

CANADA / JUDGMENT

R. v. Russell

2012 BCSC 1714

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2012 BCSC 1714 R. v. Russell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Russell,

2012 BCSC 1714

Date: 20121116

Docket: 25023

Registry: Vancouver

Regina

v.

Daniel Ronald Russell, Yong Sung John Lee, Dilun Heng

Barzan Tilli-Choli, Karwan Ahmet Saed,

Ion Kroitoru also known as John William Croitoru

Before: The Honourable Madam Justice Dillon

Ban on publication pursuant to s. 648(1) of the Criminal Code

until jury renders verdict

Reasons for Judgment

on Voir Dire No. 1

Re: Wiretap Authorization P66/2007

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Place and Dates of Hearing:

Vancouver, B.C.

June 26, 28-29, July 3-5, 9,

September 17 and 27, 2012

Place and Date of Judgment:

Vancouver, B.C.

November 16, 2012

Introduction

- [1] The applicants, Barzan Tilli-Choli ("Tilli-Choli") and Karwan Saed ("Saed"), challenge the validity of wiretap authorization P66/2007 ("P66") which was granted on November 22, 2007 and was the first of many authorizations granted that led to charges of conspiracy to murder, first degree murder and attempted murder. A voir dire was declared for this purpose and cross-examination of the affiant was allowed (R. v. Russell, 2012 BCSC 1085). The cross-examination of the affiant, Detective Timothy Rayner ("Rayner"), occurred over six days and the Crown examined Rayner for two days. After these examinations were completed, argument ensued, in the course of which the defence alleged deliberate concealment and destruction of documents by the affiant or the Crown. Unfortunately, this allegation had not been put directly to the witness. The Court allowed the affiant to be recalled and gave more time for the Crown to locate the missing documents. After re-call of the affiant, further argument ensued.
- [2] Judgment was given on this voir dire on September 27, 2012. These are the reasons for that judgment.
- [3] The heart of the issue here is whether an affiant may narrow the offences under investigation for which a wiretap is sought in order to meet investigative necessity, without describing the full scope of the investigation that may have been underway relative to offences for which the affiant does not consider that he has reasonable and probable grounds to seek a wiretap authorization. The applicants argue that the affiant's deliberate failure to disclose the much larger investigation that was underway was calculated to deprive the authorizing judge of the capacity to properly consider whether investigative necessity was established. This usurped the function of the authorizing judge and subverted the process. This strategic material non-disclosure was improper, a ruse, a misrepresentation, and a fraud that should lead to the quashing of the authorization.
- [4] In the alternative, the defence argues that investigative necessity must be interpreted in light of the objectives of the investigation as a whole and that investigative necessity, as amplified upon review, has not been established. If the authorizing judge had been informed of the true state of the investigation, he could not have granted the authorization.
- [5] The Crown argued that the affiant made full, fair and frank disclosure of the investigation at the time the authorization was sought. It contended that the police properly included the offences for which they believed they had reasonable and probable grounds to seek an authorization. The Crown also rejected the applicants' alternative argument that investigative necessity had not been met. The Crown contended that investigative necessity had been made out in relation to the specified goals of the investigation.

Background Facts

(a) Supportive Affidavit

- [6] The 111 page affidavit in support of P66 (the "ITO") was sworn by Rayner on November 22, 2007. The offences for which authorization was sought to intercept private communications included trafficking in a controlled substance, possession of a controlled substance, conspiracy to traffic in a controlled substance, possession of property or proceeds obtained by the commission of designated offences, laundering of property or proceeds so obtained, and conspiracy to possess property or proceeds obtained by the commission of designated offences. The focus was on the cocaine and heroin trafficking of Clayton Roueche ("Roueche"), Chieu Ngo ("Ngo"), Jimmy Leung ("Leung"), Mauro Zuzolo ("Zuzolo") and others. By way of introduction, Rayner stated in paragraph 6:
6. ... To date, the investigation has revealed the following about the above named individuals. Based on this investigation to date, I believe the following to be an accurate summary of the targets' involvement in the investigation:
- 6.a. ROUECHE is believed to supply cocaine to persons operating drug stash houses in the Fraser Valley and Lower Mainland from which cocaine is further distributed. I also believe that between January and June 2007, ROUECHE, with NGO and ZUZOLO, arranged for cocaine distribution in Quebec;
- 6.b. NGO is believed to be a cocaine and heroin trafficker. I suspect he receives kilograms of cocaine from ZUZOLO. NGO operates a dial-a-dope cocaine and heroin trafficking business from a rented apartment at 1201 120 Milross Avenue, Vancouver. An employee, LEUNG, lives at the apartment and prepares drugs for sale by NGO's drug delivery drivers. I believe NGO receives cocaine from TRINH;
- 6.c. LEUNG works for NGO and lives at 1201 120 Milross Avenue, Vancouver. LEUNG prepares drugs for distribution by NGO's drug delivery drivers, including folding flaps of cocaine and heroin, and collects the money from the sale of these drugs;
- 6.d. ZUZOLO is believed to be a cocaine trafficker. I believe he supplies kilograms of cocaine to NGO and others, and was trafficking cocaine on behalf of ROUECHE in Montreal, Quebec;
- [7] The objectives and strategy of the investigation were described generally in paragraphs 7 and 243 of the ITO. In paragraph 7, entitled "Arrest of Ngo Does Not Meet Investigative Goals", Rayner stated the goals of the investigation as follows:
7. Execution of a warrant to search at 1201 120 Milross Avenue, Vancouver would likely provide evidence to support drug trafficking charges against NGO, LEUNG and the drug delivery drivers Jolie PEERS, Krista PEERS and LANGE. However, the investigative goals of the investigation include learning the identity and roles of others involved in the offences under investigation, in particular those who are supplying drugs to NGO, their methods of acquiring and distributing large amounts of cocaine or other controlled substances, finding locations where these drugs are kept and learning of transportation and delivery arrangements. A search of the apartment will not provide such evidence. The arrest of NGO or LEUNG in connection with drugs trafficked from the apartment will not meet the goals of

