

CANADA / JUDGMENT

R. v. Cancela

2025 BCSC 1688

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1688 R. v. Cancela

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cancela,

2025 BCSC 1688

Date: 20250813

Docket: 26843-2

Registry: Nelson

Rex

v.

Andrew Lee Cancela

Before: The Honourable Madam Justice Lyster

Oral Ruling on Voir Dire #1

Application to Cross-Examine

Counsel for the Crown:

M. Aziz

Counsel for the Accused:

M.A. Patterson

Place and Date of Trial/Hearing:

Nelson, B.C.

August 12, 2025

Place and Date of Judgment:

Nelson, B.C.

August 13, 2025

- [1] THE COURT: This is my oral ruling with respect to the defence application filed August 7, 2025, for leave to cross-examine the affiant, Constable Andrew Backmann, on certain portions of the Information to Obtain ("ITO") sworn to obtain the search warrant in this case. The defence also applies for leave to cross-examine the handler or handlers referred to in the ITO about certain matters.
- [2] For the assistance of counsel, I will give counsel a copy of my speaking notes once I have rendered this decision. Those notes were not the formal transcript of my ruling. I will order a transcript, which this decision represents.
- [3] In the interests of moving this matter along in the time available, my reasons will be as brief as possible. Counsel referred to the leading cases in the course of submissions yesterday and the governing principles are well-known.
- [4] The defence may, on application, be granted leave to cross-examine an affiant with respect to an ITO. That is clear from *R. v. Garofoli*, [1990] 2 S.C.R. 1421, where Justice Sopinka, for the majority in the Supreme Court of Canada, held that the appellant had shown a basis for cross-examination at para. 90. At para. 88, he held that he was in favour of placing reasonable limitations on cross-examination, stating that:

Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence.

- [5] The scope of permissible cross-examination is narrow, as explained by Justice Charron in *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 (CanLII) at para. 40:
- [40] The reason that the test will generally leave just a narrow window for cross-examination is not because the test is onerous -- it is because there is just a narrow basis upon which an authorization can be set aside. Hence, in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focussed on the question to be determined on a *Garofoli* review -- whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. Such a strict standard was rejected in *Garofoli*. A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown.

- [6] The defence must therefore establish that the cross-examination will likely assist the court in the determination of the fundamental question before me in the underlying application: Is there a basis upon which the authorizing judge could have issued the authorization?
- [7] Much of the defence's concern in this case arises from the relatively unusual circumstances of this ITO. The affiant was not the handler of the confidential informants and the handler (or handlers -- it is not entirely clear on the face of the ITO), are not identified. The information provided about and by the confidential informants is therefore all hearsay, transmitted through an unidentified source or sources.
- [8] At para. 13 of *R. v. Belanic*, 2019 BCSC 1411, Justice Riley stated the following about the use of hearsay in an ITO:
- [13] the issuing justice must be furnished with information necessary to properly assess the credibility and reliability of the facts presented in the ITO. Although an affiant is permitted to rely on hearsay, he or she is expected to set out the source of any such hearsay averments so that the reader is able to properly evaluate the credibility and reliability of that source. For example, where the affiant states that he or she obtained information from the review of a police file without being more specific as to the originating source, this will often be problematic because it will not be possible to determine whether the particular factual assertion originated with a police observation, a witness statement, an informer tip, a citizen complaint, or some other source of information. Without knowing the source of the information, the reader cannot make any assessment of the credibility and reliability of the source, making it difficult or sometimes impossible to determine whether the information is capable of supporting a reasonable belief.
- [9] In a sub-facial challenge to a search warrant, the court needs to concern itself with whether the affiant knew or should have known that evidence was false, inaccurate, or misleading, and whether the affiant knew or should have known that there was additional evidence that should have been disclosed. As stated by Justice Smart in *R. v. Sipes*, 2009 BCSC 612 at para. 41:
- [41] In my view, amplification is part of the review process that occurs during a sub-facial challenge to an ITO. During this review, if the applicant establishes that the affiant knew or should have known that evidence was false, inaccurate or misleading, that evidence should be excised from the ITO when determining whether the warrant was lawfully issued. Similarly, if the defence establishes that there was additional evidence the affiant knew or should have known and included in the ITO in order to make full, fair and frank disclosure, that evidence may be added when determining whether the warrant was lawfully issued.
- [10] Justice Smart's comments were cited with approval by the Supreme Court of Canada in *World Bank Group v. Wallace*, 2016 SCC 15 at paras. 120-24. At para. 120, the Court stated that, as a general rule, there are two bases for challenging a wire authorization: first, that the record before the authorizing judge was insufficient; and second, that "the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the

authorization could not have issued." At para. 121, the Court stated that the accuracy of the affidavit is tested against the affiant's reasonable belief at that time.

