

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1220

COURT

Supreme Court of British Columbia

DECIDED

17 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1220 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 1220

Date: 20200817

Docket: 27393-25

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

Restriction on Publication: A publication ban has been mandatorily imposed under s. 648(1) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury retires to consider its verdict.

Before: The Honourable Madam Justice Maisonville

Ruling Re Application No. 25 - Sufficiency of Information to Obtain

Counsel for the Crown:

D.A. Jardine, Q.C.

D. Darby

N. Gregoire

A. La Bar

S. Dworkin

M. Sheardown

Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil):

K. Blok

A. Tolliday

Counsel for the Accused, Dean Michael Wiwchar:

S. Buck

A. Dorin

Counsel for the Accused, Larry Ronald Amero:

K. Blok appearing as agent

Place and Date of Hearing:

June 22, 2020

Place and Date of Ruling:

Vancouver, B.C.

August 17, 2020

introduction

- [1] In the course of its investigation into the murder of Sandip Duhre at the Sheraton Wall Centre on January 17, 2012, the Vancouver Police Department ("VPD") sought and obtained a production order for banking records associated to the applicant, Dean Wiwchar, held at a branch of the Bank of Montreal ("BMO") at 100 - 401 West Georgia Street in Vancouver.
- [2] Using those banking records, the VPD obtained general warrants to examine the contents of the applicant's safety deposit box and observed \$140,000.00 in cash. When they subsequently observed a couple of months later that the safety deposit box was empty, the VPD theorized that the cash had been moved to a safety deposit box in the name of Juanita Hyslop at a different BMO branch on Denman Street in Vancouver. The VPD executed a search warrant and seized \$100,000.00 from the safety deposit box. The Crown theory is that the cash inside both safety deposit boxes belonged to the applicant, and it intends to lead evidence at trial of the examination of the applicant's safety deposit box and of the seizure of \$100,000.00 at the Denman Street BMO.

- [3] The applicant seeks the exclusion of evidence obtained by the VPD from his safety deposit box, consisting of the observations made by officers of its contents. At an earlier stage in this application, the applicant sought excision of certain information from the Information to Obtain ("ITO") for the production order on the grounds that it was obtained in breach of his rights under s. 8 of the Charter. That aspect of the application was dismissed in a ruling indexed as 2020 BCSC 206.
- [4] The present ruling addresses a further challenge to the ITO for the production order. The applicant submits that paragraph 121 of the ITO is misleading and that once it is excised, the ITO provides an insufficient basis for issuance of the production order. Specifically, he maintains that the omission of the specific time of a surveillance observation inside the Georgia Street BMO branch was deliberate on the part of the affiant and done with the intent to mislead.

THE PRODUCTION ORDER

- [5] The production order at issue was directed to the BMO and provided as follows:

Whereas it appears on the affirmation of Detective Lisa Wu, a Peace Officer of the Vancouver Police Department, City of Vancouver, in the Province of British Columbia, that pursuant to Section 487.012 of the Criminal Code, there are reasonable grounds for believing that there are documents or data, namely:

- a) Banking account information for Dean Michael WIWCHAR born [redacted], including but not limited to any documents pertaining to account numbers, account history, personal information, phone numbers, credit cards and debit cards from January 1, 2012 to March 27, 2012, inclusive;
- b) Safety deposit box information for Dean Michael WIWCHAR born [redacted], including but not limited to any application forms, signature cards, history of access to the safety deposit box from January 1, 2012 to March 27, 2012, inclusive;

will afford evidence that, on or about the 17th day of January 2012, at or near the City of Vancouver, in the Province of British Columbia, Sandip Duhre was murdered contrary to section 235(1) of the Criminal Code,

And that the said documents are to be found in the possession or control of the Bank of Montreal, #100 - 401 West Georgia Street, City of Vancouver, in the Province of British Columbia.

- [6] The ITO in support of the production order ran 118 pages. The applicant does not dispute that the ITO contained grounds to support the belief that he was implicated in the murder of Mr. Duhre. He does, however, dispute that it supported the belief that the documents being sought would afford evidence of the offence.