the investigation.

In paragraph 243, Rayner said that the present strategy of the investigation included the use of wiretap to "determine how and where the cocaine and heroin are obtained, and to gather evidence against the suppliers and other persons involved in the offences under investigation". The strategy also included conducting searches, continuing surveillance and conducting interviews of those involved to stimulate conversations between the targets. In paragraph 244.a.v, Rayner said that the goals of the investigation were to "gather evidence about the suppliers and the distribution levels above the "street level" trafficking conducted" from the identified premises.

- [8] From the introductory paragraph 6 outlining the offences and offenders being investigated, it appears that the investigation was focused on the supply and trafficking of cocaine and heroin to and through Ngo's stash houses in the lower mainland and the supply and trafficking of cocaine through Roueche and Zuzolo in Montreal.
- [9] Although Rayner repeated several times in the ITO that the Combined Forces Special Enforcement Unit British Columbia ("CFSEU"), his "unit", was investigating the alleged trafficking activities (paragraph 5) and that he was receiving information obtained from members of his unit (paragraph 6), it was apparent in the ITO that investigative assistance had been provided by other police units or agencies, locally, nationally and internationally. These included: Vancouver Police Department ("VPD") (paragraphs 12, 64, 76 and 144), RCMP (paragraphs 56, 76 a., 97, 108, 147, 183, 232, and 232 e.), various Quebec police agencies (paragraphs 12, 97, and 106-109), Toronto area police (paragraph 115), United States law enforcement agencies including the United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE") (paragraphs 85-88, 161), and the Australian Federal Police (paragraphs 81 a.-c.). From this and the description of the information obtained from these police agencies it was apparent in the ITO that the investigation was national and international in scope with several cooperating international agencies.
- [10] The affidavit revealed that Ngo and Leung had been targets in another investigation involving Ngo, Leung, Ken Ho ("Ho"), and others in which wiretap authorizations had been received (paragraph 8). In September 2007, the results of those authorizations were compared with other known telephone numbers for Ngo and Leung obtained in the CFSEU investigation (paragraph 10).
- [11] It was also apparent from the ITO that the investigation was complex and related to a gang identified as the "UN gang". Rayner described that he was a member of the Organized Crime Agency of British Columbia, currently assigned to CFSEU (paragraph 1). Members of the Vancouver Police Department's Gang Crime Unit surveilled Malgorzata Lange ("Lange"), believed to be a cocaine and heroin trafficker for Ngo, at Ngo's suspected dial-a-dope operation located at 1201-120 Milross Avenue ("Milross Avenue") on August 15, 2007 and found flaps of cocaine and heroin in her vehicle when later stopped (paragraph 144). When describing the details of the investigation, Rayner said that Informant 4 had identified a drug house as operated by "UN gang members" (paragraph 66.b). Two informants said that

Roueche was the "leader of the UN gang" (paragraphs 71.a, 72, 83.a) and one identified Roueche as Ngo's "boss" (paragraph 19.b). Roueche was said to "own the coke line" (paragraph 67.b). Other persons identified as belonging to the UN gang were Ngo (paragraph 94.a) and Zuzolo (paragraph 103). Ngo and Roueche resided together from February to September 2007 (paragraph 116). Ngo, Roueche and Zuzolo were observed to meet, not always together (paragraphs 111, 125, 127, 128, 129). Informant 1 had told police about Roueche's drug importation activities that he learned through "UN gang members", including Roueche (paragraph 83.a). Roueche was said to get UN gang members to pool their money to purchase cocaine for importation into Canada (paragraph 84.a). Pre-sold shipments of 200 kilograms came through contacts in Mexico and California (paragraph 73, 83.b). Informant 1 said that Roueche never handles the drugs (paragraph 83.c). Another informant was told by Zuzolo that the UN gang was moving large amounts of cocaine to Montreal and Calgary, making \$4,000 per kilogram when sold in Montreal, and that the UN gang was negotiating for a large importation of cocaine into Montreal (paragraph 103). Later, the same informant said that Zuzolo was selling the cocaine at \$25,000 per kilogram (paragraph 104.a).

