
CANADA / JUDGMENT

R. v. Ali

2014 BCSC 439

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 439 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2014 BCSC 439

Date: 20140313

Docket: 25656

Registry: Vancouver

Regina

v.

Aram Ali

This version of these reasons has been redacted (at paragraphs 53 and 54) because of a legal privilege.

Before: The Honourable Madam Justice H. Holmes

Ruling re Defence Application under Section 187(7) Criminal Code for a Copy or, Alternatively, a Judicial Summary of Material Redacted from Wiretap Authorization P03/2009

Counsel for the Crown:

Sandra Dworkin

Michael Barrenger

Simone McCallum

Counsel for the Accused:

John Stowe

Roger Thirkell

Veen Aldosky

Place and Dates of Trial:

Vancouver, B.C.

Dates ongoing

Place and Date of Ruling:

Vancouver, B.C.

March 13, 2014

INTRODUCTION

- [1] In the disclosure it has made to the defence, the Crown has redacted material which may identify (a) a confidential informant (Informant E), or (b) a person who agreed to act as an agent for the police during their investigation. In the present application, which Mr. Ali brings under s. 187 of the Criminal Code, Mr. Ali asks the Court to open the sealed packet relating to wiretap authorization P03/2009, review the original version of the supporting affidavit, and provide the defence with either a copy or, alternatively, a judicial summary of the redacted (deleted) material. In his trial, the Crown expects to tender evidence of approximately 80 private communications intercepted under the authority of wiretap authorization P03/2009.
- [2] Mr. Ali recognizes that the identity of Informant E is protected by informer privilege, and he does not suggest that his innocence is at stake without disclosure of Informant E's identity. However, he seeks as comprehensive a judicial summary of the redacted material as can be given without violating the privilege. As to the agent, who enjoys no similar class privilege but in respect of whom the Crown asserts a case by case privilege, Mr. Ali submits that the agent's identity should be disclosed unless the balance of interests recognized by s. 187 weigh against disclosure, and he submits that it does not. Mr. Ali proposes to challenge the Authorization on the basis, among others, that it relied heavily on the police plan to use the agent, a plan which, Mr. Ali submits, the police knew or ought to have known was a near-hopeless one. Mr. Ali submits that he needs to know who the agent was so that he can support this challenge either from personal knowledge gained in the small ethnic community involved or from inquiries he will make within that community. Also, Mr. Ali submits that the agent may have provided the police with information sufficient to have required them to name him in seeking the Authorization, which they did not do.

- [3] The Crown responds that, on one side of the s. 187 balance, a strong public interest requires that the agent's identity be protected because disclosure would pose serious risks to the agent's safety and potentially that of the agent's family. On the other side of the balance, says the Crown, Mr. Ali's right to make full answer and defence is minimally affected, if at all, by non-disclosure because the redacted material concerning the agent is not relevant to the issues involved in his challenge to the Authorization. This, says the Crown, is because the identity of the agent will not bear on whether the police had reasonable grounds to believe that interception of the communications of the named targets would afford evidence of the offences under investigation. The Crown disagrees with Mr. Ali's position that the investigative plans for the agent were central to the affidavit and crucial to the issuance of the Authorization. However, the Crown acknowledges that those plans were important. To the extent that Mr. Ali may wish to contend that the plan to use the agent was insincere or near-hopeless, the Crown says that Mr. Ali already has the necessary information on which to mount his challenge without, in addition, knowing the identity of the agent. As to information relating to Informant E or a judicial summary of it, the Crown says that Mr. Ali has failed to show that it may assist him in making full answer and defence.
- [4] For the reasons below, I have concluded that the agent's identity should be disclosed. I will also ask the Crown to propose a judicial summary of the general nature of the redacted material concerning Informant E.
- [5] I will briefly set out the background to this application and the governing law, before then explaining my conclusions.

