

CANADA / JUDGMENT

R. v. Cancela

2025 BCSC 2066

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cancela,

2025 BCSC 2066

Date: 20251020

Docket: 26843-2

Registry: Nelson

Rex

v.

Andrew Cancela

Before: The Honourable Madam Justice Lyster

Oral Reasons for Judgment under s. 24(2) of the Charter

Counsel for accused:

M. Patterson

Counsel for Federal Crown:

M. Aziz

Place and Date of Hearing:

Nelson, B.C.

September 24, 2025

Place and Date of Judgment:

Nelson, B.C.

October 20, 2025

- [1] These are my reasons for decision with respect to the defence's application to exclude evidence found as the result of a search of Mr. Cancela's residence, pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms.
- [2] In an oral ruling rendered September 22, 2025, I held that Mr. Cancela's rights under s. 8 of the Charter were infringed because the search warrant could not have issued on the basis of the information to obtain sworn by Cst. Bachmann. My reasons for doing so are indexed at 2025 BCSC 2008.
- [3] The defence now applies for the exclusion of the evidence obtained as a result of the search of Mr. Cancela's residence on April 21, 2021. The Crown opposes the application.
- [4] The legal framework for the analysis the court must undertake under s. 24(2) was established by the Supreme Court of Canada decision in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353. It requires the court to objectively assess whether the admission of the evidence would adversely affect the long-term prospective reputation and integrity of, and public confidence in, the justice system. This assessment requires a balancing of three lines of inquiry: first, the seriousness of the Charter-infringing state conduct; secondly, the impact on the Charter-protected interests of the accused; and thirdly, society's interests in the adjudication of the case on its merits.
- [5] The burden under s. 24(2) remains on the accused as the applicant, to show that the admission of the evidence would bring the administration of justice into disrepute, having regard to those three lines of inquiry.
- [6] I will address each of the three lines of inquiry in turn.
- [7] First, I consider the seriousness of the Charter-infringing state conduct. This inquiry was the focus of counsels' submissions before me.
- [8] In *R. v. Khamvongsa*, 2025 BCCA 33, Madam Justice Dewitt-Van Oosten, writing for the Court, granted the accused's appeal from a decision dismissing his application to exclude evidence under s. 24(2). She did so on the basis that the trial judge had erred in principle under the first step of the Grant analysis: para. 26.
- [9] Between paras. 32-48, Dewitt-Van Oosten J.A. discussed the legal principles applicable to the first step of the Grant analysis. She did so by reference to three decisions which were also relied upon by the applicant in the case at bar: *R. v. Morelli*, 2010 SCC 8; *R. v. Rocha*, 2012 ONCA 707; and *R. v. Booth*, 2019 ONCA 970. I will review those cases by reference to Dewitt-Van Oosten J.A.'s discussion of them in *Khamvongsa*.

- [10] In relation to Morelli, the Court noted at paras. 35 and 36 of Khamvongsa that the Information to Obtain ("ITO") in Morelli was "carelessly drafted, materially misleading, and factually incomplete", but that there was "no deliberate attempt to mislead". The majority in the Supreme Court of Canada gave mitigating effect to the fact that the "search and seizure were unwarranted, but not warrantless", and that the officers who executed the search did not "wilfully or even negligently breach the Charter".
- [11] At para. 37 of Khamvongsa, the Court noted that the majority in the Supreme Court in Morelli held that the fact the officers acted on the basis of a warrant did not mean that the problems with the ITO that led to the s. 8 violation were inconsequential. The affiant was "neither reasonably diligent nor mindful of his duty to make full and frank disclosure". The ITO was, at best, "improvidently and carelessly drafted".
- [12] At para. 38 of Khamvongsa, the Court quoted the following passage from the reasons of Mr. Justice Fish in Morelli:
- [102] Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in ex parte proceedings. In discharging those duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. They must refrain from concealing or omitting relevant facts. And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant.
- [Emphasis added by DeWitt-Van Oosten J.A.]
- [13] At para. 39, the Court quoted the following passage from Fish J.'s reasons holding that the evidence in Morelli should be excluded:
- [103] The repute of the administration of justice would nonetheless be significantly eroded, particularly in the long term, if such unacceptable police conduct were permitted to form the basis for so intrusive an invasion of privacy as the search of our homes and the seizure and scrutiny of our personal computers.
- [14] Madam Justice Dewitt-Van Oosten next discussed Rocha. At para. 40 of Khamvongsa she noted that the Ontario Court of Appeal held in that case that obtaining a warrant from a judicial officer is "the antithesis of wilful disregard of Charter rights", which, in the absence of the defence showing that "the warrant was obtained through use of false or deliberately misleading information, or the drafting of the ITO in some way subverted the warrant process", would favour the admission of the evidence. At para. 41, she cited the following passage from Rocha for the correct approach:

[29] The approach rather should be to look at the ITO and consider first if it is misleading in any way. If so, the court should then consider where it lies on the continuum from the intentional use of false and misleading information at one end to mere inadvertence at the other end

[Emphasis added, internal citation omitted.]