[12] At the local level, Roueche was believed to traffic in multi kilograms of cocaine to mid-level cocaine traffickers including Zuzolo who had drug stash houses in the lower mainland. Informant information was that Roueche operated a cocaine line throughout the lower mainland and that cocaine of approximately 250 kilograms arrived every second week (paragraph 71). Drug stash houses were targeted on Hornby, Milross, and Burnaby streets in Vancouver and Dawson Street in Burnaby. There was an expected cocaine shipment coming through Abbotsford to Dawson Street in October 2007 through Roueche's cocaine line (paragraph 67), but police surveillance did not confirm the informant information exactly and no intervention occurred. Roueche was observed at the Burnaby Street location (paragraph 77) and was seen with the named persons said by an informant to operate the Burnaby house for Roueche (paragraphs 76-77). The Hornby street location was said by an informant to hold up to 4 kilograms of cocaine at one time (paragraph 64.b). Search and seizures from that location turned up \$45,000 in cash and cocaine, as a result of which charges were recommended (paragraph 65.c). The drug house then moved to Dawson Street (paragraph 66).

[13] Ngo's operation of a drug stash house on Milross Avenue and the dial-a-dope operation observed from there was described in detail in the ITO (paragraphs 130-152). Ngo trafficked in cocaine at the street level from this location, employing Leung, who was believed to prepare the drugs for distribution, and others, who did deliveries (paragraphs 130, 133). Information from an informant gave detail of the phone numbers used by Ngo and that Roueche had called Ngo on his line. The phone numbers were confirmed as connected to Ngo (paragraphs 132, 136). Ngo was observed to come and go from this location. The investigation of Milross revealed that three females worked as drug delivery drivers for Ngo (paragraph 138). From surveillance in April, June, August and September 2007, with some resulting seizures, it was very apparent that Ngo was using drivers to sell heroin and cocaine

from the Milross location (paragraphs 139-147). On October 2, 2007, police seized \$97,680 in cash in a brown paper bag that Ngo had given to Brandi Coulter ("Coulter") and was believed to be the proceeds of drug trafficking (paragraphs 180-186).

- [14] Rayner identified that police had been looking into Roueche's alleged drug importation and trafficking and had considered his alleged conspiracy to import cocaine. Roueche was identified as a "major drug importer and trafficker" (paragraph 244.b.ii). The international aspect to Roueche's criminal drug activities related to the import of cocaine through Mexico and California (paragraph 23) as investigators learned through an informant in June 2006 (paragraphs 73, 83), another informant in August 2006 (paragraph 84), and then a seizure by U.S. agents in California on September 27, 2006 (paragraphs 74, 85-88). On the latter date, a Canadian pilot, Leclerc, was stopped by U.S. authorities enroute to Chilliwack from Los Angeles with 144 kilograms of cocaine in his aircraft (paragraph 85). Leclerc was arrested and gave statements to U.S. agents and to Canadian CFSEU investigators who attended in California (paragraphs 86, 88). Leclerc identified Roueche as being one of the persons who orchestrated Leclerc's 12 previous importations of cocaine into Canada (paragraph 86). Leclerc entered into a proffer agreement to cooperate with law enforcement agencies in the expectation that his cooperation would be taken into account in sentencing. He remained in U.S. police custody as at October 10, 2007 (paragraph 87).
- [15] There was an implied link of these cocaine shipments to the investigation into cocaine going to Montreal and Calgary through Roueche, Zuzolo and Ngo. In January 2007, Ngo, Zuzolo and Roueche had travelled to Montreal together (paragraphs 19.b and 92). In March 2007, an informant said that the UN gang was moving large amounts of cocaine to Montreal and Calgary and that Zuzolo, who spoke with Roueche regularly, was holding and distributing the cocaine (paragraphs 103.a, 103.c-103.e). In June 2007, the same informant said that Zuzolo was travelling to Montreal, which information was confirmed when Zuzolo and Ngo arrived in Montreal and were seen meeting various persons (paragraphs 104.a.ii, 104.b.i, 106-109). Ngo, Roueche and Zuzolo were observed to meet, not always together, six times between September 12, 2007 and November 16, 2007, including a meeting of the three just before Ngo left for Montreal on November 9, 2007 (paragraphs 111-112, 125-129).
- [16] A further U.S. connection to the cocaine importation investigation was described in relation to Ken Ho ("Ho"), who was suspected of trafficking with Ngo and Leung (paragraph 5.e). Rayner revealed that Ho was being investigated for arranging the shipment of cocaine from Los Angeles to Ontario by commercial trucks (paragraph 161.a). Ho had been named along with Darren Zhu ("Zhu") as a principal known person in two previous authorizations in another investigation. Intercepts made pursuant to those authorizations had resulted in the seizure of two cocaine shipments in the United States and one shipment of methamphetamine in Manitoba in September 2007. Intercepted conversations between Ho and Ngo revealed that they did not like to use the phone to communicate and surveillance established that Ngo attended at Ho's residence on October 2, 2007.