- [7] Det. Cst. Lisa Wu was the affiant. She summarized the VPD's surveillance observations with respect to the applicant's presence at the BMO on March 26, 2012 in several paragraphs in the ITO, as follows:
120. I have read a Surveillance Report dated March 26, 2012 Days and obtained, in part, the following information:
- e) At 2:00 p.m. WIWCHAR was observed getting out of the driver's seat of BCLP 333 TDF, retrieving a black laptop size briefcase from the rear seat and walking into the front door at 401 West Georgia Street, Vancouver, which is a Bank of Montreal [I believe there was cash inside this briefcase based on the amount of cash WIWCHAR was observed with at the Edgewater Casino];
 - f) At 2:10 p.m. WIWCHAR exited 401 West Georgia Street, Vancouver and got back into BCLP 333 TDF;
 - g) At 2:45 p.m. WIWCHAR exited BCLP 333 TDF and WIWCHAR was no longer carrying the black briefcase.
121. I have read [an] Addendum to the Surveillance Report dated March 26, 2012 Days and obtained, in part, the following information:
- a) When WIWCHAR walked into the front door of 401 West Georgia Street, Vancouver, surveillance members lost sight of him;
 - b) A check of the automated teller area, all the teller wickets and offices off the main lobby area of the bank was made and there was no sign of WIWCHAR [I believe WIWCHAR was possibly in the safety deposit box area];
 - c) At 2:10 p.m. when WIWCHAR exited 401 West Georgia Street, Vancouver, he was still carrying the black laptop size briefcase.
125. I have read a Police Statement written by Detective 2010 St. Amant dated March 27, 2012 and obtained, in part, the following information:
- a) Upon review of the Surveillance Reports and verbal information received by Detective 1416 Greene, Detective 2010 St. Amant learned that:
 - i. WIWCHAR had entered the Bank of Montreal with a black shoulder type briefcase and was not observed at the teller area;
 - ii. The belief was that WIWCHAR went to an office or to a safety deposit box [I believe this is the belief of the surveillance member who went into the bank to look for WIWCHAR];
 - iii. WIWCHAR exited (the Bank of Montreal) 8 minutes later with the black shoulder type briefcase;

[8] The source material that Det. Cst. Wu drew upon for the foregoing information was a surveillance report, an addendum to the surveillance report and a task report prepared by Sgt. St. Amant.

[9] The surveillance report set out:

TIME

OBSERVATIONS

1400

WIWCHAR out of the driver's seat of BCLP-333TDF (white Toyota Rav4) and retrieved a black laptop sized briefcase from the rear seat. WIWCHAR slung the briefcase over his shoulder and walked south on Homer St.

1402

WIWCHAR walked into the front door of 401 W Georgia St, Vancouver (Bank of Montreal)

1410

WIWCHAR walked out the front door of 401 W. Georgia St, Vancouver (Bank of Montreal) and walked north on Homer St.

[10] These observations were included in the ITO at paragraphs 120(e) and 120(f).

[11] The VPD surveillance members prepared an addendum to the surveillance report after it was completed. The addendum included an additional observation at 14:03 hours:

1403

The automated teller area, all the teller wickets, and offices off the main lobby area of the bank were negative for WIWCHAR.

[12] Although Det. Cst. Wu included the times of the observations at 14:00 and 14:10 in the ITO, she did not include the time in relation to the negative check for the applicant at 14:03. As noted above, she wrote at paragraph 121(b):

A check of the automated teller area, all the teller wickets and offices off the main lobby area of the bank was made and there was no sign of WIWCHAR [I believe WIWCHAR was possibly in the safety deposit box area].

[13] The applicant submits that it is significant that paragraph 121(b) did not include the time of the observation. He says that the information in the addendum about his not being observed at certain areas inside the bank was limited to the precise time of 14:03. While Det. Cst. Wu could have easily included the time in the ITO, she did not and left the false impression that surveillance members could not account for the applicant's whereabouts for the entire eight minutes he was inside the bank.