BACKGROUND

- [6] Mr. Ali is charged on a direct indictment with two counts of attempted murder and one count of discharging a firearm with intent to wound (contrary to s. 239(1)(a.1) and s. 244(2)(b) respectively).
- [7] Authorization P03/2009 was the fourth in a series of authorizations issued in support of investigation "E-Patroun" into a May 8, 2008, attack on two vehicles travelling together in Burnaby, which resulted in the death of Jonathan Barber and the wounding of his girlfriend Vicki King. One of the central targets of that investigation was Mr. Barzan Tilli-Choli. The police theorized that Mr. Tilli-Choli was a senior member of the U.N. gang, and that he was centrally involved in the attack on Mr. Barber and Ms. King, who the U.N. gang believed were associated with the rival group in an illegal drug trade turf war. The affidavits for E-Patroun authorizations named other targets as well, with some variation from authorization to authorization, but none of them included Mr. Ali among the people so named.
- [8] The events to which the charges relate took place in mid-February, 2009. Mr. Ali was arrested later that same month. He was at first charged on an indictment with a number of other people. A new direct indictment in January 2011 charged him with but one other person. A further direct indictment now charges him alone.

- [9] Pre-trial applications or voir dire proceedings were scheduled for 40 days beginning in March 2014, with the trial before a jury in September 2014 for 100 days. Counsel agreed on the order in which the various applications would be made, and dates for filing notices and submitting written argument. The present application under s. 187 is the first such application.

THE GOVERNING LAW

- [10] It is common ground that s.187, which I will discuss in more detail below, largely codifies the procedure for disclosing the content of a wiretap affidavit, as set out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1461:
1. Upon opening of the packet, if the Crown objects to disclosure of any of the material, an application should be made by the Crown suggesting the nature of the matters to be edited and the basis therefor. Only Crown counsel will have the affidavit at this point.
 2. The trial judge should then edit the affidavit as proposed by Crown counsel and furnish a copy as edited to counsel for the accused. Submissions should then be entertained from counsel for the accused. If the trial judge is of the view that counsel for the accused will not be able to appreciate the nature of the deletions from the submissions of Crown counsel and the edited affidavit, a form of judicial summary as to the general nature of the deletions should be provided.
 3. After hearing counsel for the accused and reply from the Crown, the trial judge should make a final determination as to editing, bearing in mind that editing is to be kept to a minimum and applying the factors listed above.
 4. After the determination has been made in (3), the packet material should be provided to the accused.
 5. If the Crown can support the authorization on the basis of the material as edited, the authorization is confirmed.
 6. If, however, the editing renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the wiretap evidence.
- [11] Section 187, enacted in 1993, constitutes a code of procedure for access to a sealed wiretap packet. Section 187 provides as follows:

187(1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).

(1.1) An authorization given under this Part need not be placed in the packet except where, pursuant to subsection 184.3(7) or (8), the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.

(1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

- (a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and
- (b) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

- (2) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to section 185 or subsection 186(6) or 196(2) may only be made after the Attorney General or the Minister of Public Safety and Emergency Preparedness by whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.
- (3) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to subsection 184.2(2) or section 184.3 may only be made after the Attorney General has been given an opportunity to be heard.

- (4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could
- (a) compromise the identity of any confidential informant;
 - (b) compromise the nature and extent of ongoing investigations;
 - (c) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
 - (d) prejudice the interests of innocent persons.
- (5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4), the accused shall be provided with an edited copy of the document.
- (6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.
- (7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused.
- [12] Section 187(4) thus authorizes the Crown to redact information where it believes disclosure would be prejudicial to the public interest. The Crown here has redacted the information relating to Informant E on the basis that it could identify that person, in violation of the informer privilege that person enjoys. In relation to its redactions of the agent-related information, the Crown asserts a public interest privilege (sometimes called "immunity") based on serious concerns for individuals' safety.
- [13] An accused may challenge such a claim of public interest privilege by bringing an application pursuant to s. 187(7) for an order requiring disclosure of the redacted material. Before ordering disclosure of that material under s. 187, the judge must be satisfied that the disclosure is required in order for the accused to make full answer and defence, and that a judicial summary of the redacted material would not suffice.