- [17] There was also a link established in the ITO between Roueche and Zhu, believed to be importing cocaine and manufacturing methamphetamine (paragraph 5.j). Zhu had been the target of a separate file that had received authorization to intercept his communications, resulting in seizures in Australia of methamphetamine in August and September 2007. Zhu continued to talk about the trafficking and production of methamphetamine during the time that he met with Roueche (paragraph 81.f). Roueche met with Zhu on October 30, 2007 before attending at the Burnaby stash house (paragraphs 77, 78) and then met with Zhu again on November 8, 2007 (paragraphs 78, 80). Charges were proposed against Zhu once that investigation was complete (paragraph 81.g).
- [18] Rayner summarized the "present status of the investigation" in paragraph 242 as: Ngo continuing to control the dial-a-dope operation from Milross with Leung managing the operation through supply of cocaine and heroin to drug delivery drivers; Roueche supplying cocaine to the Burnaby stash house run by his associates; Roueche, Ngo, and Zuzolo in regular contact and continuing to be involved in the distribution of cocaine in Montreal; and Ngo believed to purchase cocaine from Zuzolo and Roueche.
- [19] As for the investigative plan, physical surveillance had yielded some results but was unlikely to reveal the identities of all of those involved in the offences under investigation, to determine what activities took place at the identified locations, or to allow police to gather sufficient evidence to prosecute all involved (paragraph 244.a). Rayner said that there were grounds to obtain a search warrant for Milross but the execution of such a warrant would not attain the goals of the investigation to catch the higher ups (paragraph 244.a.v). Informants and agents were said to be of little assistance for various reasons: the five informants relied upon feared for their safety and would not testify, their information was dated and they were unlikely to obtain timely information, one had not been involved in the criminal activities and could not provide detailed information, another could only give local information, and no other agents had been cultivated or identified who could gain knowledge of the offences under investigation (paragraph 244.b). Production orders and number recorders had confirmed Ngo and Leung as users of Milross but had not been successful to detect Roueche's associations or activities (paragraph 244.c).
- [20] Rayner stated that "No search warrants have been executed to date" and that while searches might support "street level drug trafficking charges against Ngo, Leung and the drug delivery drivers...[it] would not assist the investigative goals of the investigation including gathering evidence against the suppliers" (paragraph 244.d). Details of forensic examination conducted to date referred to Leung's fingerprints found on paper flaps with traces of cocaine and the cell phones used by Ngo and others.
- [21] With respect to the use of undercover operators, Rayner stated at paragraph 244.f:
- 244.f.i The success of an undercover operator is dependent on the extent to which the undercover operator is able to gain confidence and trust. I do not believe an undercover operator could infiltrate the alleged suppliers ROUECHE, ZUZOLO or TRINH;

244.f.ii. Investigators believe that it may be possible to introduce an undercover operator at the street level of NGO's dial-a-dope operation, but this would not satisfy the goals of the investigation. It may provide evidence to support charges against one or more of NGO's drug delivery drivers, and may even support a single charge of trafficking (at the street level) against NGO. However, this would not reflect NGO's role as head of a significant dial-a-dope operation, or his position as a mid level buyer and supplier of drugs. It would also not assist in the identification of NGO's drug suppliers nor provide evidence regarding NGO's involvement in the Montreal, Quebec drug trafficking operation.

[22] Finally, Rayner said that witness and suspect interviews could provide information but would alert other persons and compromise the investigation (paragraphs 244.h, 244.i).

(b) Cross-examination of the Affiant

[23] The cross-examination of the affiant included much specific detail that cannot adequately be summarized here. Reference will be made to particular matters as necessary in the assessment of omissions and misstatements that follows the consideration of legal principles.

[24] An investigation known as E-Prada began within CFSEU in about September 2006 when Calgary police advised of information related to Leclerc that they had received through intercepted communications. Shortly afterwards, Leclerc was arrested in California with 144 kilograms of cocaine in his aircraft. U.S. authorities entered into a proffer agreement with Leclerc whereby he provided information in return for consideration upon sentencing. Leclerc cooperated fully. Leclerc identified Roueche, Daniel Russell ("Russell") and Douglas Vanalstine ("Vanalstine"), amongst others, as involved in the drug shipment which was destined for British Columbia. He described the organization that he knew about in California and told about the drop of one cocaine shipment in Chilliwack, British Columbia. He described Roueche, Vanalstine and Russell as high ranking members of the UN gang. Leclerc's information was current only to the time of his arrest.

[25] Roueche was one of the main targets of the E-Prada investigation. Roueche was known to smuggle large amounts of marijuana to the United States and import cocaine through the United States to Canada. Roueche and others identified as being in the UN gang had been the targets of other investigations by various lower mainland investigative teams for a number of years, at least since 2002. CFSEU worked cooperatively with these other teams in the E-Prada investigation and continued to liaise with them throughout the investigation.