[15] As discussed at para. 42, there may be factual statements in an ITO that have "the potential to mislead", which may be problematic even if not crafted with a subjective intention to mislead.

[16] Starting at para. 43 of Khamvongsa, Dewitt-Van Oosten J.A. discussed Booth. At para. 43, she quoted the following from Justice Paciocco's decision, emphasizing the importance of accuracy in drafting an ITO:

[54] 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.

[Emphasis added.]

[17] At para. 44, she further quoted from Paciocco J.A.'s reasons with respect to the first step of the Grant analysis, including the following passage:

[122] In cases such as this, where a search warrant has been obtained, the proper starting point is recognition that an attempt to obtain a search warrant is ordinarily the antithesis of wilful disregard for Charter rights: *R. v. Rocha*, 2012 ONCA 707, 112 O.R. (3d) 742, at para. 28; *Morelli*, at para. 99. However, that does not end the inquiry. The ITO must be considered. As Doherty J.A. said in *Rocha*, at para. 29:

The approach should be to look at the ITO and consider first if it is misleading in any way. If so, the court should then consider where it lies on the continuum from the intentional use of false and misleading information at one end to mere inadvertence at the other end.

[123] In *R. v. Herta*, 2018 ONCA 927, 143 O.R. (3d) 721, where innocent errors occurred because of sloppy work, the case fell in the middle of the good faith to bad faith spectrum: at paras. 64, 74. In *Rocha*, there was no bad faith, but there was blameworthy "inattention to constitutional standards": at para. 43. Similarly, in *Morelli*, the breach was serious notwithstanding that a warrant had been obtained by officers believing they were acting under lawful authority

[124] In this case, the affiant officer fell far short of that standard. Although I accept the trial judge's assessment that the affiant officer did not intentionally violate the Charter, he was clearly negligent. He testified that he was aware of his obligation to make full and frank disclosure, but he was patently inattentive to that obligation. It is not unfair to characterize the ITO as an exercise in advocacy, rather than disclosure... There is no possible conclusion other than that the affiant officer's failure to make full and frank disclosure, while not intentionally in violation of the Charter, approaches the more serious end of the spectrum.

[Emphasis added.]

[18] Following that comprehensive review of the leading authorities on step one of the Grant analysis, *DeWitt-Van Oosten J.A.* held at para. 46 of *Khamvongsa* that, while the fact a warrant was obtained will be attenuating, it is not determinative, and its mitigating effect may be outweighed or significantly diminished by factors unique to the case.

[19] At para. 47, *DeWitt-Van Oosten J.A.* held that the assessment of seriousness of the Charter-infringing conduct is "fact-intensive, determined case-by-case, and contextually -informed". All material findings on the s. 8 voir dire inform the analysis, including findings that necessitated the excision of information from the ITO.

[20] Finally, at para. 48, *DeWitt-Van Oosten J.A.* held that while a finding of an intention to mislead will likely result in a finding that the conduct in question is at the "top end of the culpability ladder, that is not the only route to getting there." Among those other routes are the ITO being factually misleading, irrespective of intent, or suffering from drafting issues the cumulative effect of which is to subvert the warrant process.

[21] Applying those principles, the Court in *Khamvongsa* concluded that the trial judge had committed a material error by adopting too narrow a focus in assessing the seriousness of the Charter-infringing state conduct.

[22] In the case at bar, the applicant relied on the following passages from my ruling holding the search warrant to be invalid under s. 8 of the Charter:

- [70] It is of concern that Constable Bachmann knew that certain specific pieces of information provided by the informants could not be corroborated, namely that Mr. Cancela is the biggest cocaine dealer in Castlegar and that Ms. Melville works for Mr. Cancela, but he did not state that in the ITO. In my view, where a police officer knows a particular piece of relevant information provided by an informant could not be corroborated, that should be specifically stated in the ITO. The failure to do so falls short of the obligation on an officer seeking a search warrant to "discharge the special duties of candor and full disclosure that attach in ex parte proceedings": *R. v. Morelli*, 2010 SCC 8, at para. 102. The failure to do so risks misleading the issuing justice into thinking the evidence in support of the warrant being issued is stronger than it, in fact, is.
- [71] The extent to which the surveillance corroborates the informants' information was also overstated in the ITO. I have already quoted the passage where Constable Bachmann stated that he believed Mr. Cancela and Ms. Melville were trafficking drugs on a daily basis, a belief he based on surveillance, which he said showed daily drug trafficking when surveillance was conducted. The difficulty with this statement is that surveillance was not conducted on a daily basis, and even on some days that it was there was no evidence of behaviour consistent with drug trafficking. Constable Bachmann may well have had a suspicion that Mr. Cancela and Ms. Melville were involved in daily drug trafficking, but the evidence contained in the ITO did not establish that to the level of a credibly-based probability.
- [23] The applicant argued on the basis of this part of my ruling that the Charter-infringing conduct was at the serious end of the spectrum. In respect of the failure by Cst. Bachmann to disclose the specific aspects of the confidential informants' information that could not be corroborated, the applicant submitted that this amounted to an intentional failure to disclose, which was misleading to the authorizing justice. Similarly, with respect to Cst. Bachmann asserting his belief that Mr. Cancela and Ms. Melville were engaged in trafficking drugs on a daily basis, when surveillance was not conducted on a daily basis, the applicant asserted that Cst. Bachmann had knowingly exaggerated the evidence in order to obtain the warrant.
- [24] In response, the Crown acknowledged that this part of my ruling reflected some degree of failure to disclose by Cst. Bachmann, which was not merely technical in nature, but submitted it was not of the most serious variety. The Crown submitted with respect to the asserted belief that Mr. Cancela and Ms. Melville were engaged in the daily trafficking of drugs that Cst. Bachmann was perhaps over-optimistic, but not dishonest.
- [25] In my s. 8 ruling I did not find that Cst. Bachmann intended to mislead the authorizing justice, nor do I now conclude that he intended to mislead the authorizing justice. Importantly, in *Morelli*, at para. 59, Fish J. stated that "the relevant question here is whether the ITO was misleading, not whether it was intentionally misleading". In that case, the trial judge found that there was no deliberate intention to mislead, and the Supreme Court did not disturb that finding on appeal. Nonetheless, Fish J. went on to hold at para. 59:

It is nonetheless evident that the police officer's selective presentation of the facts painted a less objective and more villainous picture than the picture that would have emerged had he disclosed all the material information available to him at the time.

- [26] I find that the same is true in the case at bar. As I stated in my s. 8 ruling at para. 70, "In my view, where a police officer knows a particular piece of relevant information provided by an informant could not be corroborated, that should be specifically stated in the ITO".
- [27] In this case, the confidential informant information that could not be corroborated was that Mr. Cancela is the biggest cocaine dealer in Castlegar and that Ms. Melville works for him. Both are significant assertions, which, if accepted as true, would lead the reader to believe that Mr. Cancela is at least a mid-level drug trafficker who employs others to sell for him, and that he is the biggest cocaine dealer in Castlegar. The latter assertion, in particular, has a pejorative connotation - the reader is led to believe that Mr. Cancela is a serious drug dealer.
- [28] Cst. Bachmann was candid and forthcoming under cross-examination that he could not corroborate either of these two pieces of information. He included in the ITO a general statement that he could not corroborate all of the confidential informants' information, but he did not provide the issuing justice with any information about what information could not be corroborated. In my view, this was a serious breach of the officer's duty to make full and frank disclosure. Knowing that these assertions could not be corroborated, Cst. Bachmann should have disclosed that fact in the ITO. Had this court not granted leave to the applicant to cross-examine Cst. Bachmann, no one would ever have known that those assertions could not be corroborated. The disclosure of this inability to corroborate would have enabled the authorizing justice to more properly assess both the reliability of the confidential informants, and the strength of the evidence against Mr. Cancela. While I do not find that Cst. Bachmann intended to deceive the authorizing justice, I find that this non-disclosure of material facts was misleading in effect.
- [29] Cst. Bachmann's statement that he believed Mr. Cancela and Ms. Melville were trafficking drugs on a daily basis was different in nature, but was also subversive of the warrant process. I have no reason to believe that Cst. Bachmann did not truly believe that Mr. Cancela and Ms. Melville were trafficking drugs on a daily basis. The difficulty with the statement of belief is that it lacked a sufficient evidentiary foundation. There were 13 days of surveillance carried out over roughly a month and a half. Mr. Cancela was only observed on two days. There were days where no behaviour consistent with drug trafficking was observed. Cst. Bachmann's statement of belief exaggerated the strength of the evidence that Mr. Cancela was involved in drug trafficking, and significantly exaggerated the strength of the evidence that he was doing so on a daily basis.
- [30] A police officer swearing an ITO in support of the issuance of a warrant has an obligation to make full and frank disclosure, and must be careful to present all material facts: Morelli at para. 58. The issuing justice relies on the affiant to fulfil that duty. Here, while Cst.