- [14] Det. Cst. Wu gave evidence with respect to the sufficiency of the ITO. The Court granted the applicant leave to cross-examine her on her personal belief that the applicant was in the safety deposit box area of the BMO during surveillance (2019 BCSC 1959).
- [15] When pressed about whether she had endeavored to leave the impression that there was continuous surveillance during the period the applicant was in the bank, Det. Cst. Wu, responded "I did not deliberately leave out the time" and indicated further that she just forgot. She did not have an explanation for leaving the time out, adding that it would have been "advantageous for me to put it in" because it showed that the applicant was only in the bank for a very brief period of time, which supported her belief that he was in the safety deposit box area rather than speaking to financial advisors in their offices. She said her belief was that the applicant was not in the areas of the automated tellers, the teller wickets and the offices off the main lobby area of the bank for the entire eight minutes.
- [16] Det. Cst. Wu agreed that she had read the task report prepared by Sgt. St. Amant, which included the following:

On March 27th, 2012, Detective Constable 2010 ST AMANT reviewed the strike force surveillance sheets from March 26th, 2012 and discussed with Detective Constable Dean GREENE the information he received verbally from strike force. Detective ST AMANT learned:

▷ WIWCHAR entered the Bank of Montreal with a black shoulder type briefcase and was not observed at the teller area;

▷ The belief was that WIWCHAR went to an office or to a safety deposit box;

▷ WIWCHAR exited eight minutes later with the black shoulder type briefcase;

- [17] Det. Cst. Wu said that she did not include the belief that the applicant Wiwchar was either in an office or in the safety deposit box area because that was based on a second-hand verbal communication whereas she had relied on the written signed addendum to the surveillance report.

Defence submissions

- [18] The applicant submits that Det. Cst. Wu drafted paragraph 121 so as to leave the false impression that surveillance members could not account for his whereabouts for the entire eight minutes he was inside the bank. He alleges that she knowingly misrepresented the information for the strategic purpose of misleading the justice to believe that he must have been in the safety deposit area of the bank for the entirety of the time. He bases this submission on the following factors:
- a) The omission favours the application for the production order, as the safety deposit box area is where the police needed to place the applicant in order to satisfy the justice that the BMO held safety deposit documents in the name of the applicant;

- b) Numerous other paragraphs in the ITO contain surveillance observations of the applicant between March 24 and March 27, 2012 and each of these 44 observations include a corresponding time. Paragraph 121 is the sole exception;
 - c) Det. Cst. Wu failed to include the portion of the task report of Sgt. St. Amant that referred to the surveillance member's belief that the applicant was either in an office or the safety deposit box area in paragraph 121, the logical place to put it. Instead, she included it under the heading, "Dean Wiwchar is a Suspect" (at para. 125 of the ITO); and
 - d) In cross-examination, Det. Cst. Wu was unable to provide an explanation for the omission of 14:03, saying only that it was not deliberate and that she forgot. The applicant asserts this is not believable.
- [19] The applicant submits that the information in the addendum was limited to recording that the applicant was not observed at certain areas inside the bank at the precise time of 14:03. Thus, inclusion of that time in the ITO would have informed the reader that the applicant's whereabouts were unknown only for that particular moment and that he could have been at an automated teller, a teller wicket or in an office for the remainder of the time he was in the bank. By deliberately omitting this information from the ITO, Det. Cst. Wu left the false impression that surveillance members could not account for the applicant's whereabouts the entire eight minutes he was inside the bank.
- [20] The applicant argues that since paragraph 121, as it stands, is misleading, the only appropriate remedy is excision of the paragraph from the ITO. Amplification, he says, is not appropriate here where the omission was deliberate and made in bad faith. The applicant maintains that without any information in the ITO to believe that the applicant accessed the safety deposit box area of the bank on March 26, 2012, there are no grounds to believe that the BMO held safety deposit box documents in the name of the applicant.

Crown submissions

- [21] The Crown agrees that the time of the observation (14:03) was omitted from the ITO but says that there are three separate paths of analysis with respect to paragraph 121 that lead to the conclusion that the production order could have issued.
- [22] First, the Crown says that even if paragraph 121 (or 121(b)) is excised from the ITO, there remains sufficient reliable evidence upon which the production order could have issued. The applicant does not dispute there were sufficient grounds to support the inference that he was implicated in the murder of Mr. Duhre. There was also evidence that the murder was a paid hit; that the applicant was seen flashing large wads of cash at the Edgewater Casino the night before he was seen at the bank; and that he went into the bank with a laptop sized briefcase. The Crown says that even without the information in paragraph 121, it was obvious that the applicant was using some form of service at the bank, whether a bank account or safety deposit box. It was not necessary for the ITO to establish precisely which service he was using, as there was some basis to support a reasonably held belief he was

using one of them. The Crown says that the ITO did not need to establish the precise whereabouts of the applicant within the bank; the fact that he was in the bank was a sufficient basis, considered in the context of the ITO as a whole, upon which a production order for any bank account and safety deposit box records in his name could have issued.