- [11] Limitations on cross-examination of an affiant are often necessary due to the need to ensure that the identity of confidential informants is not inadvertently revealed, thereby breaching informer privilege. The court, and all parties, must be vigilant in ensuring that any cross-examination does not reveal, or tend to reveal, the identity of the confidential informants. "The privilege is a hallowed one, and it should be respected scrupulously": *R. v. Leipert*, 1997 CanLII 367 (SCC), citing Chief Justice of British Columbia McEachern at para. 18.

- [12] In this connection, I will also refer to the following passage from Pires:

- [36] The second countervailing interest against allowing cross-examination as of right is the need to protect the identity of informers. As McLachlin J. (as she then was) noted in *Garofoli* (dissenting, but not on this point), cross-examination of the affiant increases the risk that the identity of informers might be revealed:

Cross-examination is much more likely to reveal the details of investigative operations and the identity of informers than affidavits, which can be carefully drafted to avoid such pitfalls. How can one cross-examine an officer on the reliability of an informant without probing details that might reveal that informant's identity, for example? Once a damaging statement is made in answer to a question in cross-examination, editing is to no avail.

McLachlin J. further noted how difficult it is for the trial judge to restrict the scope of cross-examination:

Attempts to restrict the scope of cross-examination are notoriously fallible. Since effective cross-examination usually depends on considerable latitude in questioning, a restricted cross-examination may be of little value. Moreover, it is often difficult to predict when a particular question will evoke a response that trenches on a prohibited area.

- [13] With these principles in mind, I consider the areas in which the defence seeks leave to cross-examine in their application as amended during the course of submissions before me.
- [14] I will start by saying that the application to cross-examine the unnamed handler or handlers is premature. The decisions of this court in *R. v. Sanghera*, 2012 BCSC 992 and *R. v. Edwardson*, 2016 BCSC 530 make clear that leave should first be sought to cross-examine the affiant. If leave is granted, the defence may, should a basis for doing so be revealed in the evidence, seek leave to cross-examine the handlers. I, therefore, dismiss the part of the application relating to cross-examination of the handler or handlers, with leave to reapply should a subsequent basis be established.
- [15] I turn to the requested areas for cross-examination of the affiant, which are largely set out in paragraph 8 of the application.

1. Names of the handlers

- [16] I am satisfied that the defence has established that leave should be granted with respect to cross-examining on the names of the handlers. Their identity is important to the assessment of the reliability of the information they communicated to the affiant. While hearsay is admissible, the source must, as stated in *Belanic*, be named.
- [17] No reason is given in the ITO for the handler (or handlers) not being named. Counsel were unable to identify any other cases in which the handlers were anonymized. Handlers are not covered by confidential informant privilege.
- [18] Mr. Aziz for the federal Crown suggested that it might be that a decision was made to anonymize the handlers because they were chosen with a view to their personal characteristics, such as gender or ethnicity, such that identification of the handlers could tend to identify the informants.
- [19] If that is so, no mention of it is made in the ITO. The affiant clearly described his reasons for not providing other information that could identify the informants. I would have expected that he would do the same if there was some particular reason to believe, in the circumstances of this case, that the identification of the handlers could identify the informants.
- [20] I direct that cross-examination on this issue proceed carefully and with a scrupulous view to not eliciting information that could tend to identify the informants. I would expect counsel to ask first if there was a reason the affiant did not identify the handlers. If there is a reason, I would expect counsel then to ask if that reason was to protect the identity of the informers. If that was the reason, then that would be the end of this line of cross-examination. If it was for some other reason, then counsel may continue to explore this line of cross-examination.
- [21] In this connection and regardless of the reasons the handlers were not identified, counsel may cross-examine with respect to paragraph 33 of the ITO and the isolated reference to Handler B to ascertain whether there were in fact two handlers, or whether this was merely a typographical error.
2. The affiant's relationship with the handlers
- [22] I am also satisfied that the defence has established that leave should be granted to cross-examine with respect to the affiant's relationship with the handlers. Issues such as whether the handlers are police officers and whether they are colleagues of the affiant may be relevant to the assessment of the reliability of the information provided.
3. The length of time that the handlers and the affiant worked together on this investigation
- [23] The question of the length of time that the handlers and the affiant worked together on this investigation goes hand in hand with the question just addressed. Leave is granted to cross-examine in this area.
4. The information contained in the notes or recordings of the handlers