Bachmann acknowledged that surveillance had not been conducted on a daily basis, he made the sweeping assertion that drug trafficking was occurring on a daily basis. An issuing justice would be likely to believe that a police officer had good grounds for stating such a belief, and cannot be expected to go behind such a statement and assess the grounds for the stated belief with a fine-tooth comb. This exaggeration made the evidence against Mr. Cancela sound significantly stronger than the contents of the ITO, as amplified on cross-examination, could support.

- [31] These were not the only bases upon which I held that the warrant could not have been issued, and thus that Mr. Cancela's s. 8 rights were infringed. Also important to that conclusion were the concerns that I discussed in my ruling with respect to the anonymous handler and the lack of any information in the ITO to assess their credibility or reliability. That aspect of the s. 8 ruling did not figure in counsels' submissions with respect to the seriousness of the Charter-infringing conduct. In my view, counsel were correct to focus their submissions elsewhere. The lack of any information about the handler, and thus any basis to assess the credibility and reliability of the information they passed on from the confidential informants, was a serious weakness in this ITO. There is no reason, however, to think that Cst. Bachmann's failure to disclose any information about the handler was anything other than a good faith, if possibly unwarranted, attempt to safeguard the confidential informants' safety and anonymity.
- [32] Focusing then on the omission of material information about what information could be corroborated, and the exaggeration of the strength of the case against Mr. Cancela, I conclude that the Charter-infringing state conduct in this case, while perhaps not on the very highest rung of the ladder, was indeed serious.
- [33] I turn to the second Grant step, and the impact of the breach on the Charter-protected interests of the applicant. The warrant obtained on the strength of the ITO permitted the police to search, among other places, Mr. Cancela's home. The Crown properly conceded that the search of a person's home is a serious breach of their s. 8 rights. The search of one's home is inherently intrusive. This search had a serious impact on Mr. Cancela's Charter-protected privacy rights.
- [34] I turn to the third Grant step, that is, society's interest in the adjudication of the case on the merits. Mr. Cancela is charged with a serious offence: possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. The seriousness of the offence charged is reflected in the fact that a person convicted of it is subject to a term of imprisonment, potentially for life. Society has a clear interest in the adjudication of such a charge on its merits.
- [35] It is perhaps self-evident that, if this application is successful, the case against Mr. Cancela will collapse. Crown counsel submitted that if this matter proceeds to trial, the Crown will lead evidence of items being found in Mr. Cancela's residence including 222 grams of cocaine and over \$78,000 in cash. The Crown would lead evidence from officers who dealt

with those exhibits, and would seek to lead evidence from an expert witness who would provide their opinion about Mr. Cancela's level of drug trafficking. Without commenting on the proposed expert evidence, about which this court has no information, the real evidence seized from Mr. Cancela's residence would be reliable evidence upon which a conviction could be obtained.

[36] With respect to the third Grant step, I find that the exclusion of the evidence would seriously undermine the truth-seeking function of the trial, which weighs against its exclusion.

[37] I must weigh and balance all of the considerations arising from the three Grant steps. In Morelli, at para. 108, Fish J. stated that:

[108] In balancing these considerations, we are required by Grant to bear in mind the long-term and prospective repute of the administration of justice, focussing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused.

[38] In Grant, at para. 84, the majority stated the following with respect to the seriousness of the offence:

In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[39] This is not a mathematical exercise. The court must balance and weigh the various, and competing, interests. Having done so in the case at bar, I have concluded that admitting the unconstitutionally obtained evidence would bring the administration of justice into disrepute. As stated by Fish J. in *Morelli*, at para. 109, the repute of the administration of justice would be significantly undermined were criminal trials allowed to proceed on the basis of evidence obtained from a person's home on the basis of misleading, inaccurate and incomplete information, such as that provided in the ITO relied upon to obtain the warrant in the case at bar. This means that society will be deprived of an adjudication of this case on its merits, but the greater societal interest is to ensure the long-term repute of the administration of justice.

[40] For these reasons, I grant the defence's application and therefore exclude the evidence obtained from Mr. Cancela's residence.

"L.M. Lyster J."

LYSTER J.

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