

CANADA / JUDGMENT

R. v. MacNeil

2013 BCCA 162

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 162 R. v. MacNeil

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. MacNeil,

2013 BCCA 162

Date: 20130411

Docket: CA038959

Between:

Regina

Respondent

And

Daniel Michael MacNeil

Appellant

There is a Ban on Publication of Information that Could Identify the Undercover Police Officers
Pursuant to Section 486.5(1) of the

Criminal Code of Canada

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice K. Smith

The Honourable Mr. Justice Chiasson

On Appeal from Conviction in the Supreme Court of British Columbia,

February 11, 2011 (R. v. MacNeil, New Westminster Registry, Docket X72393-15)

Counsel for the Appellant:

S.K. Fenton

K.M. Bradley

Counsel for the Respondent:

W.P. Riley

Place and Date of Hearing:

Vancouver, British Columbia

February 10, 2012

Place and Date of Judgment:

Vancouver, British Columbia

April 11, 2013

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Mr. Justice K. Smith

The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

- [1] Daniel Michael MacNeil was convicted by Madam Justice Gerow in New Westminster Supreme Court on a four-count indictment, dated the 19th of January 2011, charging him with one count of conspiracy to traffic in cocaine and methamphetamine (s. 5(1) of the Controlled Drugs and Substances Act ("CDSA") and s. 465(1)(c) of the Criminal Code (the "Code")), one count of being a member of a criminal conspiracy directing a person to traffic in cocaine and methamphetamine (s. 5(1) CDSA and s. 467.13(1) Code); one count of trafficking in cocaine and methamphetamine in association with a criminal organization (s. 5(1) CDSA and s. 467.12(1) Code) , and one count of possession of a restricted weapon (s. 95(1) Code).
- [2] The trial judge convicted the appellant of all four counts but entered a conditional stay of proceedings on the third count on the basis of the principle in *R. v. Kienapple*, [1975] 1 SCR 729.

- [3] The trial judge found that Mr. MacNeil was the leader of a group of people who conspired to traffic in drugs, namely cocaine, heroin and methamphetamine in an enterprise known colloquially as a "dial-a-dope" operation. The trafficking was conducted by way of two telephone lines in Surrey and Langley. The activity was the subject of a 15-month police investigation started in July 2005, during which time investigators made 30 undercover purchases of controlled substances over the telephone lines in question.
- [4] The central issue at trial was the admissibility of evidence of private communications which had been intercepted pursuant to two wiretap authorizations obtained by the RCMP in August of 2006. Consequently, the trial consisted principally of a number of voir dices heard on various days in April and May of 2010 in which the appellant sought to exclude the evidence under s. 24(2) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 (the "Charter"). At the conclusion of the voir dices, the trial judge refused the appellant's application and admitted the impugned evidence. On January 11, 2011, the trial continued, with the appellant making admissions of fact relating to the counts. The appellant did not call evidence but relied instead on the weaknesses he alleged in the case for the Crown. The trial judge convicted the appellant on all counts on February 11, 2011.
- [5] The appellant's grounds of appeal relate solely to the wiretap rulings. Broadly stated, the appellant says first, that the trial judge erred in dismissing his application to cross-examine the police officer who swore the supporting affidavit for both wiretap authorizations. Second, the appellant argues that the trial judge erred in holding that the full wiretap authorization met the statutory requirements of "investigative necessity" and "reasonable grounds".

Procedural Background

- [6] On August 4, 2006, Associate Chief Justice Dohm issued two Orders ("authorizations") pursuant to ss. 186 and 184.1 of the Code, authorizing the interception of the appellant's private communications.
- [7] The main authorization was issued under ss. 186(1)(a) and (b) of the Code. It authorized the interception of the appellant's private communications for the following offences:
1. Trafficking in a controlled substance contrary to s. 5(1) of the Controlled Drugs and Substances Act ("CDSA");
 2. Conspiracy to traffic in a controlled substance, contrary to s. 465(1)(c) of the Criminal Code;
 3. Possession of a controlled substance for the purpose of trafficking, contrary to s. 5(2) of the CDSA;
 4. Production of a controlled substance, contrary to s. 7(1) of the CDSA;

5. Procuring, attempting to procure, or soliciting a person to have illicit intercourse with another person, contrary to s. 212(1)(a) of the Criminal Code; and
 6. Procuring, or attempting to procure, a person to become a prostitute, contrary to s. 212(1)(d) of the Criminal Code.
- [8] The second authorization was a one-party consent authorization made pursuant to s. 184.2 of the Code. The appellant made no reference to this authorization in his argument as it is common ground that it would stand or fall with the first authorization.
- [9] The authorizations were granted on the basis of an affidavit sworn by Constable Greenaway of the RCMP. The affidavit is lengthy, 167 pages long (186 pages if one includes appendices), and contains wide-ranging references to numerous undercover drug transactions, information attributed to informants, and surveillance evidence. More particularly the averments in Cst. Greenaway's affidavit were based on: (i) information from a number of witnesses or named sources about the alleged prostitution activities; (ii) seven unnamed informants designated Informants A to G who provided information about Mr. MacNeil (sometimes identified by the name "Nasty") and various associates, and their role in the drug trade; (iii) police investigation of dial-a-dope activity in Surrey and Langley; (iv) multiple undercover drug purchases from individuals involved in the alleged dial-a-dope ring, including Mr. Castillo; (v) surveillance of Mr. MacNeil, Mr. Castillo and others; and (vi) information gleaned from number recorder warrants and tracking devices.
- [10] The affidavit was organized chronologically. It was made up of a number of sections with separate headings. At its beginning it contained a section entitled "Summary of the Investigation" with the rest of the evidence falling under titles grouped chronologically according to category. Examples of the titles include: "Objective"; "Tracking Warrant Relied Upon"; "Subscriber Information"; "Confidential Informants"; "Grounds Relating to Procuring Prostitution"; and the like.
- [11] I will not summarize the information contained in the affidavit beyond this general statement as it would serve no purpose on this appeal. I will refer to particular portions of it later in these reasons.
- [12] At the beginning of the trial defence counsel sought leave to cross-examine Cst. Greenaway. Defence counsel maintained that the "Summary of the Investigation" unfairly exaggerated the appellant's involvement in drug trafficking. He argued that he should be permitted to cross-examine Cst. Greenaway to determine whether the officer had complied with his duty to provide full, frank and fair disclosure and whether he intentionally or recklessly sought to make the appellant's role in the investigation more sinister in the summary than was revealed in later paragraphs.
- [13] The trial judge refused the application to cross-examine in a ruling to which I will refer later in these reasons.