- [14] In determining an application under s. 187(7), the judge is required to strike a balance between the competing interests of law enforcement and the right of the accused to make full answer and defence (Garofoli at 1458-60; *R. v. Durette*, [1994] 1 S.C.R. 469 at 494).
- [15] In the evaluation of those competing interests, the judge must determine whether the redacted information is potentially relevant, as measured in relation to the accused's right to make full answer and defence. That right must, in turn, be considered in the context within which it is asserted (*R. v. Pires and Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343 at paras. 29-31). The context here is Mr. Ali's challenge to the Authorization, and relevance must therefore be assessed by reference to the principles framing the challenge, which I will briefly set out below. If material may be relevant (or is not clearly irrelevant) it must generally be disclosed, unless it is privileged or not in the possession or control of the prosecuting Crown (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 338-341; *R. v. Egger*, [1993] 2 S.C.R. 451 at 466-67).
- [16] As mentioned above, relevance must be assessed in the applicable context, and here the context is Mr. Ali's challenge to the Authorization. The starting point for the review of a wiretap authorization is the preconditions set out in s. 186(1) of the Criminal Code, under which this Authorization was issued. Section 186(1) reads as follows:
186. (1) An authorization under this section may be given if the judge to whom the application is made is satisfied
- (a) that it would be in the best interests of the administration of justice to do so; and
- (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
- [17] Case authority such as *R. v. Duarte*, [1990] 1 S.C.R. 30, interprets s. 186(1)(a) as requiring:
- (i) reasonable and probable grounds to believe that a particular offence has been or is being committed; and
- (ii) reasonable and probable grounds to believe that an authorization will afford evidence of that offence.
- [18] The validity or otherwise of the authorization is to be determined at the end of the voir dire according to the well-known test set out in *Garofoli* at 1452:

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

[19] In *R. v. Bacon*, 2010 BCCA 135 at para. 25, Donald J. succinctly expressed that test as follows:

The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant. While evidence of fraud, material non-disclosure, or misleading information are all relevant to this enquiry, their sole impact is to determine whether there is a continuing basis to support the warrant [citations omitted].

[20] It is within the legal context framed by those principles that the relevance of the redacted material is here to be measured. Sopinka J. in *Durette* at 492 explained as follows the relationship between these principles and the process for which s. 187 provides:

The rule requiring that an accused automatically be given access to the sealed packet is based upon the fact that, as part of the right to make full answer and defence, the accused has the right to be given the opportunity to challenge the admissibility of evidence tendered by the Crown. The most effective way of challenging the admissibility of wiretap evidence is to challenge the validity of the authorizations pursuant to which that evidence was gathered. If the authorization is invalid then the admissibility of the wiretap evidence may be challenged on both statutory and constitutional grounds. The validity of a wiretap authorization turns upon whether the affidavit put before the issuing judge, as amplified by any evidence taken on review, provides a basis upon which that judge could have been satisfied that the pre-conditions for granting the authorization exist. The validity of the authorization is heavily dependent upon the contents of the affidavit. Therefore, the accused must be provided with access to the affidavit if he or she is to be given the opportunity to mount an effective challenge to the admissibility of wiretap evidence tendered by the Crown.

[21] In the balancing of the interests recognized by s. 187, disclosure should be favoured, subject only to maintaining those minimal redactions as are necessary to protect the public interest (*Durette* at 495). The Crown thus bears the onus of justifying its belief that disclosure of the redacted material would be prejudicial to the public interest as defined in s. 187(4).

[22] The right of the state to withhold information which is not clearly irrelevant on the basis of a public interest is also recognized at common law (*Carey v. Ontario*, [1986] 2 S.C.R. 637; *R. v. Lam*, 2000 BCCA 545; *R. v. Russell*, 2011 BCSC 1457 [Russell 1457] at para. 24).

[23] As noted above, public interest privilege is a case-by-case privilege (*R. v. Trang*, 2002 ABQB 19 at paras. 32-47). The Crown must accordingly justify its refusal to disclose relevant information on the basis of public interest. The determination of a claim of public interest privilege will require a balancing of the competing interests at play.

[24] The Crown successfully claimed public interest privilege in relation to the same agent in a proceeding related to the case at bar (*Russell* 1457; *R. v. Russell*, 2011 BCSC 1607 [Russell 1607]).