[26] Rayner and other CFSEU investigators also worked cooperatively with United States police authorities, starting with the Leclerc seizure. The Drug Enforcement Administration ("DEA") and ICE had agreed to "fully cooperate with CFSEU-BC investigators in any ongoing investigation, in Canada, where Roueche and Vanalstine or other associates of the UN gang [were] involved". U.S. and Canadian authorities shared investigative documents, travel information about suspects, and general investigative information related to the importation of cocaine into Canada and the exportation of marijuana to the U.S. Although this was

variously described in notes as a "joint investigation", Rayner testified that it was not "joint" in the full sense of the word and there was not full cross-border investigative exchange. The cooperation at all times related to investigation of the cocaine importation/marijuana exportation activities of the UN gang, for which the U.S. investigation was winding down towards an indictment while the Canadian investigation was just starting. Rayner explained that the U.S. information was useful in a limited sense because, while it pointed Canadian investigators in a certain direction and provided important background to UN gang drug activities, it was outdated by the time that the CFSEU investigation started.

- [27] Following the Leclerc seizure, Calgary police assisted with provision of documents taken during the search of the Leclerc home and CFSEU searched for Leclerc travel information. Rayner and others from CFSEU attended in California with respect to the Leclerc matter in early December 2006 and returned to interview Leclerc when Leclerc "proffered" on February 12, 2007. Leclerc identified Russell and Roueche, among others, from photos, as members of the UN gang. His Blackberry was seized and turned over to Canadian authorities for search in January 2007, the results of which were shared with U.S. police. There is no evidence that part of the Leclerc proffer involved testifying in Canada. The focus of the investigation in the spring of 2007 was driven by the Leclerc seizure and the proffered information related to importation of cocaine and the export of marijuana.
- [28] E-Prada investigators first met with U.S. investigators to share information on October 27, 2006. Rayner went to Los Angeles with other investigators in early December, 2006. There was a further meeting on December 14, 2006 to share information about the American investigation. By this time, the U.S. police were close to indicting Roueche and others and planned on a sealed indictment which remained confidential until October 2007. ICE informed Canadian investigators about other Canadians arrested in the U.S. who were cooperating with U.S. authorities, about U.S. access to an informant, and about use of undercover agents in the California money laundering scheme. Rayner said that this information was too dated to be of practical use to Canadian authorities. Canadian involvement in the Leclerc proffer was also discussed. In January 2007 at another meeting between U.S. and Canadian investigators, ICE investigators provided documents in relation to their investigation. The U.S. information related to events in 2005 and 2006 involving the smuggling of Canadian marijuana into the U.S. suspected to have been organized by Roueche, Vanalstine, and Russell. Another meeting occurred in Canada in May 2007 when U.S. investigators attended in Vancouver to interview someone. U.S. Investigators appear to have been granted a 60 day country clearance to attend to business in Canada: however, the full details of this document were missing and not presented into evidence. In August 2007, more information about Leclerc's airplane activity from Abbotsford airport and travel information related to E-Prada targets and associates was shared with American authorities. About this time, police were alerted to the presence of a UN gang member from Los Angeles who was producing a movie in Toronto and who was alleged to be responsible for putting all the cocaine shipments together in Los Angeles for shipment to Canada. Leclerc had identified this man as the coordinator of the 144 kilogram shipment in September 2006 and

U.S. investigators had connected him to a residence in California also linked with Vanalstine. Consideration was given to establishing an undercover operation through this connection but nothing came of it. U.S. police planned to place a wiretap interception on this person when he returned to Los Angeles, but there is no evidence that this was ever done or shared. In the meantime, the person was under a Canadian immigration bond. Also in August 2007, Leclerc was interviewed again by U.S. investigators concerning information obtained from his cell phone that had been seized and analyzed by Canadian police. U.S. investigators shared the interview summary with E-Prada investigators. By late October 2007, CFSEU learned that U.S. authorities had indicted Roueche, Vanalstine and Russell on charges of conspiracy to distribute and export cocaine, conspiracy to import marijuana, and conspiracy to engage in money laundering. The charges related to investigation of drug trafficking activities that ended in 2006. Leclerc had not entered pleas to any charges as at October 10, 2007.

- [29] Calgary police continued to assist with surveillance of Russell and Vanalstine before they departed to Mexico and then to Colombia in late June 2007. Their travel was recorded and the two were subjected to a secondary inspection when they returned via Calgary to Canada. While in Calgary, the two were seen with a known Calgary drug dealer. RCMP in Colombia also assisted.
- [30] Investigators worked to obtain number recorder orders in January and March 2007 for certain telephones thought to be used by Roueche, Vanalstine, and others. The focus of the investigation at that time was the importation activities of Roueche and others. The ITOs in support of these production orders were more specific about the details of the investigation in some respects, particularly the details of the Leclerc investigation, than was the ITO in support of P66. Special surveillance teams had been employed and surveillance continued.
- [31] The CFSEU team of investigators on the E-Prada investigation were from various police agencies, including Abbotsford police, VPD, RCMP, and some specialty teams. Investigators had decided early on that wiretap would be required for the investigation. Rayner had been appointed as the affiant by November 2006 and worked on the P66 ITO continuously until November 2007. There were many drafts, changes, consultations, and discussions about what should be in the affidavit. Initially, the drafted ITO focused on offences related to importation and exportation of drugs. The targets were based upon knowledge at the time. The focus then widened in the spring of 2007 to include crimes of violence with expanded primary targets. Consideration, consultation, and drafting effort went into a combined federal and provincial warrant. This was abandoned because, by July 2007, Rayner was concerned that the grounds that may have existed for a wiretap in the spring were now gone. The focus re-shifted again. Rayner stated that he did not believe that he had reasonable and probable grounds to proceed on the importation charges. By August 2007, police decided that the best way to succeed on obtaining a wiretap authorization was through focussing on the local drug trafficking activities of Ngo and Leung. The targets of the investigation shifted again. In the course of all of these changes, the targets of the

wiretap authorization changed as currency and the named offences required. Not all of the suspected UN gang members were targeted in P66.

