
CANADA / JUDGMENT

R. v. Edwardsen

2015 BCSC 1659

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1659 R. v. Edwardsen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Edwardsen,

2015 BCSC 1659

Date: 20150915

Docket: 30870-2

Registry: Terrace

Regina

v.

David Harry Edwardsen

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

on "Basi" Application

Counsel for the Crown:

J.N. Walker

A.M. Switzer

Counsel for the Defence:

K.S. Westlake, Q.C.

Place and Date of Hearing:

Terrace, B.C.

August 11,12 & 14, 2015

Place and Date of Judgment:

Terrace, B.C.

September 15, 2015

Introduction

- [1] A lengthy and complex investigation by the RCMP led to various drug and firearm charges being laid against the accused, David Harry Edwardsen. In the course of the investigation the police obtained a number of judicial authorizations, including a warrant permitting police to install a tracking device on a truck associated with Mr. Edwardsen. The accused intends to challenge the validity of that tracking warrant.
- [2] The Crown disclosed to the accused the information to obtain (the "ITO") the tracking warrant, and in reasons reported as *R. v. Edwardsen*, 2015 BCSC 705, I allowed a defence application seeking disclosure of source handler notes and source debrief reports (the "Source Materials") pertaining to confidential informants who provided information relied upon in the ITO. Both the ITO and the Source Materials contained numerous redactions, which the Crown says are necessary to protect informer privilege. The Crown also submits that certain of the redactions merely deleted information which is irrelevant to the Garofoli review or other issues (*R. v. Garofoli*, [1990] 2 S.C.R. 1421).
- [3] In this application, the accused seeks to have the Court review in camera in a "Basi" hearing supporting the information to obtain, (so named as a result of the Supreme Court of Canada's decision in *R. v. Basi*, 2009 SCC 52), the unedited, unredacted Source Materials in order to assess the legitimacy of the Crown's assertions of informer privilege and irrelevance. The accused further seeks disclosure of any relevant materials not properly protected by informer privilege.
- [4] After hearing argument on the accused's request for review by the Court of vetted material I dismissed the application with reasons to follow. These are those reasons.

Background

- [5] On September 19, 2012 police executed five search warrants pertaining to the accused's primary residence and other locations. The ITO used to acquire those warrants included information furnished to police by seven confidential informants. The accused applies for the Basi hearing in support of the Garafoli application previously filed.
- [6] The defence takes the position that upon challenging the Crown's invocation of informer privilege the accused is automatically entitled to have the Court review the redacted material to assess the applicability of the privilege. I note however that the defence is not

applying to have the Court review the redactions in the ITO. The Crown, on the other hand, argues that the defence must establish some basis for the Court to review the materials, and submits that the accused has failed to do. The Crown therefore urges me to decline to review the materials, and dismiss the defence application.

- [7] In *R. v. Basi*, 2010 BCSC 26, Madam Justice A. MacKenzie (as she then was) considered the issue of a court review of redactions of source materials. The defence applied to have the Court review certain documents in order to assess the validity of Crown assertions of informer privilege. The defence also sought disclosure of any portions of the materials not properly protected by the privilege. The Crown resisted the defence application, contending that informer privilege attached to all of the materials at issue, and that these were irrelevant in any event.
- [8] Basi involved two classes of materials: 1) the "miscellaneous informer vets," which referred to the redacted portions of 30 documents disclosed to the defence, and 2) the "source witness debriefing reports," 427 source debrief reports which had not been disclosed to the defence (para. 1).
- [9] Regarding the "miscellaneous informer vets," MacKenzie J. reviewed unedited versions of each of the 30 documents, and accepted that the Crown had validly asserted informer privilege over the vetted portions. She further found that the Crown had accurately characterized much of the vetted information as irrelevant "on its face." She therefore declined to order disclosure of those materials (para. 22).
- [10] As to the "source witness debriefing reports," MacKenzie J. expressly declined to review those materials to assess either their relevance or whether informer privilege properly applied to them. She did so because the defence failed "to establish the potential relevance of the materials," and because, in her view, the informer privilege question could be properly resolved without reviewing the materials (paras. 42, 45-46).
- [11] At para. 47 of Basi, MacKenzie J. also relied on the following passage from Charron J.'s ruling in *R. v. Pires*; *R. v. Lising*, 2005 SCC 66:

[47]

The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one counsel when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

- [12] Of relevance to the defence application in this case is the distinct treatment given to the two classes of materials at issue in Basi. As discussed, MacKenzie J. opted to review the "miscellaneous informer vets," which comprised discrete portions of a relatively modest number of otherwise relevant, otherwise disclosed documents, in order to assess whether

informer privilege validly applied to those materials. She made no express finding as to whether the Crown's assertions of privilege or irrelevance could be appropriately assessed by the Court without first reviewing the documents.