- [24] In the course of submissions, defence counsel limited this request to whether the affiant read or reviewed the notes or recordings of the handlers and not the information contained in such notes or recordings.
- [25] The defence is granted leave to cross-examine on this issue. Paragraphs 31, 32, 33, and 35 of the ITO all refer to the affiant meeting with a handler and obtaining information that an informant had provided to the handler. Information is then set out which the affiant says is an accurate summary of the information provided to him by the handler.
- [26] There is no information in the ITO about how any of this information was provided. Did the handler read from their source notes or source briefings? Did the handler orally summarize information for the affiant? Did the affiant read or otherwise review the handler's records? Did the affiant accurately repeat or summarize what he was told or read? In other words, did the affiant faithfully summarize what he was told or read? All of this may be relevant to the question of what the affiant knew or ought to have known and whether he disclosed in the ITO all relevant information he knew or ought to have known about.
- [27] To be clear, cross-examination is not permitted on the contents of the information contained in the handler's notes or recordings, as that could clearly tend to identify the confidential informants.
5. When and where did the handlers meet with the informants, the length of the meetings that took place between the affiant and the handlers
- [28] In the course of submissions, defence counsel properly withdrew this request on the basis that cross-examination in these areas could tend to identify the confidential informants.
6. Information in relation to any surveillance that the handlers carried out on the applicant
- [29] Leave is not granted to cross-examine in this area. The ITO contains a great deal of information about surveillance carried out by the affiant, by Acting Corporal Plotnikoff, and by Constable Aimoe. No basis was provided for why information with respect to any surveillance that the handlers carried out on Mr. Cancela would assist this court in assessing if the authorizing justice could have issued the warrant.
7. The dates and times of any surveillance that the handlers carried out on the applicant
- [30] For the same reasons, leave is denied in this area. There is nothing in the ITO which would tend to suggest that the handlers carried out any surveillance on Mr. Cancela that was not included in the surveillance information included, or that the affiant knew or ought to have known about any such surveillance. Even if they did engage in surveillance not mentioned in the ITO, no basis has been provided that cross-examination about that issue would be likely to assist me in determining whether the authorizing justice could have issued the warrant.
8. Paragraphs 31.8 and 33.8 - means of corroboration

- [31] In the course of submissions, defence counsel applied to amend his application to seek leave to cross-examine about paragraphs 31.8 and 33.8 of the ITO, in particular about information provided by the confidential informants being corroborated by reference to surveillance and other police officers. The Crown did not oppose that amendment.
- [32] It is not clear on the face of the ITO whether it was the affiant or the handlers or someone else who corroborated the information. The police officers and surveillance used to corroborate the information are not identified. It is reasonable to assume that the surveillance is that discussed in the ITO, but that is not stated. No information is given about the identity of other police officers, the information they provided, or when.
- [33] I am prepared to grant leave to the defence to cross-examine on the narrow question of whom or what were the sources of corroboration referred to in paragraph 31.8 and 33.8, that is who were the police officers that corroborated the confidential informants' information? Was it the affiant or someone else such as the handler that corroborated the confidential informants' information with other police officers? I expect counsel to be extremely circumspect in this line of cross-examination, as it is essential that no questions be asked that have any potential to identify the informants. The significance, if any, of the affiant's evidence with respect to the means by which the confidential informants' information was corroborated will be a matter for argument on the underlying challenge to the warrant.
- [34] I propose, subject to any comments counsel may have, to advise Constable Bachmann when he enters the witness box that the defence has been granted leave to cross-examine on a number of defined areas, that the questions are not intended to reveal anything about the identity of the confidential informers, and to specifically direct him to not provide or volunteer any information that could tend to identify the confidential informants.
- [35] That concludes my oral ruling with respect to the application for leave to cross-examine.
- "L.M. Lyster J."
- LYSTER J.

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