- [25] In Russell 1457 the accused Mr. Barzan Tilli-Choli applied for disclosure according to the Stinchcombe principles for information relating to the agent, including the agent's identity and material relating to the agent including an unedited copy of the affidavit sworn in support of P03/2009. Mr. Tilli-Choli asserted the information was relevant to, among others, his challenge to authorization P03/2009 in which he contended that the affidavit failed to establish investigative necessity (Russell 1457 at para. 18). The Crown resisted disclosure, on the bases that the material was of minimal value to the defence, and that it was protected by a common law public interest privilege relating to the safety of the agent and the agent's family (Russell 1457 at para. 8).
- [26] Stromberg-Stein J. ordered the Crown to produce under seal for the Court's review the materials sought (Russell 1457 at para. 36). After reviewing those materials, she observed that the material related "to a failed implementation of a police objective, with only momentary and incidental relation to any of the accused" (Russell 1607 at para. 7). She dismissed the application as failing to meet the Stinchcombe threshold for disclosure, and on the additional basis that the safety interests of the agent in any event outweighed Mr. Tilli-Choli's interests in the material for the purposes of making full answer and defence (Russell 1607 at paras. 8-11).

ANALYSIS

- [27] The Crown does not seek to defend non-disclosure of the agent-related information on any basis other than public interest privilege based on serious risks to personal safety. The Crown submits that the risks, which are not seriously disputed, far outweigh any value of the information to Mr. Ali in making full answer and defence to the charges, including by challenging the Authorization which generated much of the evidence the Crown proposes to lead in the trial.
- [28] My view is somewhat different of the balance, in this case, between the public interest, on one hand, and the need for Mr. Ali to have the agent-related information in order to make full answer and defence, on the other. In my view, the balance falls in favour of disclosure.
- [29] I will first explain why I conclude that Mr. Ali requires the information in order to make full answer and defence by challenging the Authorization on the basis described earlier in these reasons.
- [30] The Crown submits that such a conclusion is, effectively, unavailable, because judicial comity requires that the agent-related material redacted from the affidavit be viewed in this application as only marginally relevant to the validity of the Authorization. Stromberg-Stein J. so characterized that material in her analysis of an application for disclosure of essentially the same material about the same agent in the same affidavit supporting the same Authorization: see Russell 1607.

- [31] I do not agree with Mr. Ali that Stromberg-Stein J.'s decision should be distinguished because the accused in the case before her sought disclosure according to the principles in Stinchcombe and not release under s. 187 of the Code of a copy of the redacted material or a judicial summary of it, as is the application here. Stromberg-Stein J. engaged in the same general analysis as is required in this application.
- [32] However, Mr. Ali has distinct interests in this application. His proposed challenge to the Authorization is not identical to the challenge in Russell 1457. Mr. Ali would rely on some of the bases mentioned in Russell 1457, but also on others. Even in relation to bases raised also in Russell 1457, Mr. Ali's submissions have a different focus and emphasis, in the overall context of his challenge. Also, while the Court in Russell 1607 reviewed a substantial portion of the evidence also placed before this Court, this Court also received additional evidence, including background material concerning the agent redacted from an affidavit in support of a prior authorization (P42/2008), and transcripts of some of the police briefings or interviews with the agent. Thus neither the evidence nor the submissions were the same.
- [33] And nor were the parties. Mr. Stowe advises that at an earlier stage of these proceedings, the Crown gave formal notice of its intention to apply to have all applications concerning the validity of P03/2009 heard and determined together, whether arising in the Russell trial, Mr. Ali's trial, or in some other "satellite" trials. However, the Crown then discontinued that application, and Mr. Ali therefore had no opportunity to make his submissions on the point. He also had no standing to participate in the application in Russell. Mr. Stowe submits, and I agree, that there is a hint of unfairness in the Crown having failed to pursue its application to have Mr. Ali bound by the determination in Russell 1607 and now seeking to have that determination effectively bind him in any event.
- [34] For these reasons, I find it appropriate to conduct an assessment of the potential relevance of the redacted material on the basis of the evidence and submissions in this application.
- [35] The Crown submits that the defence does not need the redacted material in order to put forward its position that the investigative plans for the agent were unrealistic or insincere. The defence knows, from the redacted affidavit, that the agent took part in 24 police scenarios, and that nothing ultimately came of this participation, which progressed no further than socialization between the agent and one of the targets of the investigation.
- [36] However, I am unable to agree that additional information would not assist the defence. The Crown filed extensive materials under seal in this application, materials for the Court's review, but not given to the defence. Some of the materials relating to the agent's involvement near the end of the 24 scenarios and after their conclusion, strike me as very likely to assist the defence, particularly notes made by cover officers in the days after the last of those 24 scenarios. (In expressing this conclusion for the purposes of this application I recognize that the evidence or submissions in a later application may cast a different light on the sealed materials I have reviewed.)