[14] Having failed to obtain leave to cross-examine, the appellant was left to argue the invalidity of the authorizations based on facial invalidity. These arguments were rejected. I will return to them later in these reasons.

Grounds of Appeal

[15] The appellant states his grounds of appeal as these:

It is submitted that the learned Trial Judge erred:

- i. in failing to grant the Appellant leave to cross-examine the Affiant who swore the Affidavit in support of the application for the authorizations to intercept the Appellant's private communications;
- ii. in failing to find that the Affiant violated his duty to provide "full and frank disclosure of material facts" on the ex parte application to the authorizing judge;
- iii. in failing to find that the Affidavit, after being excised to remove false and misleading paragraphs, failed to provide reasonable grounds for the issuance of the wiretap authorizations;
- iv. in failing to find that the Affiant failed to establish "investigative necessity";
- v. in finding that s. 186(1.1) of the Criminal Code was applicable to excuse the issuing judge from being satisfied that the requirements of investigative necessity were met; and
- vi. in failing to exclude the wiretap evidence at trial pursuant to s. 24(2) of the Charter.

[16] The first two grounds are part of the same question and I will deal with them together. I will examine the third and fourth grounds separately. For reasons which should become clear, it will be unnecessary for me to discuss the fifth and sixth grounds of appeal.

Discussion of the Grounds of Appeal

First Ground of Appeal - Refusal to Permit Cross-Examination of the Affiant

[17] The key statutory requirements for a wiretap authorization in s. 186(1) are found in paras. (a) and (b) of the Criminal Code:

186.(1) An authorization under this section may be given if the judge to whom the application is made is satisfied

- (a) that it would be in the best interests of the administration of justice to do so; and
- (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

- [18] The first requirement, that the authorization may be given if the authorizing judge is satisfied that "it would be in the best interests of the administration of justice to do so", has been interpreted by the courts to include the requirement that, in accordance with s. 8 of the Charter, there must be reasonable and probable grounds on which to believe that an offence has been committed, or is being committed and that the authorization sought will afford evidence of that crime. (*R. v. Duarte*, [1990] 1 S.C.R. 30 at 45.)
- [19] The second requirement, which has come to be known as "investigative necessity", requires the authorizing judge to be satisfied that other investigative methods would fail, or have little likelihood of success, or that urgency requires it. (*Duarte*, *supra*.)
- [20] The right to full answer and defence entitles an accused to examine, subject to editing, the contents of the material placed before the authorizing judge in support of the successful wiretap authorization and to a limited review of the authorization at trial. (*R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1433, 1452.)
- [21] The Court in *Garofoli* held that on the review an accused might be permitted to cross-examine the author of an affidavit relied upon by the issuing judge. Speaking for the majority, Sopinka J. said this at 1465:

Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. 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. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.

When permitted, the cross-examination should be limited by the trial judge to questions that are directed to establish that there was no basis upon which the authorization could have been granted. [Emphasis added.]

Referring to the role of the appellate court in examining the review by the trial judge, Sopinka J. continued:

The discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised. While leave to cross-examine is not the general rule, it is justified in these circumstances in order to prevent an abuse of what is essentially a ruling on the admissibility of evidence. [Emphasis added.]

- [22] In the later case of *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, the Supreme Court of Canada directly addressed the role of the appellate court in examining the decision of the trial judge to grant or refuse leave to cross-examine. Charron J. said this for the Court:
- [46] On reviewing a trial judge's decision to permit or deny leave to cross-examine, an appellate court is not entitled to simply substitute its view for that of the trial judge. The trial judge's determination of whether the proposed cross-examination is reasonably likely to elicit

evidence of probative value to the issues for consideration involves an exercise of discretion. The trial judge is in a better position to assess the material, the submissions of counsel and the evidence, if any, in the context of the particular voir dire and trial. The need for a deferential standard of appellate review was recognized in *Garofoli*. Sopinka J. stated that "[t]he discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised" (p. 1465).

- [47] This deferential standard is important. If not adhered to, trial judges, out of an abundance of caution, are likely to embark upon many unnecessary hearings rather than risk vitiating an entire trial. The trial court's power to control the proceedings then becomes more illusory than real and, in the context of a *Garofoli* hearing, the very purpose of the leave requirement is defeated.
- [23] In the case at bar the trial judge refused the appellant's application to cross-examine Cst. Greenaway. The application was premised on the assertion that the "Summary of Investigation" in the officer's affidavit was misleading as it over-stated the appellant's involvement in drug trafficking. "The Summary of the Investigation" stated in full:
5. Based on the evidence gathered to date, as outlined in this Affidavit, I believe the following to be an accurate summary of this investigation:
 - a. This investigation began as a "dial-a-dope" investigation on July 22, 2005. It identified Aaron Richard MORNEAU ("MORNEAU") as a street level ecstasy and marihuana trafficker when he sold a total of 7.3 grams of marihuana to Cst. [R.] ("[Cst. R.]"), acting in an undercover capacity, over 3 occasions. MORNEAU had also offered to sell ecstasy to [Cst. R.].
 - b. The investigation progressed and MORNEAU was believed to be working for Daniel MACNEIL and CASTILLO who also appeared to be controlling a number of other "dial-a-dope" drug traffickers. Between August 4, 2005 and April 27, 2006, [Cst. R.] has been able to purchase a total of 47.3 grams of marihuana and 275 tablets of ecstasy directly from CASTILLO over 12 occasions.
 - i. CASTILLO has also facilitated in arranging 2 purchases of crack cocaine totaling 0.80 grams by [Cst. R.] from a dial-a-dope phone number associated to Daniel MACNEIL. During two of the undercover purchases of ecstasy from CASTILLO on November 25, 2005 and December 16, 2005, Daniel MACNEIL was present and facilitated in the sale of ecstasy by negotiating price and commented on the purity of the ecstasy;
 - c. Efforts by the undercover operators to deal directly with MACNEIL by increasing the quantity of ecstasy to be purchased have failed. As later outlined, [Cst. R.] attempted to thank Daniel MACNEIL after receiving a discounted price on the purchase of ecstasy and Daniel MACNEIL denied any involvement in the transaction. [Cpl. L.] attempted to purchase one ounce of cocaine from CASTILLO in an attempt to receive a referral to Daniel MACNEIL. When [Cpl. L.] asked CASTILLO for one ounce of cocaine CASTILLO stated that he was not allowed to sell cocaine and immediately offered to sell [Cpl. L.] marihuana. As later outlined

[Cpl. L.] met with CASTILLO and arranged to purchase a larger quantity of ecstasy from CASTILLO. After CASTILLO departed to pick up the ecstasy to complete the deal [Cpl. L.] received a phone call from CASTILLO stating that he did not have any ecstasy and to call back in 4 to 5 days and the transaction was not completed. [Cst. R.] phoned CASTILLO at a later date and attempted to purchase a larger quantity of ecstasy. CASTILLO told [Cst. R.] that he no longer sells ecstasy. [Emphasis added.]