- [13] On the other hand, as noted earlier, MacKenzie J. declined to review the "source witness debriefing reports," which included the entirety of a relatively large number of documents, previously undisclosed to the accused. Relying on *R. v. Barzal* (1993), 84 C.C.C. (3d) 289 (B.C.C.A.), MacKenzie J. viewed those materials as legally irrelevant to the issues before the Court (I reached a different conclusion relating to the Source Materials at issue in this case, relying on *R. v. Bernath*, 2015 BCSC 632), and explicitly held that the validity of the Crown's assertion of informer privilege over these documents could be appropriately assessed on the basis of the Crown's submissions and affidavit evidence. The latter included police evidence suggesting that it is ill advised or even dangerous for the Court to attempt to edit source materials so as to protect informer privilege (paras. 42, 45-46).
- [14] Mr. Justice Macaulay provided the following commentary on MacKenzie J.'s decision in *Basi* in *R. v. Belcourt*, 2012 BCSC 737:
- [48] The court declined to review the reports in the circumstances and held that the request did not meet the low threshold of a reasonable possibility of the information being useful to the accused in making full answer and defence, as discussed in *R. v. Chaplin*, [1995] 1 S.C.R. 727 (para. 26). Justice MacKenzie cited a number of authorities in support of her conclusion that reliability at large was not at issue in the particular context.
- [49] Of significance, Mackenzie J. also commented on the guidance given to trial judges in *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, at para. 35, to decline to embark upon an evidentiary hearing at the request of one counsel unless the counsel can "show a reasonable likelihood that the hearing can assist in determining the issues before the court." This is, of course, the threshold burden to be satisfied before embarking on any Charter-based inquiry.
- [50] In a similar vein, Holmes J. concluded in *R. v. Terezakis*, 2005 BCSC 850, at para. 29, that the defence must show, in order to obtain disclosure of evidence said to be "potentially useful" to challenge a wiretap authorization, that there is a "reasonable possibility" that such evidence exists.
- [15] As a result it appears that in an application such as that advanced by the defence, seeking to have the Court review certain materials in order to determine whether the Crown has validly withheld disclosure of all or part of those materials due to irrelevance or informer privilege, the defence must show a reasonable likelihood that such review will assist in determining the issues before the Court.
- [16] That reasonable likelihood will be diminished or absent where the validity of the assertion of informer privilege can be assessed without reviewing the materials in question, for instance by relying on other evidence and the submissions of counsel. Where such is the case the Court has jurisdiction to decline to embark upon the review.

- [17] As a result the Basi procedure applies where the accused seeks to have the Court review the redactions made to source materials. I note however that Basi did not deal with redactions made in an ITO in the context of a challenge to the validity of an authorization obtained on the strength of that ITO. While the defence referred me to *R. v. Chor-Yin Choi*, 2013 ONSC 291, that decision related to court review of an unredacted ITO, not the issue of the review by the Court of unredacted copies of source information.
- [18] Here, the Basi procedure governs the defence application in relation to the Source Materials, hence the defence must satisfy the reasonable likelihood test in order to have the Court review those materials. I am not aware of any authority suggesting that there is an automatic entitlement to review by the Court of the Crown's choice to redact or withhold source materials.

Discussion

- [19] During the course of the investigation the RCMP relied on confidential informants. The informants are described as informants "A", "B", "C", "D" and "E". The informants each had an RCMP handler.
- [20] The main argument of the defendant is that every assertion in an ITO should be supported by unvetted portions of the handler notes or the source debriefing reports and if it is not the Court should review the vetted materials.
- [21] The Crown acknowledges that some of the vetted information sought by the accused is relevant. They state however that such relevant information cannot be disclosed where it is necessary to withhold the information in order to protect informant privilege.
- [22] Clearly the accused is the person who is in the best position to identify who the informants are. The Crown asserts that the disclosure of any further information risks identifying the informants.
- [23] The defendant has, in support of his application, divided the disclosure issues into three categories described as Class I, II and III.

Class I

- [24] The defendant says "Class 1" references assertions in the affiant's evidence that they are not disclosed in the material produced. That is, there is no documentation supporting certain of the affiant's assertions. They submit that as a result it is a "straw man" affidavit. They argue there are no source documents disclosed respecting the documents the defence has listed and the implication is that much of the material has been over-vetted. In addition they submit, "false information was initially redacted" but then subsequently unredacted and disclosed.

