

CANADA / JUDGMENT

R. v. Lee

2002 BCSC 1908

COURT

Supreme Court of British Columbia

DECIDED

8 January 2002

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2002 BCSC 1908 R. v. Lee Citation: R. v. Lee Date: 20020108 2002 BCSC 1908 Docket: CC010051 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA Ruling on Right to Cross-Examine Affiant The Honourable Mr. Justice Cullen January 8, 2002 HER MAJESTY THE QUEEN AGAINST SEE CHUN LEE, GOU DIN HO, CHUK FONG TAO, WEI BO CHEN, SIU WAH CHAU, AND CHEUNG HUNG Counsel for the Crown M. Devlin J. Torrance Counsel for the Defendant, See Chun Lee P. Leask, Q.C. D. Jevning Counsel for the Defendant, Gou Din Ho P. Hart Counsel for the Defendant, Chuk Fong Tao D. Sokol Counsel for the Defendant, Wei Bo Chen D. Gaffar Place and Date of Hearing: Vancouver, B.C. January 8, 2002 BAN ON PUBLICATION 648 CCC

- [1] THE COURT: Counsel for Lee, joined by counsel for Ho, seek leave to cross-examine the affiant in relation to authorization P5/99. I granted leave to cross-examine the affiant on his subjective belief in the existence of the requisite grounds in relation to Lee and Ho, the objective basis for those grounds, and the reliability of the informant information advanced in support of those grounds.
- [2] Counsel also seek leave to cross-examine on the issue of the extent or lack of minimization of the authorization. The authority to intercept private communications extends to the residences and the vehicles of the accused, and counsel raise the issue of whether the scope of that order is justified on the supporting material.
- [3] Counsel for the Crown opposes cross-examination on this issue, submitting that it is a function of investigative necessity in s. 186(1)(b), and can simply be argued on the basis of the affidavit before the court as edited.
- [4] Counsel for the accused submit cross-examination on the issue meets the test in R. v. Garofoli (1990) 60 C.C.C. (3d) 161 at page 198, that it "will elicit testimony tending to discredit the evidence of one of the preconditions of the authorization." Counsel point to an absence of evidence obtained by previous authorizations from the locations at issue, and question the affiant's subjective belief and the need to cast the electronic net to cover the residences and cars of the two accused.

- [5] In my view, this involves the issue of minimization which was defined in *R. v. Finlay and Grellette* (1986) 23 C.C.C. (3d) 48 (Ont. C.A.) at page 73 in the following terms: Minimization has been defined as the adoption of measures to reduce the extent of court ordered electronic surveillance to a practical minimum and at the same time to allow legitimate investigative aims to be pursued.
- [6] In *Finlay and Grellette*, the issue was whether the invasion of privacy legislation met the constitutional standard, and whether the lack of an express minimization requirement in that legislation rendered it unconstitutional.
- [7] In finding that the scheme met the constitutional standard, Martin J.A. for the court, stated the following at page 75: I am of the view that having regard to the provisions of s. 178.132(d), now 186(4)(d), which may and should be resorted to by the authorizing judge to impose a minimization requirement when the circumstances of the interception warrant the imposing of such a term, the absence of an expressed minimization requirement such as that contained in Title III does not render Part 4.1 unconstitutional.
- [8] Section 186(4)(d) reads as follows: 186 (4) An authorization shall
- (d) contain such terms and conditions as the judge considers advisable in the public interest. The minimization requirement is on a different footing from that of reasonable and probable grounds or investigative necessity. The latter two requirements are preconditions of the authorization, dependent upon evidence advanced by the affiant, and his or her subjective belief. The former requirement rests on the discretion of the issuing judge.
- [9] Thus, while the issue is one that may be canvassed on a voir dire as to the congruence of the authorization with the minimization requirement identified in *R. v. Finlay and Grellette*, supra, it is not one in which cross-examination "will elicit testimony tending to discredit the existence of one of the preconditions of the authorization," as the exercise of the issuing judge's discretion is the focus of the inquiry, not the subjective belief of the affiant as to how it should be exercised.
- [10] Accordingly, I do not grant leave to cross-examine in that area.

The Honourable Mr. Justice Cullen

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