.A."

"I agree. E.E. Gillese J.A."

"I agree. S. Gomery J.A."

- [1] The Liquor Licence Act was repealed as of November 29, 2021. It has since been replaced by the Liquor Licence and Control Act, 2019, S.O. 2019, c. 15, Sched. 22.
- [2] The Police Services Act was repealed on April 1, 2024. It has since been replaced by the Community Safety and Policing Act, 2019, S.O. 2019, c. 1, Sched. 1

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://norma.lexum.com/coa/coa/en/item/23700/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mccormack-v-evans-2025>

Prepared on 25 October 2026 · Esheria