- [32] Obviously, the focus and objectives of the investigation changed over time. Operational plans were prepared as the focus of the investigation changed. There were three operational plans developed: January 2007, May 2007, and September 2007. Not all of these plans were located, some were approved but not seen in finalized form, and one was missing pages. While much was made of these facts, the inference that the operational plans were deliberately missing to hide the fact of the presence in Canada of U.S. undercover operatives cannot be made. The shifting focus of the investigation was clear. At first, CFSEU was interested in the importation/exportation activities of Roueche as disclosed by the Leclerc seizure. The charges under consideration included the import and export of controlled substances, possession and trafficking of same, and related offences. This remained the focus until February 2007 when one of the competing gang leaders was shot and as conflict between the UN gang and other gangs escalated. The focus then shifted to violence crimes and a concern for public safety. Rayner worked on a combined authorization related to both drug and violence offences.
- [33] However, the focus and objectives of the investigation changed again in August 2007. After many months and after compiling many pieces of information and incidents related to the activities of the UN gang, there still was not sufficient evidence to support the laying of any charges, particularly charges related to violence or drug importation. The U.S. information was dated and Rayner was limited in the use that he could make of specific U.S. information. Nothing had come from the presence of the movie producer/cocaine exporter in Toronto. Investigators decided to focus on the domestic distribution of drugs. Ngo was identified as the active member of the group that was vulnerable to aggressive investigation. Despite the scale of the investigation to date, investigators thought that the best means of access to Roueche was through Ngo. Rayner agreed in cross-examination that proceeding through focus on Ngo was to obtain a "toe hold" offence so to be able to move against the suppliers of Ngo, thought to lead to Roueche. It was decided to focus on the drug trafficking activities in the lower mainland as the key to obtaining wiretap against Roueche. The offences under investigation were narrowed to the offences listed in P66. The goal was narrowed to identify the suppliers and higher ups in the drug network that supplied cocaine and heroin to Ngo's and others' stash houses located in the lower mainland of British Columbia. Rayner agreed in cross-examination that the strategy changed to facilitate obtaining the wiretap authorization. The overall goal was to secure admissible, reliable and determinative evidence in support of the named offences and arrest, charge and prosecute those involved.
- [34] In keeping with the change of strategy, in August 2007, CFSEU planned surveillance on 120 Milross Street, the suspected drug house of Ngo. It was planned to stop and search Ngo and Peers, his suspected delivery person, when they left the house. The Milross operation was to be "fleshed out" and the "bread and butter" dial-a-dope operation exposed. It was thought that the upstream operation flowed from Ngo to Zuzolo to Roueche and that the downstream

operation flowed from Leung to the Peers sisters and Lange. Ngo was being intercepted in another investigation at the time, but the authorization was to end soon, putting pressure on Rayner in September to complete his affidavit.

- [35] Beginning in early November 2007, CFSEU planned to ask VPD for assistance with the Milross investigation. Senior investigators met with the VPD on November 8 to discuss using the VPD drug section to investigate Ngo's dial-a-dope operation and E-Prada investigators were informed of this on the same day. By at least November 13, 2007, this plan was known within the E-Prada team. However, Rayner could not remember when he learned of the plan to use VPD and considered that this was still in the discussion phase. He was busy at the time with Crown counsel preparing the final draft of the ITO. He knew that materials had been given to the VPD. At the November 20 E-Prada team meeting, the group was advised of the plan to request VPD involvement and to make a presentation to them on November 22. It appears that Rayner was not at the team meeting. CFSEU planned to pass certain targets including Ngo, Leung and the Peers to VPD. A presentation was made to the VPD drug section on the morning of November 22, 2007, the same day that Rayner swore the ITO. CFSEU described E-Prada as a project targeting members and associates of the UN gang. Ngo was described as a drug trafficker and importer. The request was for VPD drug unit to assist the E-Prada investigation by further investigation of the drug activities of Ngo and Leung, execution of a search warrant at Milross, and arrest of Ngo and other members of the group. This would capture the downstream participants in the stash house but not address capture of the higher up suppliers. CFSEU would continue its investigation and use the information gathered by the VPD. Rayner was not aware that this presentation had been made to the VPD.
- [36] Rayner was cross-examined as to whether an undercover operator or agent had been identified and considered for placement within Roueche's organization. It was not established that an undercover operator or police agent had been identified or used within Canada. Although the use of such an operator had been considered and U.S. authorities had employed several in the American investigation by late 2006, it was not established that any American operatives had infiltrated the Canadian organization or that such a plan had been hatched between U.S. and Canadian police. Although the 60 day clearance for U.S. investigators was not forthcoming in evidence, it cannot be concluded that the purpose of this was for a full undercover operation within Canada that is not otherwise documented. Rayner said that, because of the sensitive nature of such an operation, reference would have been made in reports different than the missing operational plans. Nothing came from the consideration of using the Los Angeles movie producer as basis for an undercover operation. Rayner did not believe that an undercover operator could infiltrate Roueche's organization at the level required, even though the Americans had had some success with an old childhood friend of Roueche who no longer was in the picture. Similarly, a number of Canadians who were arrested in the U.S. on drug related charges and who were suspected of being associated with the UN gang, ended up cooperating with U.S. police. Information about these persons was shared with Canadian investigators: however, none of these