- [24] Counsel for the appellant took the position in this Court that the statements in paragraphs b and b(i) of the affidavit were conclusory statements unsupported by the evidence contained in the affidavit. With respect to paragraph b the appellant said that, contrary to what was stated in the subparagraph, there was little evidence that Morneau was working for MacNeil. With respect to paragraph b(i) he said the evidence did not support the statement that MacNeil had facilitated the drug deals. For purposes of this appeal it is sufficient to refer only to the statement in paragraph b(i). The facts relating to that assertion were later stated in the affidavit as this:

I was advised by [Cst. R.] that on November 25, 2005 at 17:15 hours he made an undercover purchase of ecstasy from Yasmany CASTILLO. I have reviewed the notes made by members of my section for that date and based on my reading, I believe that the following is an accurate account of the observations and events:

- a. At 17:17 hours [Cst. R.] phoned [telephone number] and spoke to CASTILLO about ordering between 30 to 40 tablets of ecstasy. CASTILLO stated that he could make the deal and instructed [Cst. R.] to attend the residence.
- b. At 17:42 hours [Cst. R.] arrived at the residence and walked to the front door. Before [Cst. R.] could knock on the door CASTILLO opened the door and ushered [Cst. R.] inside.
- c. The same Caucasian male with the shaved head (Daniel MACNEIL) was present inside the house. Daniel MACNEIL was peering at a male outside the house on a bike. Both Daniel MACNEIL and CASTILLO asked [Cst. R.] who the male on the bike was and asked if he came with [Cst. R.].
- d. Daniel MACNEIL was answering calls on two separate cellular phones at the same time. When [Cst. R.] asked Daniel MACNEIL if he was from Cuba Daniel MACNEIL replied that he was from Surrey. [Cst. R.] noted that Daniel MACNEIL acted like he was the boss. At one point Daniel MACNEIL was speaking to someone on his cell phone and then directed the male to call him back on Daniel MACNEIL's other phone.
- e. CASTILLO invited [Cst. R.] into the kitchen. [Cst. R.] stated that he wanted to purchase 40 ecstasy tablets for \$200. CASTILLO stated that the price was too low and [Cst. R.] explained that it was all the money he had. Daniel MACNEIL was standing beside CASTILLO during this conversation.
- f. CASTILLO turned to Daniel MACNEIL and began speaking in Spanish.

- g. [Cst. R.] clearly heard CASTILLO use the words "quarente" and "dos centos" during the conversation.
- i. [Cst. R.] advised me that he believed that the word "quarente" referred to 40 or 400 in English, and that "dos centos" referred to 200 in English. [Cst. R.], who is fluent in the French language, based his interpretation of the numbers to their similar pronunciations to the French language.
- ii. In Spanish "cuarenta" means 40 and "doscientos" means 200.
- h. [Cst. R.] noted that CASTILLO and Daniel MACNEIL continued to converse back and forth in Spanish and then Daniel MACNEIL nodded.
- i. Daniel MACNEIL said something to CASTILLO in Spanish and then heard Daniel MACNEIL use the words "quarente" and "dos centos" and "si".
- j. CASTILLO immediately turned to [Cst. R.] and said "Okay".
- k. [Cst. R.] thanked CASTILLO and Daniel MACNEIL and then turned to Daniel MACNEIL and said "I understand some of that. I'm from Montreal, I speak [F]rench. Dos centos is two hundred, right". Daniel MACNEIL smiled and said "Just what we didn't want you to hear".
- l. CASTILLO asked [Cst. R.] if he wanted blue or red ecstasy tablets. [Cst. R.] ordered twenty of each.

...

I was advised by [Cst. R.] that on December 16, 2005 at 14:03 hours he made an undercover purchase of ecstasy from Yasmany CASTILLO. I participated in the surveillance and have reviewed the notes made by members of my section for that date. I believe that the following is an accurate account of the observations and events:

- a. At 14:03 hours surveillance was established at [residential address] Surrey, BC.
- b. At 14:08 hours a Caucasian male who appeared to be 17 years old attended the front door and knocked. The male entered the residence and departed at 14:09 hours.
- c. At 16:43 hours [Cst. R.] phoned [telephone number] and spoke to CASTILLO. [Cst. R.] asked to purchase 100 tablets of ecstasy and CASTILLO agreed. CASTILLO directed [Cst. R.] to attend the residence at any time.
- d. At 16:46 hours Daniel MACNEIL's Hummer arrived and parked in the driveway of [residential address] Surrey, BC. Daniel MACNEIL and five other people exited the vehicle and entered the house.
- e. At 16:57 hours [Cst. R.] attended the front door and knocked. A mulatto male opened the door and let [Cst. R.] inside. [Cst. R.] noted that there was a heavy smell of marihuana present inside the residence.

- f. [Cst. R.] entered the kitchen where he was met by CASTILLO and Daniel MACNEIL. CASTILLO had a large number of pink pills in a Ziploc bag for [Cst. R.]. CASTILLO patted the bag of tablets and stated he had what [Cst. R.] needed.
- g. CASTILLO showed [Cst. R.] the pills which had a little stamp on them. CASTILLO stated that they were of good quality and that they were pure "M D MAX". Daniel MACNEIL laughed and corrected CASTILLO and stated they were "MDMA". (MDMA refers to the chemical name for ecstasy).
- h. [Cst. R.] asked CASTILLO how much the ecstasy was going to cost and CASTILLO appeared unsure.
- i. [Cst. R.] looked at Daniel MACNEIL and said "Last time I had bought 40 for \$200". CASTILLO looked at Daniel MACNEIL and they both began conversing rapidly in Spanish.
- j. [Cst. R.] stated that he heard the words "quatro" and "centos".
- k. CASTILLO looked at [Cst. R.] and said "Okay four dollars each". [Cst. R.] replied "four hundred" and CASTILLO said "yes".
- l. [Cst. R.] looked at Daniel MACNEIL and said "thanks" and Daniel MACNEIL proceeded to put his hands up to his side and laughed stating "not me". Daniel MACNEIL's cell phone rang and he proceeded to answer it at this time.
- m. [Cst. R.] paid CASTILLO \$400 for 100 tablets of ecstasy and CASTILLO counted the money once he accepted it.