- [37] Those materials are not of themselves the subject of an application for disclosure, although I expect they will be, given my conclusion in this application. The materials are filed to assist me in determining the potential relevance of the material concerning the agent's activity that has been redacted from the P03/2009 affidavit. They do so by, in my assessment, making plain that the defence should have an opportunity to pursue its challenge based on more specific information than the defence currently has, which should include the details of the agent scenarios as they were planned and as they actually played out.
- [38] All of the details of the agent scenarios are redacted from the affidavit as disclosed to the defence because disclosure would inevitably identify the agent. The Crown helpfully provided the Court with a draft summary of the redacted material for the Court to consider providing to the defence as a judicial summary of edited material under s. 187, should the Court conclude that some further disclosure must be made. The Crown advised that the draft is as inclusive (of the redacted material) as it can possibly be, without identifying the agent. I do not doubt that such is the case.
- [39] However, the proposed judicial summary is so general as to be almost worthless to the defence. And most -- perhaps all -- of its content in any event appears elsewhere in the redacted affidavit. Of more specific concern is that the proposed summary does not disclose at all those details about the agent's involvement which I have concluded are very likely to assist the defence in presenting its challenge. In s. 187's terms, a judicial summary therefore "would not be sufficient" to convey the information deleted from the affidavit and which I have concluded is required in order for Mr. Ali to make full answer and defence.
- [40] As I have said, some of that information falls outside the scope of this application under s. 187, because it was not included in the original affidavit. However, that information underscores the likely relevance of some of the agent material that was included in the original affidavit but was redacted from the version disclosed to the defence.
- [41] I find an ample basis for concluding that disclosure of the redacted agent material is necessary for Mr. Ali to make full answer and defence.
- [42] On the other side of the s. 187 balance concerning the agent-related material, the public interest in personal safety, while very important, is in my view reduced in its weight in this case. It is clear from the sealed materials that the agent knowingly undertook the risks in so acting, and accepted that disclosure may be made, and that the police proceeded on that the agent did so. While the personal safety risks relating to the agent and the agent's family merit very serious consideration, they are risks which, it appears, the agent and the police were prepared from the start to contend with if necessary at the appropriate time.
- [43] For these reasons, I am unable to view the public interest in non-disclosure as outweighing Mr. Ali's need for the redacted material in order to make full answer and defence by challenging the Authorization.

- [44] I also come to the same conclusion, namely that Mr. Ali should have the agent-related material, on a slightly different analysis of the interests at play in the s. 187 determination. This next portion of my reasons draws on evidence and submissions made in camera, Mr. Ali not present by request of his own counsel and with his consent. Counsel are asked for their submissions about whether this portion of the reasons should remain under seal, on either a temporary basis or over the longer-term.
- [45] In essence, I view both the public interest at play in this matter and Mr. Ali's interest in making full answer and defence as encompassing an interest in the trial proceeding as scheduled. For the reasons I will briefly explain, the matter of the agent's identity places this trial at very serious risk.
- [46] In very brief summary, after both parties had filed their written arguments on both Mr. Ali's application under s. 187 and his application for disclosure according to Stinchcombe, defence counsel requested that the Court convene in camera without Mr. Ali's presence for the following reason. Defence counsel had reached the conclusion that they had identified the agent, through their close analysis of the details contained in the voluminous Crown disclosure, as supplemented by Ms. Aldosky's facility in the Kurdish language and her familiarity with the relatively small Kurdish community. Mindful of the Crown's position that disclosure of the agent's identity would cause serious risks to individual safety, defence counsel did not feel at liberty to discuss their conclusion with their client or to take the instructions which defence counsel felt they needed in order to pursue Mr. Ali's challenge to the Authorization.
- [47] In the in camera proceedings, defence counsel made submissions in support of an adjournment of the voir dire proceedings for about 7-10 days to enable them to prepare to apply on Mr. Ali's behalf for a stay of proceedings based on abuse of process. In that application the defence would have argued, as I understand, that the Crown's inadvertent disclosure of information over which the Crown asserts a privilege places defence counsel in insurmountable conflict, obliging them to seek leave to withdraw, and that to require Mr. Ali to begin again the challenging task of retaining and instructing new counsel for these complex proceedings would amount to an abuse of the Court's process.
- [48] Several developments then followed, in the in camera proceedings, including these. The Crown tendered an affidavit which indicated that the defence had not correctly identified the agent. Also, the Crown sought, and the defence did not oppose, an order requiring the defence to return substantial portions of the disclosed material, and to destroy all copies.
- [49] While the defence conclusion about the identity of the agent was thus revealed as erroneous, the defence analysis which led to the conclusion -- which counsel set out in clearly in written argument in support of the adjournment application -- evidently exposed to Crown counsel areas of disclosure that ran a risk of identifying the agent.