- [25] As the Crown notes, the defence assertion is not that there are no informant materials in relation to the information in the ITO, but rather that there is no support for the assertion in the unvetted portions of the documents. Just because the vetted information produced does not include everything in the ITO does not necessarily mean that the information in the ITO is not supported, or unreliable, or not credible.
- [26] The Crown says that there is redacted information in the Source Materials, which corresponds to the assertions at issue, but submits that it cannot disclose that information due to informer privilege. I find that position troubling. It would seem to me that if the information can be sufficiently obscured so as to be presented in an ITO and disclosed to the accused in that medium, then it should be possible to vet the source materials so as to disclose that same information without identifying the informant.
- [27] However, I do not accept that this circumstance gives rise to a reasonable likelihood that review of the redactions in Class I will assist the Court. To the contrary, the Crown position, Staff Sgt. Cater's evidence regarding the difficulty or impossibility of vetting source materials to protect informer privilege, and MacKenzie J.'s recognition of that same problem at para. 45 in *Basi*, all weigh against the defence contention. Similarly, the defence may still argue, in aid of the *Garofoli* procedure, that the lack of support for the affiant's assertions in the ITO weakens the validity of the warrant, or provides grounds for cross-examining the affiant.
- [28] The mere fact that there is vetted supporting information does not engage the need for court review otherwise all informant information relied on would form a basis for an order that the Court review and in effect second guess the Crown.
- [29] As part of the Class I disclosure the defence also submits that certain false information, now disclosed, was initially redacted.
- [30] The fact that at one time something was redacted and has now been disclosed does not have anything to do with whether the Court should review the vetting. As the Crown noted the vetting process in relation to informant privilege is complex and it is not surprising that there may have been drafts of proposed vetting. In addition the defence now has disclosure of this allegedly "false" information, which it can use to aid its challenge to the warrant. This allegation does not support judicial review but rather such an allegation can be addressed in the *Garofoli* review hearing.
- [31] I further accept that the mere fact that certain information was at one time redacted, only later to be disclosed, does not, without more, support the notion that a review of the redactions is necessary. That is particularly so as none of the instances in Class I suggest to me any reasonable likelihood that there is other, as yet unredacted information of the same sort elsewhere in the source materials.

Class II

- [32] Class II relates to information existing in the source handler notes (the "SHNs") but not in the produced source debriefing reports ("SDRs").
- [33] For example, there are SHNs containing details that are not repeated in the SDRs. The underlying assumption of the defence application is that SDRs must repeat SHNs. That is not the purpose of an SDR. As Staff Sgt. Cater noted at paras. 19, 22 and 25 of his affidavit:
19. The handler is expected to document the information about criminal activity in a standardized RCMP form referred to as an SDR. The purpose of the SDR is provide a conduit for making CI information about criminal activity available in a controlled way within the RCMP.
22. As noted above, the handler's notes are the primary record of the information provided by a CI during a particular debriefing. The purpose of the SDR is not to create a primary record of the information provided by the CI, but rather to ensure that the intelligence information provided by the CI with respect to past, ongoing, or future criminal activity is made available to police officers involved in the identification and investigation of criminal activity, under the process that is described in more detail below.
25. Handlers may take the approach of drafting an SDR in a "compass format" which simply points the reader in a general direction. For example "Dave Smith deals cocaine". From there, the reader would have to contact the handler for more specific information and depending on that assessment, take other investigative steps as appropriate, to independently corroborate the CI information. Other handlers may draft an SDR that is more informative and paints a more complete picture of the information, yet still must stand on its own in protecting the source of the information.
- [34] The defendant asserts increased disclosure is required in order to ensure the relied upon information is accurate, otherwise the entire judicial authorization process can be subverted and unchecked. They submit that the failure of the RCMP to have the information placed in the SDRs and thereby adhering to the system for dealing with informant privilege raises issues of the reliability of the information.
- [35] Staff Sgt. Cater's evidence makes it clear that it is expected and appropriate that certain information contained in the SHNs might not appear in other, less detailed renderings of that same information in other types of documents. Class II therefore provides no basis for reviewing any redacted materials, particularly as the SHNs (thoroughly vetted) have been disclosed to the accused.

Class III

- [36] Class III is disclosure that reveals discrepancies between the affiant's evidence and the documents. The defendant asserts that there has been over vetting by the Crown.

- [37] For example the defendant refers to vetted page numbers, the existence of notes stating, "remove vetting", and information disclosed that is not in the SDRs provided. They submit that they fail to see how the disclosure of page numbers may identify informants.
- [38] The Crown addressed each of the specific criticisms of the defendant stating that there are vetted notes supporting each of the issues raised. They note as well that Staff Sgt. Cater's evidence makes it clear that it is not expected that each version of the information, whether in an SHN, SDR or a word document, will be identical or contain all of the same details. What is important is that there is, in the material over which privilege is asserted, information supporting the assertions contained in the ITO.
- [39] It is my view that discrepancies between the ITO and source materials or other documents are matters properly considered within the context of the Garofoli procedure. Such discrepancies, without more, do not suggest a reasonable likelihood that a review of vetting will assist the Court in this case.
- [40] In the result, I find that the accused has failed to meet its burden under the Basi procedure, and I dismiss the plaintiff's application to have the Court review the appropriateness of the redactions made to the source materials under Classes I, II and III.

"Punnett J."

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