[25] In refusing the application to cross-examine the trial judge said this:

- [11] Mr. MacNeil asserts that he should be allowed to cross-examine the affiant on paragraphs 4 to 6 of the affidavit which set out what the affiant describes as "an accurate summary of the investigation." Mr. MacNeil argues that the paragraphs would have misled the authorizing judge and that he is entitled to cross-examine the affiant on the paragraphs to show the affiant's summary is inaccurate.
- [12] In making that argument, Mr. MacNeil suggests the authorizing judge would rely on and be unduly influenced by the introductory paragraphs in making his determination as to whether the authorizations should issue. In his argument, Mr. MacNeil suggests that the authorizing judge in this case would rely heavily on the affiant's summary of the investigation and would not have the time or inclination to review the remainder of the affidavit in detail to determine whether the facts disclosed in the text of the affidavit supported the affiant's summary.
- [13] The description Mr. MacNeil advances of the authorizing judge's role is similar to that advanced in Pires and Lising, as outlined at para. 22:

I wish to note however that the appellants' description before this Court of the authorization process and the passive role of the authorizing judge in that process is inaccurate. On the role of the authorizing judge, the comments of LeBel J. in *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, bear repeating:

Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. He or she should not be reluctant to ask questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant. [para. 29]

- [14] In other words, it is the authorizing judge who must satisfy himself or herself that the authorizations should be granted, and in what terms, after a thorough review of the material and after making any enquiries which are necessary about the material. To suggest that the authorizing judge in this case would ignore his duty to review the materials thoroughly and determine whether a need for the authorizations is demonstrated by the material and instead rely on or be unduly influenced by the opinion of the affiant is inappropriate at best and as noted in *Pires and Lising*, a misunderstanding of the authorizing judge's role.
- [15] Mr. MacNeil submits that cross-examination should be allowed so that he can show that the affiant made false or misleading statements particularly in the introductory statement as that would tend to mislead the authorizing judge. He asserts that based on the text of the affidavit, to which he referred in argument, that I should conclude that the inferences the affiant drew in the accurate summary were not fair, and that the affiant took licence with the facts and made Mr. MacNeil seem more villainous than the facts indicated.
- [16] Mr. MacNeil seeks to cross-examine the affiant to determine why he misled the Court. He says it is necessary to determine whether it was through inadvertence or negligence or was deliberate. Mr. MacNeil submits that it is important for the reviewing judge to know why the affiant made the statements in the impugned paragraphs in determining whether the authorizing judge should have issued the authorizations.
- [17] Mr. MacNeil refers to *R. v. Morelli*, 2010 SCC 8 as support for the proposition that false and misleading statements in an introductory statement should be viewed with more concern because the authorizing judge is likely to be misled by the early statements in the affidavit when reviewing the remainder of the affidavit.

- [18] However, in my view, Morelli, *supra*, does not stand for the broad proposition advanced by Mr. MacNeil. It is apparent from reading Morelli, the reason for the Court's concern about the impugned paragraph in that case was that it was the first paragraph to adduce specific facts in support of the application and contained two glaring and misleading inaccuracies as to what the affiant saw on a computer screen when he saw nothing of the sort described in the paragraph.
- [19] In this case, Mr. MacNeil asserts that the "accurate summary" is not borne out by the remainder of the material in the affidavit and that the inferences drawn by the affiant are unsupported by the evidence in the text of the affidavit. Counsel for Mr. MacNeil made extensive references to the other paragraphs in the 168-page affidavit in order to demonstrate that the affiant's belief as to what was an "accurate summary of the investigation" was not accurate based on an analysis of the affidavit as a whole.
- [20] However, the belief or opinion of the affiant as to whether the material presented to the authorizing judge established the need for an authorization or what inferences can or should be drawn from the text of the affidavit is irrelevant. It is for the authorizing judge to determine whether an authorization should be issued based on the totality of the material presented, augmented by any questions he might address to the applicant, not a summary of what the affiant believes should be concluded on the basis of the evidence in the affidavit. Paragraph 5 clearly sets out that the contents of the paragraph are based on the affiant's belief.
- [21] As well, Mr. MacNeil contends that if the "accurate summary" is found to not to be accurate that puts into issue the affiant's credibility and cross-examination is necessary to explore that matter further. As stated in *Pires and Lising*, there is no doubt that the affiant's credibility may be relevant on the review. However, at best, cross-examination on the impugned paragraphs in this case may reveal that the affiant over-stated what conclusions or inferences could be drawn from the evidence set out in the text of the affidavit.
- [22] The statement in issue is:
- During two of the undercover purchases of ecstasy from Castillo on November 25th, 2005 and December 16th, 2005, Daniel MacNeil was present and facilitated in the sale of the ecstasy by negotiating price and commented on the purity of the ecstasy.
- [23] Mr. MacNeil takes issue with whether that statement is accurate given the evidence described later in the affidavit.
- [24] The meetings in which the two undercover purchases were made are disclosed in detail of the text of the affidavit. An undercover officer, [Cst. R.], purchased drugs from Mr. Castillo on November 25, 2005 and December 16, 2005. On both occasions, Mr. MacNeil was present while [Cst. R.] and Mr. Castillo were negotiating the price of the drugs. In the affidavit, there is evidence that on November 25th there were discussions in Spanish between Mr. MacNeil and Mr. Castillo after [Cst. R.] made an offer to Mr. Castillo to purchase 40 ecstasy tablets for

\$200. At the end of the discussions between Mr. MacNeil and Mr. Castillo, Mr. Castillo immediately turned to [Cst. R.] and agreed to the price he had offered. [Cst. R.] thought he understood three words in Spanish and asked Mr. MacNeil about one of the words stating "I understand some of that. I am from Montreal, I speak French. Dos centos is two hundred, right?" Mr. MacNeil replied "Just what we didn't want you to hear."