- [23] Second, the Crown submits that paragraph 121 was not misleading in the first place. It says that the applicant's submissions presume that the 14:03 entry was a mere snapshot, but that has not been established. The surveillance report, as is typical, does not expressly set out continuing observations as having taken place over a specified time frame. In the Crown's submission, it is at least one reasonable interpretation that the 14:03 entry did not simply capture a moment in time but, rather, encompassed the entire period the applicant was in the bank. Accordingly, it was not misleading or inaccurate for the ITO to suggest that the applicant was not in the automated teller area, at a teller wicket or in an office during the entire period he was in the bank.
- [24] Moreover, argues the Crown, the omission of the 14:03 time was not material. Whether there was no sign of the applicant at precisely 14:03 only or the whole time the applicant was in the bank was immaterial to the issuance of the production order. A negative check for the applicant in the areas of the ATMs, the teller wickets or the offices off the main lobby of the bank at any time during the applicant's attendance at the bank tends to support the inference that he went to the bank for the purpose of attending at a private area of the bank, which in turn tends to support the inference that he was using a safety deposit box.
- [25] Lastly, the Crown contends that if the Court concludes that paragraph 121 of the ITO is misleading, then it should be amplified, not excised. Excision in these circumstances would violate fundamental principles of review of judicial authorizations, as set out in *R. v. Booth*, 2019 ONCA 970.

LEGAL PRINCIPLES

- [26] As the legal principles that govern this application have been thoroughly summarized in *Booth*, it is convenient to quote extensively from that decision (at paras. 54-64):
- [54] Obviously, it is imperative that issuing judges or justices have an accurate understanding of the material, known facts available to the affiant officer. If the ITO contains erroneous, incomplete, or dishonest information relating to known information, an issuing judge or justice could be misled, and provide an authorization that should not have been provided. To ensure accuracy, anyone seeking an ex parte authorization, such as a search warrant, is required to make full and frank disclosure of material facts: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 46. This is because an ex parte warrant application is not adversarial. As a corollary of the privilege of being the only party permitted to present evidence in an ex parte application, a search warrant affiant bears the burden of presenting the facts accurately and fairly, from the perspectives of both sides.

- [55] Therefore, a search warrant ITO should never try to trick its readers, or offer misleadingly incomplete recitations of known facts, and the affiant officer must not "pick and choose" among the relevant facts in order to achieve a desired outcome: Araujo, at para. 47; R. v. Morelli, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 58. Nor should the affiant officer invite inferences that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed: Morelli, at para. 58.
- [56] What, then, is the frame of material information that should be included to make full and frank disclosure? To answer that question, consider what is required to issue a "reasonable and probable grounds" search warrant. For such a search warrant to issue, the grounds for the warrant must be adjudged not only to be probable, but reasonable to rely upon. The ITO affidavit has to disclose what Dickson J. described in Hunter et al. v. Southam Inc. as a "credibly-based probability [that] replaces suspicion": [1984] 2 S.C.R. 145, at p. 167; see also R. v. Floyd, 2012 ONCJ 417, 263 C.R.R. (2d) 122, at para. 9. As a result, the frame of material information required to achieve full and frank disclosure includes all material information that: (a) could undercut the probability that the alleged offence has been committed; (b) could undercut the probability that there is evidence to be found at the place of the search; and (c) that challenges the reliability and credibility of the information the affiant officer relies upon to establish grounds for the warrant.
- [57] Where full and frank disclosure has not been made, a reviewing court will correct the warrant ITO to achieve full and frank disclosure, and then determine based on that corrected ITO whether the warrant could properly have issued if full and frank disclosure had been made. "What is involved is an analysis [of the corrected ITO] to determine whether there remains sufficient reliable information upon which the search authority could be grounded": R. v. Paryniuk, 2017 ONCA 87, 134 O.R. (3d) 321, at para. 45.
- [58] Sometimes erroneous information in an ITO will be corrected by simply removing it. Information that should not have been included in the warrant will always be "excised" in this way: Morelli, at para. 45.
- [59] Erroneous information that would have been appropriate for inclusion in the ITO if presented accurately will sometimes be corrected by "amplification" so that it can be considered during the sufficiency review. Amplification entails adding information that should have been disclosed in order to give an accurate picture or replacing mistakenly inaccurate information with accurate information. When material information that would hinder a finding of reasonable and probable grounds has been improperly omitted, the ITO must be amplified to include it. However, amplification relating to information that could advance the warrant application is permissible only if the error is not making full and frank disclosure is: (1) a "minor, technical error"; and (2) made in "good faith": Araujo, at para. 59; Morelli, at para. 41.
- [60] Whether the omission satisfies the first of these two amplification prerequisites - the "minor technical error" requirement - depends on the significance and nature of the error.