persons were identified as a possible informant or agent for purposes of the Canadian investigation. The U.S. undercover operatives and cooperating accused were dated and not linked to any Canadian investigation. Rayner said that there was no opportunity to introduce an undercover operative at the level required to identify the suppliers of Ngo.

[37] Extensive surveillance was undertaken. In paragraph 14 of the ITO, Rayner stated:

14. Between December 13, 2006 and November 16, 2007 surveillance has been conducted on subjects of this investigation a total of 223 times. ROUECHE was observed 46 times, NGO 64 times, LEUNG 21 times, ZUZOLO 13 times, COULTER once, SZABO two times. TRINH has not been observed during surveillance. ...

In cross-examination, Rayner agreed that the first sentence could imply that surveillance over all seven suspects had occurred during the time period. However, only Roueche was the subject of surveillance throughout this period and surveillance of Ngo and Zuzolo only started in 2007.

[38] In paragraph 35 of the ITO, Rayner described number recorder and production warrants obtained in January 2007 for numbers thought to be related to Roueche. Rayner then went on to state that there had been no contact with these numbers and any numbers associated with either Ngo or Leung. He failed to state that the number for Roueche from the warrants was a different number than set out in the ITO or that the numbers for Ngo and Leung were obtained only after the duration of the warrants. Later, in paragraph 40 of the ITO, in relation to more recent recorder and production warrants, Rayner said that there had been no contact between Roueche's numbers and the numbers for Ngo and Leung.

[39] Rayner agreed in cross-examination that a full description of all of the E-Prada investigation was not provided in P66. He intentionally only put in material related to the offences for which he sought the authorization. Rayner said that at the time of P66, CFSEU was not investigating importation because there were not sufficient grounds to proceed with that charge and importation was not the basis for P66. Although there was sufficient information to lay charges against Ngo and some of the street level operators, the purpose of the ITO was limited to identification of the suppliers of Ngo and Leung's drug trafficking operation. Rayner stated that he and his legal advisors believed that there were not sufficient grounds to obtain an authorization on any other charges. There had been nothing new related to importation and exportation charges since the Leclerc seizure, some confidential informant information which was now dated, and surveillance which had failed to produce corroborative evidence. Rayner left out many details in the ITO that he considered were not directly pertinent, including the full scope of assistance from U.S. and other investigative agencies, his personal background, known information about Roueche and other UN gang members, and historical incidents of the investigation that he considered too dated to be relevant. Relevance was decided on the basis of evidential value towards grounds, for the named offences.

[40] Rayner acknowledged that the information in P66 was based upon only a few months of an investigation that had been ongoing for a year. He selectively chose pertinent information such as the Leclerc seizure to give background into how the investigation started and Roueche's involvement in the drug trade. However, the U.S. information remained static after the Leclerc seizure and Rayner did not consider any of the investigative exchange after Leclerc to be relevant to the domestic charges that were now contemplated. He denied that his objective was only to succeed in obtaining an authorization, without regard to his duties as an affiant for full, fair and frank disclosure, and maintained that his decision to include information was based upon relevance to the named offences under investigation. He said that he deliberately left out what he considered irrelevant detail to the named offences with no intention to mislead or to deceive. Once it had been decided not to pursue drug related import or export charges, there was no need to go into detail about the investigation into those offences if it was not relevant to the specific charges listed in P66. Investigation into the other offences, however, continued. No mention was made of the U.S. indictment in the affidavit because it did not affect the continuing investigation in Canada.

Standard Upon Review

[41] The role of a judge reviewing the validity of a wiretap authorization is to consider whether there is sufficient reliable information, as amplified upon review, upon which the authorizing judge could have granted the authorization (*R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452, 60 C.C.C. (3d) 161 at 188 (*Garofoli*); *R. v. Araujo*, 2000 SCC 65 at para. 51, [2000] 2 S.C.R. 992 (*Araujo*); *R. v. Lee*, 2008 BCCA 240 at para. 12, 256 B.C.A.C. 241 (*Lee*); *R. v. Wilson*, 2011 BCCA 252 at para. 37, 272 C.C.C. (3d) 269). On an application of this nature, the reviewing judge does not perform the same function as the authorizing judge and does not substitute her view for that of the authorizing judge (*Araujo* at para. 51). The authorization will be set aside only if the reviewing judge is satisfied on all of the material presented and upon considering the totality of the circumstances, that there was no basis upon which the authorization could be sustained (*Lee* at para. 14).