- [25] The evidence is that during the December 16, 2005 undercover purchase, Mr. MacNeil corrected Mr. Castillo when he described the tablets he was selling to [Cst. R.] as good quality and MD MAX. Mr. MacNeil said that they were MDMA. There was a discussion in Spanish between Mr. MacNeil and Mr. Castillo after the [Cst. R.] said he had paid \$200 for 40 tablets of ecstasy the last time. After the discussion with Mr. MacNeil, Mr. Castillo looked at [Cst. R.] and said "Okay four dollars each". [Cst. R.] looked at Mr. MacNeil and said, "Thanks", whereupon Mr. MacNeil put his hands to his side and laughed, stating: "Not me."
- [26] In my view, the inferences drawn by the affiant and set out in his "accurate summary of the investigation" are possible on the evidence described in the affidavit. However, as stated earlier, what inferences the affiant draws are irrelevant. It is the authorizing judge who is tasked with the duty of determining whether the statutory pre-condition of reasonable and probable grounds has been made out on a review of the whole of the material including the text of the affidavit.
- [27] Accordingly, I have concluded that the cross-examination of the affiant as to why he believed his summary was accurate will not assist the determination of the relevant issues and will not be permitted. [Emphasis added.]
- [26] As the reasons of the trial judge reveal, she carefully examined the grounds for the application. She determined that the conclusions set out in the summary of the investigation were supported by the evidence, and that in any event the issuing judge would have reached his own conclusions on the evidence. It follows that if disputed paragraph b(i) was not misleading, there was no basis on which to cross-examine the affiant on an alleged failure to comply with his duty to make full and frank disclosure. Even if the paragraph might be said to present a robust view of the evidence in light of the paragraphs that followed, then the evidence on which the conclusion was based was there in the affidavit for the issuing judge to scrutinize himself.
- [27] The same observations must be made of the statements in the summary referring to Morneau. The evidence with respect to Morneau was set out in the body of the affidavit. There was nothing to be gained in cross-examining Cst. Greenaway about his opinion of the strength of the evidence in the affidavit. That was for the issuing judge to decide.
- [28] I would not accede to this aspect of the first ground of appeal.
- [29] This was not the only basis, however, on which the appellant wished to cross-examine Cst. Greenaway. He also wanted to pursue the question of "investigative necessity" with him.

[30] The trial judge concluded that there was no need to fulfill the requirement of investigative necessity as the exception in s. 186(1.1) was met by the circumstances of this case.

[31] Section 186(1.1) follows s. 186(1) (reproduced above). It provides:

(1.1) Notwithstanding [s.186(1)(b)], that paragraph does not apply where the judge is satisfied that the application for an authorization is in relation to

- (a) an offence under section 467.11, 467.12 or 467.13;
- (b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or
- (c) a terrorism offence.

[32] For reasons which I will not reproduce here the trial judge found s. 186(1.1) applied in the circumstances of this case and that it was therefore unnecessary for her to decide whether the appellant should be permitted to cross-examine Cst. Greenaway on his assertion that investigative necessity required the issuance of the wiretap authorization.

[33] In this Court the appellant noted that the application before the authorizing judge did not refer to s. 186(1.1). His counsel submitted that it must be inferred that the authorizing judge did not consider that section of the Code in determining whether the authorization should be granted. Counsel for the appellant submitted it followed that it was wrong for the trial judge to conduct her review on a point not before the authorizing judge.

[34] Crown counsel defended the ruling in this Court on the basis that no matter whether s. 186(1.1) applied in the circumstances of this case or not, the trial judge would not have ordered cross-examination on the question of investigative necessity in any event. The Crown asserted that the appellant had not identified specific areas of cross-examination that would have assisted the trial judge in determining whether the authorizing judge could have been satisfied that investigative necessity had been established. As the Crown put it in its factum, the appellant "did not identify any facts, materials, or information relevant to the issue, beyond the four corners of the affidavit. The application to cross-examine on investigative necessity was simply a prelude to an argument about what conclusions could be drawn from the averments in the affidavit. Cross-examination was not likely to elicit evidence relevant to the trial judge's determination of whether the facts in the affidavit were capable of establishing investigative necessity." I agree with this submission. I would not accede to this aspect of the first ground of appeal.

[35] In the result I am not persuaded that the trial judge erred in denying the appellant's application to cross-examine Constable Greenaway. I would not accede to this ground of appeal.

The Second Ground of Appeal – Did Reasonable Grounds Exist for the Issuance of the Warrants?

- [36] The appellant submitted that the trial judge erred in finding that the authorization in question was facially valid. His counsel submitted that the trial judge erred in finding that there were reasonable grounds upon which it could be issued. The appellant's central complaint on this ground was that the information supplied by the seven unnamed informants was uncorroborated and unreliable.
- [37] The evidence provided by the informants, when read together as a whole, provided a clear, though somewhat complicated picture of the appellant as a major street trafficker and person behind a number of dial-a-dope lines in Surrey and Langley. The evidence of the informants is lengthy and intricate with some parts of their information being unconfirmed, much of it corroborated by information from other informants, and some of it corroborated by the observations of police officers.
- [38] Constable Greenaway's affidavit designated the confidential informants as Informants A through G. Police knowledge of each informant was set out near the beginning of the affidavit, and the information provided by each informant was included later in the affidavit, in chronological order along with the other events of the investigation.
- [39] Rather than tediously rehearsing all of the evidence, I will set out some examples of the evidence found in the affidavit of Cst. Greenaway.
- [40] Constable Greenaway's affidavit set out that Informant A provided information to a Corporal Hurst on one occasion, in person, in March of 2002. Cpl. Hurst was able to substantiate some, but not all, of the information provided by Informant A through independent police investigation. Informant A's primary motivation was to "win favour with the police". Informant A's criminal record was appended to the affidavit, with the details redacted to protect the informant's identity.
- [41] Informant A provided information in March 2002 to the effect that:
- (a) Mr. MacNeil is known as Nasty and his brother is known as Blue.
 - i. The identification of Mr. MacNeil as Nasty was corroborated by Informant B (who said Nasty's name is Daniel MacNeil) and Informant F (who said Nasty's first name is Dan).
 - ii. The assertion that Nasty and Blue are brothers was also corroborated directly by Informant B, and indirectly by Informant C who said Nasty and Blue were involved together in dial-a-dope drug trafficking.
 - (b) Mr. MacNeil, Blue and a Mr. Ghuman (referred to elsewhere in the affidavit as "Dip" and "BG") are active in the Surrey drug trade and control numerous stash houses. The report about Mr. Ghuman's participation in drug activity with Mr. MacNeil was corroborated by Informants B, D and F. The police searched a stash house said to be associated with the MacNeil brothers, but did not secure any direct evidence proving they were in control of the site.