- [61] Errors that have been corrected by amplification include: mistakenly attributing observations to the wrong observer (Araujo, at para. 61; R. v. Lewis, 2012 NBQB 312, 395 N.B.R. (2d) 201 (N.B. Q.B.), at para. 24); mistaken dates and typographical errors (R. v. Crevier, 2015 ONCA 619, 330 C.C.C. (3d) 305 (Ont. C.A.), at para. 75; Lewis, at para. 15); and erroneous but unimportant errors in the description of the source of information (R. v. Plant, [1993] 3 S.C.R. 281 (S.C.C.), at pp. 298-299; R. v. Lall, 2019 ONCA 317, 432 C.R.R. (2d) 195 (Ont. C.A.), at para. 39; R. v. Van Diep, 2015 BCCA 264, 373 B.C.A.C. 230 (B.C. C.A.), at para. 5.)
- [62] In contrast, amplification was not available for errors that are too significant to qualify as "minor, technical" errors, including: the failure to identify properly the target unit in a plaza (R. v. Ting, 2016 ONCA 57, 333 C.C.C. (3d) 516 (Ont. C.A.), at para. 71); the failure to include information supporting the expertise of a police officer (Morelli, at para. 74); and the failure to provide evidence supporting the provenance and reliability of a document of disputed authenticity (R. v. Voong, 2013 BCCA 527, 304 C.C.C. (3d) 546 (B.C. C.A.), at para. 52.)
- [63] Where the erroneous information cannot be corrected because the error is not a "minor, technical" one, it is obvious that it must be excised in its entirety. This is because the uncorrected, erroneous information simply cannot be permitted to remain in the ITO, thereby providing an inaccurate boost to the case for reasonable and probable grounds.
- [64] The same is true where an officer has not acted in good faith when failing to make full and frank disclosure - the second amplification prerequisite. Given that amplification is confined to "good faith" error correction, it follows that by acting in bad faith, an affiant officer squanders the opportunity to have intentionally misleading information considered in its corrected form by the reviewing judge. The misleading information cannot remain.

Findings

- [27] I accept the evidence of Det. Cst. Wu. I find that she acted in good faith and that her omission of the time in relation to the negative surveillance check for the applicant in the areas of the automated tellers, the teller wickets and the offices off the main lobby of the bank at 14:03 was nothing more than a mistake. As Det. Cst. Wu testified, it would have been to her advantage to have included the information. I reject the applicant's submission that Det. Cst. Wu deliberately omitted the time of the observation and that she did so with the intent to mislead the authorizing justice.
- [28] As for Det. Cst. Wu's stated belief in paragraph 121(b) that she believed the applicant was possibly in the safety deposit box area, I find there was nothing sinister in her preferring the written signed addendum to the surveillance report over the second-hand verbal communication recorded in the task action report, and that she was justified in doing so.
- [29] Further, I find that, in any event, the omission of the time in paragraph 121 of the ITO was not misleading. One reasonable interpretation of the surveillance report addendum was that the observation at 14:03 was a continuing observation that encompassed the entire period the applicant was in the bank after 14:03. Indeed, Det. Cst. Wu testified that it was her belief

that the applicant was not in the automated teller area, at a teller wicket or in an office off the main lobby area of the bank for the entirety of the time he was in the bank. Accordingly, it was not misleading for the ITO to leave that impression.

[30] I find no reason to amplify the ITO or to excise paragraph 121 or some part of it. That being the case, and considering the ITO as a whole, I am satisfied that it provided reasonable grounds to believe that the BMO branch had banking and safety deposit box information related to the applicant that would afford evidence of the offence under investigation.

"Maisonville J."

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://www.bccourts.ca/jdb-txt/sc/20/12/2020BCSC1220.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-alkhalil-2020-bcsc-1220>

Prepared on 28 October 2026 · Esheria