- [50] For this reason, defence counsel maintained that they still faced an impossible conflict in their representation of Mr. Ali. Counsel spoke of the large volume of information disclosed but then withdrawn, and the extent to which the defence team had analyzed that information and assimilated it into the defence approach to Mr. Ali's defence. Details are set out in the defence "Applicant's Memorandum: Summary of the Conflict", which is sealed exhibit 9, beginning at para. 7. The defence team includes experienced and senior counsel, and has consulted at least four other senior counsel and Benchers about the situation. Having done so and having reflected at length, defence counsel advised the Court that they saw no solution to the ethical conflict and no alternative but to withdraw as counsel, at least for the voir dire proceedings and potentially for the trial as well. In all the circumstances, that is not a conclusion which the Court would second guess.
- [51] Counsel agreed, however, to argue the present application on the basis set out in the written argument filed on Mr. Ali's behalf before the ethical conundrum arose. That argument included no reference to any of the material disclosed but then withdrawn by the Crown. Counsel agreed in this application to make no reference to any of the disclosed but withdrawn information, and to seek no instructions from Mr. Ali concerning that information. Recognizing the constraints therefore placed on counsel (of the nature described in detail in *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389 at paras. 45-6, and *R. v. G.*, [2004] EWCA Crim. 1368), the Court indicated that, should the application fail, Mr. Ali will have liberty to apply again under s. 187 at an appropriate time.
- [52] If defence counsel were to withdraw, either entirely or for the voir dire proceedings, the proceedings would likely adjourn for a very considerable time. The charges are serious, and the evidence and the issues complex. Within the relatively small pool of counsel with the necessary experience to take up Mr. Ali's defence, few counsel can be expected to be available on short notice to begin the lengthy preparation process, let alone to appear for Mr. Ali in the voir dire proceedings or the trial on the dates currently scheduled. As I noted earlier, the charges relate to events in February 2009, in respect of which Mr. Ali was first arrested in that same month. Neither his nor the public's interests in trials taking place within a reasonable time would be well-served by an extended adjournment.
- [53] [CONTENT REDACTED]
- [54] [CONTENT REDACTED]
- [55] I should also note that in the unredacted version of the affidavits supporting authorizations P03/2009 and P42/2008, Informant E is not named, except as such. Those versions do show the information redacted from the disclosed versions, evidently redacted on the basis that it would tend to identify Informant E. The Crown's proposed judicial summary, to which I referred earlier, makes no reference to the information redacted to protect the identity of Informant E, and I would ask the Crown to now propose a further judicial summary of those redactions. I recognize that likely little of substance may be disclosed without jeopardizing the privilege, but would invite the Crown to consider whether a general description of the

type of information redacted could appropriately be provided.

CONCLUSION

- [56] Mr. Ali's application under s. 187 is granted. The Crown is to disclose the agent-related information redacted from the affidavit supporting authorization P03/2009.
- [57] Counsel are invited to make submissions concerning next steps, including when this order should take effect, and whether portions of these reasons should be maintained under seal on a temporary or longer-term basis.
- [58] Crown counsel are also asked to propose a judicial summary of the information relating to Informant E that has been redacted from the affidavit, while also maintaining the informer privilege attaching to Informant E's identity.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

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