- (c) Mr. MacNeil was running a Surrey "crack house" where a man was shot "last year", that is, some time in the year before informant A provided the information in March 2002. Cst. Greenaway was unable to corroborate this detail.
- [42] Cst. Greenaway's affidavit stated that since April 2005, Informant B provided information to Cst. Flynn on approximately ten occasions, which led to the seizure of drugs valued at \$2,000, recovery of stolen vehicles, and multiple drug-related charges as described later in the affidavit. Informant B was in custody on the first occasion when the information was provided, as a result of which charges were not recommended to the Crown. Informant B's primary motivation was said to be financial gain, and this individual had been paid approximately \$1,000. Informant B had outstanding criminal charges. Informant B's criminal record was appended to the affidavit, with the details redacted.
- [43] The information provided in April, May, July and November 2005 by Informant B, as stated in Cst. Greenaway's affidavit, can be summarized as follows:
- (a) Mr. MacNeil is a major street level trafficker known as "Nasty", who drives a white Hummer and lives in White Rock.
- i. The identification of Mr. MacNeil as Nasty was corroborated by Informant A (who said Nasty was Daniel MacNeil) and Informant F (who said Nasty's first name was Dan). The fact that Mr. MacNeil drove a white Hummer and lived in White Rock was corroborated by independent police investigation.
- (b) Informant B identified a number of dial-a-dope telephone lines allegedly operated by individuals for or on behalf of Mr. MacNeil.
- i. Informant B had personally purchased drugs from many of these dial-a-dope lines.
- ii. Some of this information was corroborated by undercover drug purchases from the same dial-a-dope phone lines, including one dial-a-dope number provided to an undercover operator by Mr. Castillo.
- iii. Several of the numbers were corroborated by Informant F and one number was corroborated by two separate anonymous tips.
- (c) Informant B identified several of Mr. MacNeil's associates in the drug trade, including a Mr. Ghuman and "JJ".
- i. The information about Mr. Ghuman's participation in drug activity with Mr. MacNeil was corroborated by Informants A, D and F.
- ii. The information about the participation of "JJ" in drug activity with Mr. MacNeil was corroborated by Informants D and F.

- [44] Cst. Greenaway stated in his affidavit that Informant F provided information to Cst. Gallamore six times after May 2006. Some of Informant F's information had been corroborated by independent means, and some could not be corroborated. Informant F received \$150 for providing information. Informant F's criminal record was appended to the affidavit with the details redacted.
- [45] The information provided in May, June and August 2006 by Informant F, as found in Cst. Greenaway's affidavit, can be summarized as follows:
- (a) Nasty, whose first name is "Dan", a drug dealer said to distribute 80% of the heroin in Surrey, is involved in marihuana grow operations, and runs multiple dial-a-dope lines in Surrey and Langley.
 - i. Mr. MacNeil's involvement in heroin distribution was corroborated by Informants B and D, and his role in running dial-a-dope lines was corroborated by Informants B and D.
 - (b) Informant F identified a number of individuals who worked for or with Nasty in the drug trade including (i) "DP" or "Dip", (ii) a Cuban called "Tony M" who runs a marihuana house, and (iii) "JJ".
 - i. Mr. MacNeil's association with "DP" or "Dip" was corroborated by Informants A and B. Mr. MacNeil's association with a "Cuban" running a marihuana house was corroborated by undercover drug purchases from Mr. Castillo at his residence in Surrey (some in the presence of Mr. MacNeil), and by the fact that Mr. Castillo was Cuban. The involvement of "JJ" in Mr. MacNeil's drug trafficking activities was corroborated by Informants B, C and D.
 - (c) Informant F identified Nasty's cell phone number as [telephone number]. The police found this same number stored in the memory of a cell phone under the name "Nasty" seized from Mr. Lucier (an alleged drug supplier), and a cell phone seized from Mr. MacNeil's brother (under the name "N").
 - (d) Informant F identified two separate dial-a-dope telephone lines allegedly operated by individuals for or on behalf of Mr. MacNeil. One number was corroborated by Informant B, several anonymous tipsters, and the arrest of two individuals using this number for dial-a-dope drug trafficking. The other number was corroborated by Informant B, who claimed to have purchased drugs using this number.
- [46] In her May 17, 2010 ruling on the voir dire the trial judge summarized the appellant's position as this:
- [3] Mr. MacNeil asserts that the informant information does not provide reasonable and probable grounds for the authorizations because the tips are very vague and do not have the degree of reliability that is necessary for reliance on a confidential informant. He submits it is apparent on the face of the affidavit that the affiant could place no reliance on the informant tips. As well, he says the affidavit is woefully inadequate and exaggerates the links between Mr. MacNeil and street-level drug dealers. Stripped of its misleading statements

and deficiencies, all that is left is vague, unsourced, and uncorroborated tips from unnamed informants that Mr. MacNeil is a drug dealer.

- [47] The trial judge eventually dealt with the informant evidence in this way:
- [35] The evidence before the authorizing judge was that there had been a series of tips, all of which provided information about Mr. MacNeil, including that his street name is Nasty and he is a drug dealer. There are two named informants, seven confidential informants, and two anonymous tips, all of whom stated that Mr. MacNeil was involved in dealing drugs.
- [36] Although Mr. MacNeil attempts to parse the affidavit and take issue with some of the paragraphs, all of the information he points to in other paragraphs in the affidavit as not supporting the affiant's conclusions and statements was before the authorizing judge.
- [37] For example, Mr. MacNeil takes issue with the information provided by Informant A because there is no comment in the affidavit that Informant A is of unknown reliability and the evidence was from 2002, well before the current investigation commenced. However, there is no comment from the affiant that Informant A is reliable. Some of the information given by Informant A is corroborated. Further, Mr. MacNeil contends that the affiant's reference to the corroboration for Nasty controlling in excess of 10 marijuana grow operations is misleading. The information pointed to as corroborating that statement is from Informant F and is regarding a marijuana grow operation in May 2006. Mr. MacNeil argues that information provided by Informant F could not constitute corroboration of the tip from Informant A. However, that information was all before the authorizing judge and it was up to him to determine whether the reference provided any corroboration.
- [38] As well, Mr. MacNeil contends that the corroboration of Informant B's information that Mr. MacNeil is a major drug dealer in Surrey and his street-level name is Nasty is materially misleading because it is based on the uncorroborated evidence of other informants.
- [39] However, as stated earlier, it is the totality of the circumstances that must be looked at in assessing whether the informant information is reliable. Many of the informants provided information that Mr. MacNeil was a drug trafficker and was involved in a dial-a-dope operation. All of that evidence was before the authorizing judge, including the source of the information and whether the informants were of proven reliability. The degree of detail of the information provided by both the named and confidential informants was evident to the authorizing judge on the face of the affidavit.
- [40] Mr. MacNeil contends the statement that it is unknown where Mr. MacNeil stores his drugs is materially misleading because it gives the impression that Mr. MacNeil stores drugs somewhere. However, it is clear from the affidavit the police have been unable to corroborate if and where Mr. MacNeil stores drugs.
- [41] The issue on this voir dire is whether, after disregarding the inadmissible material, there is some basis upon which the authorization could have been issued. In other words, even without the informant information that is unreliable because it was not stated to be based

upon personal knowledge or not corroborated or of insufficient detail, was there other material before the authorizing judge that could have satisfied him that there were reasonable and probable grounds to believe that the specified offences had been or were being committed?

- [42] In the case at bar, the information provided by the informants is considerably more than simply a tip as to past, present, or future occurrences. [Emphasis added.]
- [48] After summarizing the other evidence contained in the affidavit the trial judge concluded:
- [55] In my view, there is a basis in the affidavit upon which the authorizing judge could have issued the authorizations. The basis upon which the authorizing judge could have issued the authorizations to intercept Mr. MacNeil's private communications consists of a body of informant information from both the named and unnamed informants that is of sufficient detail and is corroborated as it relates to the probability of Mr. MacNeil's past and present involvement in drug trafficking and his involvement and role within a dial-a-dope operation with a group of other individuals, including Mr. Castillo. That, together with the observations of the undercover operators, are all circumstances upon which the issuing judge could conclude that there was a probability that the interceptions sought would afford evidence of the specified crimes. As noted in *R. v. Madrid* (1994), 48 B.C.A.C. 271, at paragraph 83: judges may "put two and two together on a question such as this one".
- [56] The affidavit contains information gathered since July 2005 linking Mr. MacNeil and people associated with him to drug trafficking in a sophisticated dial-a-dope operation. The affidavit sets out the ongoing involvement of the organization with dial-a-dope sales of drugs, the evidence of numerous individual sales by lower-level dealers to undercover officers, and the steps taken by Mr. MacNeil to insulate himself and the management of the enterprise from direct involvement in the sales.
- [57] It is my view that the authorizing judge could, using the Debot and Garofoli factors, have found reliability in the informant information such that it could form part of the basis for his orders. I am of the opinion based on a review of the whole of the material, including the named and confidential informant information and the other investigative evidence, that the authorizing judge could have concluded that the interception of Mr. MacNeil's private communications would afford evidence of the specified offences involving drug trafficking and a conspiracy to traffic in drugs.
- [49] In my view these passages from the voir dire ruling demonstrate that the trial judge properly understood her role as a reviewing judge and applied the principles accordingly.

[50] As the trial judge noted, the reviewing judge does not stand in the place of the justice who issued the authorization. The question is not whether the reviewing judge would have granted the order, but whether there was any basis on which the issuing justice could have done so: Garofoli at 188; R. v. Araujo at para. 51. In other words, the reviewing judge should only set aside the authorization if satisfied, on the whole of the material presented, that there was no basis on which it could be sustained: Garofoli at 188.

[51] In performing his or her task on review the trial judge is not to assess the evidence piecemeal but to examine the "totality of the circumstances". As Frankel J.A. explained in R. v. Whitaker, 2008 BCCA 174, 254 B.C.A.C. 234 at paras. 39-40, leave to appeal ref'd [2008] S.C.C.A. No. 246:

[39] The "reasonable grounds" standard is well-known. The Supreme Court of Canada said this about it in Mugesera v. Canada (Minister of Citizenship & Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40:

114 The first issue raised by s. 19(1)(j) of the Immigration Act is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: Sivakumar v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433 (C.A.), at p. 445; Chiau v. Canada (Minister of Citizenship and Immigration), [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: Sabour v. Canada (Minister of Citizenship & Immigration) (2000), 9 Imm.L.R. (3d) 61 (F.C.T.D.)

[40] The judgment of Madam Justice Wilson in R. v. Debot, [1989] 2 S.C.R. 1140 (at 1166), is also apt:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.

[41] A determination with respect to whether reasonable grounds exist requires a consideration of the "totality of the circumstances": R. v. Bracchi, 2005 BCCA 461, 201 C.C.C. (3d) 35 at para. 20; Re Church of Scientology & The Queen (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at 502. This means that, "it is important that the Information be examined as a whole and not one piece of evidence at a time, because each piece of evidence colours other pieces of evidence and a fuller picture emerges by considering all of the evidence together": R. v. Lam, 2002 BCCA 99, 172 B.C.A.C. 161 at para. 10.

- [42] Further, the assessment of the facts relied upon to establish reasonable grounds is made on a practical, non-technical, and common sense basis: *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont.Ct.)(G.D.) at 367. As Mr. Justice Cumming observed in *R. v. Charlton* (1992), 15 B.C.A.C. 272, the person deciding whether the reasonable grounds standard has been met is entitled to "put two and two together": para. 34. [Emphasis added.]
- [52] Where the grounds are based in whole or in part on information from an informant, the Court must consider the "totality of the circumstances" to determine whether the informant information was sufficiently reliable to have formed part of the grounds to support the authorization or warrant: *R. v. Plant*, [1993] 3 S.C.R. 281 at 297. Under this approach the Court must consider: (i) the extent to which the information predicting the criminal offence is compelling, i.e., the extent of detail provided; (ii) the credibility or reliability of the source; and (iii) the extent of corroboration. These are not separate tests but rather factors to be evaluated as part of the "totality of the circumstances". Weaknesses in one area may be overcome by strengths in the others: *R. v. Debot* at 215; *R. v. Plant* at 297-298.
- [53] In my view the trial judge in the case at bar properly held that the informant information in Cst. Greenaway's affidavit contained sufficient indicia of reliability to have formed part of the grounds relied upon in support of the authorization. Viewed in totality, the informant information was sufficiently detailed, reliable, and corroborated to have been considered by the authorizing judge.
- [54] The learned trial judge properly concluded that Cst. Greenaway's affidavit contained facts capable of satisfying the issuing judge that the named drug offences had been or were being committed and that interception of Mr. MacNeil's private communications would afford evidence of these offences. There was compelling information from multiple informants that Mr. MacNeil was involved in the distribution of cocaine, heroin, methamphetamine, ecstasy and marihuana, and in particular that Mr. MacNeil was responsible for a number of dial-a-dope telephone lines in Surrey and Langley. This informant information was corroborated in multiple respects. The fact that the police had not obtained direct evidence of Mr. MacNeil's role in these drug activities did not negate or undermine the reasonable belief that he was involved.
- [55] I would not accede to the second ground of appeal.

Third Ground of Appeal – Did the Trial Judge Err in Failing to Find that the Requirement of Investigative Necessity was not Made Out?

- [56] As I mentioned earlier, the trial judge concluded that it was not necessary for the Crown to show investigative necessity in the case at bar. Rather than defend the ruling on the basis of the "criminal organization" exception provided by s. 186(1.1), the Crown in this Court submitted that there was evidence in this case which supported the conclusion that the authorization was an investigative necessity.

- [57] The investigative necessity requirement in s. 186(1)(b) is met where the authorizing judge is satisfied that, practically speaking, there is no other reasonable alternative method of investigation in the particular circumstances: Araujo at para. 29. The focus for the reviewing court is whether the facts set out in the affidavit could have satisfied the issuing judge that the investigative necessity requirement was met: Araujo at para. 40.
- [58] In Araujo, LeBel J. spoke of "the need for electronic interception in the context of the particular investigation and its objects" (para. 29). In this regard, the investigative necessity requirement applies to the investigation as a whole, not each individual target. The focus of the investigation and its objectives must be considered. He reasoned that s. 186(1)(b) had to be applied in a "practical commonsense fashion" (para. 33), with a realistic understanding of the challenges faced by law enforcement in the investigation of certain kinds of criminal activity, and the limitations of particular investigative techniques. In *R. v. Wasfi*, 2006 BCCA 55, 222 B.C.A.C. 130, Low J.A. held at para. 49 that it was important for the reviewing judge to recognize "the realities" of the criminal activity under investigation when considering the investigative necessity requirement:
- [59] In his factum and oral argument the appellant cited the evidence that the police had collected with respect to Mr. MacNeil's involvement in the dial-a-dope operation:
1. [Constable Greenaway's affidavit showed that the police had placed] multiple undercover officers into situations where they were able to regularly purchase drugs from a variety of alleged "dial-a-dope" dealers. The police were successful in arresting several of such persons. They were simply unable to identify that those drug dealers were connected to ... the Appellant.
 2. The police [conducted] extensive physical surveillance on the Appellant and others, some of whom (but not the Appellant) they identified as being involved in committing criminal offences. Furthermore, the police successfully obtained search warrants for the Appellant's brother's and parents' homes, but no incriminating evidence against the Appellant was located.
 3. Finally, the police also [employed] a "tracking warrant" on the Appellant's automobile for a six-week period from June 23 to August 12, 2006, but inexplicably did not conduct any surveillance on the Appellant's automobile in conjunction with the tracking device in order to determine if the Appellant was committing criminal offences.
- [60] Given the state of the evidence, the appellant submitted that the statements in Cst. Greenaway's affidavit which alleged that "investigative necessity" was established were conclusory statements unsupported by the actual state of the investigation(s). The appellant submitted:

[T]he police were highly successful in utilizing several investigative techniques over a two year period during their investigation. This is not a case where the police tried, but were unsuccessful, in utilizing surveillance, search warrants, undercover officers, tracking warrants, traffic stops, or other investigative techniques. Rather, notwithstanding their successful multi-layered efforts, there was simply no evidence disclosed that the Appellant was, on "credibly-based suspicion" or "reasonable and probable grounds", committing criminal offences.

[61] The Crown characterized what had been turned up by the investigation differently. The Crown submitted that this was not a case where the police rushed to obtain a wiretap authorization without regard to the utility of other investigative techniques. Cst. Greenaway's affidavit, the Crown submitted, reflects that the police drew upon a host of techniques and strategies to achieve the broader objectives of the investigation. The police employed specific undercover activities and surveillance initiatives intended to uncover the drug distribution network and modalities of distribution, without success. The Crown submitted that the police had reached a point where, practically speaking, a wiretap authorization was the only way to meaningfully investigate the offences with a view to achieving the broader objectives of the investigation. Crown counsel's position was that Cst. Greenaway's affidavit demonstrated there were compelling grounds to believe that Mr. MacNeil and his associates were heavily involved in the distribution of drugs, principally, though not exclusively, through the operation of dial-a-dope phone lines. Second, despite resorting to a multitude of investigative techniques over an extended time, the police had been unable to gather direct evidence against Mr. MacNeil. Among other things, the police had been unable to infiltrate the upper echelons of the drug distribution system responsible for supplying the various dial-a-dope lines.

[62] The Crown responded to Mr. MacNeil's criticism of the police for failing to conduct surveillance in conjunction with the tracking device installed on his vehicle by saying that the argument overlooked the reality of the investigation. As counsel put it:

First, extensive physical surveillance of Mr. MacNeil had not produced direct evidence capable of proving his role in the crimes under investigation. ... Second, both Mr. MacNeil and Mr. [Castillo] had shown themselves wary of police surveillance and engaged in counter-surveillance tactics, making further direct surveillance both unproductive and risky to the viability of the investigation. Finally, it was unclear how physical surveillance of Mr. MacNeil for extended periods of time (with or without a tracking device) would ever produce direct evidence showing his role in the crimes under investigation. Indeed, it was a reasonable inference from informer information (including reports that Mr. MacNeil used "stash houses" to store drugs), undercover operators, and surveillance, that Mr. MacNeil took steps to insulate himself from the physical handling of drugs or other incriminating evidence.

[63] In my view the Crown's position is borne out by the evidence. The realities of the criminal activity under investigation had to be taken into account. The informant evidence revealed that the appellant was part of the upper echelons of a drug dealing operation that took place primarily over the telephone lines. Thus the limitations as to what physical surveillance

could achieve are obvious. In the two drug deals with Castillo and the undercover agent, the appellant had shown himself to be wary of connecting himself to the transactions. I agree with the Crown that a case was made out that the police had reached the point in the investigation that a wiretap authorization was the only way to meaningfully conduct the balance of the investigation.

[64] In my view there was evidence to amply support the investigative necessity of intercepting the appellant's private communications. I would not accede to this ground of appeal.

Conclusion

[65] I would affirm the convictions and dismiss the appeal.

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Mr. Justice K. Smith"

I Agree:

"The Honourable Mr. Justice Chiasson"

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