Investigative Necessity

[42] Section 186(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 requires that prior authorization to intercept private communications must be based upon investigative necessity. Section 186(1)(b) of the Criminal Code says:

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

...

- (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.

[43] In *Araujo*, the leading case on the interpretation of investigative necessity, the Supreme Court of Canada rejected the "last resort" and the efficiency test and clarified that the police do not have to establish that all other investigative avenues have been exhausted to meet the investigative necessity requirement. LeBel J. said at para. 29:

29 ... The words of the Code must be read with some common sense having regard both to the nature and purpose of the particular investigation which the police wish to undertake. A pure last resort test would turn the process of authorization into a formalistic exercise that would take no account of the difficulties of police investigations targeting sophisticated crime. ...

As noted at para. 37, "[t]he proper test...concerns whether, practically speaking, there is no other reasonable means of investigation". This standard of necessity negated the efficiency standard which countenanced wiretap when police had opportunity (*Araujo* at para. 39).

[44] LeBel J. concluded by saying at para. 29:

29 Parliament and the courts have indeed recognized that the interception of private communications is a serious matter, to be considered only for the investigation of serious offences, in the presence of probable grounds, and with a serious testing of the need for electronic interception in the context of the particular investigation and its objects (cf. *Smyk*, supra, at p. 74). There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry. [Emphasis in original.]

[45] Investigative necessity is to be interpreted in a practical, commonsense manner with due regard to the nature and purpose of the particular investigation. The "context of the particular investigation and its objects" and the "circumstances of the particular inquiry" point to the specifics of the investigation under review as informed by the offences for which there are reasonable and probable grounds on which to believe that the offence had been or is being committed, and that the authorization sought will afford evidence of that offence, the first part of the s. 186(1) Criminal Code requirements. (s. 186(1)(a) Criminal Code; *Garofoli* at paras. 33-35; *Araujo* at para. 20). If there are not the reasonable and probable grounds required to satisfy the first part of s. 186(1), then the affiant would not get to second base, that is, to establish investigative necessity under s. 186(1)(b).

[46] It may be obvious, but, investigative necessity must be established in relation to each stated offence included in the authorization (*R. v. Riley*, [2009] O.J. No. 738 at paras. 168, 172, 181 and 193 (S.C.J.) (*Riley*)). However, there is no requirement to include all offences that are under investigation and for which interception of private communications is anticipated to yield evidence (*R. v. Comisso*, [1983] 2 S.C.R. 121 at 129, 1 D.L.R. (4th) 577; *R. v. Chesson*, [1988] 2 S.C.R. 148 at 159, 6 W.W.R. 193; *Riley* at paras. 171-179). The authors, Robert W.

Hubbard, Peter M. Brauti and Scott K. Fenton, *Wiretapping and Other Electronic Surveillance*, 2012 (Thomson Reuters Canada Limited) at 4.3.3, noted that windfall evidence is perfectly admissible in relation to unnamed offences. Further, naming unnecessary offences that are not the focus of the investigation renders an authorization vulnerable to attack for failure to make out investigative necessity, as occurred in *Riley* at para. 201, or for failure to make out reasonable and probable grounds to believe that an offence has been, or is being, committed.

[47] The investigative necessity requirement does not apply to each person named in the authorization but to the investigation as a whole (*R. v. Tahirkheli* (1998), 130 C.C.C. (3d) 19 at para. 4, 113 O.A.C. 322; *R. v. Pham*, 2002 BCCA 247 at paras. 85-86, 167 B.C.A.C. 66 (Pham)). This means that there is no requirement for an individualized showing of investigative necessity in relation to a particular named individual. The fact that other investigations may be underway of particular named persons does not preclude investigative necessity in relation to the same and other persons in another investigation whose objectives are broader and which relates to ongoing criminal activity (Pham at paras. 82-89). Similarly, the fact that certain charges could be laid against certain individuals in a drug investigation does not preclude investigators from continuing to investigate the full scale of the criminal activity, the drug line of supply, and the higher echelon people involved (*R. v. Shalala*, 198 N.B.R. (2d) 1, [1997] N.B.J. No. 560 at para. 42, leave to appeal ref'd [2000] N.B.J. No. 14 (Q.B.); *Araujo* at paras. 41 and 43; *R. v. Adam*, 2006 BCSC 382 at para. 148; *R. v. Ciancio*, 2006 BCSC 1717 at paras. 43-45).

[48] The objective of the police investigation informs the investigative necessity analysis. LeBel J. said at para. 43 of *Araujo*:

43 The objective of the police investigation here was to bring the higher-ups in a drug ring to justice, not simply to remove a few replaceable street dealers. Among their various arguments, the appellants challenged the right of the police to define the objectives of their investigation, alleging that the police could manipulate the objectives in order to get the chance to use a wiretap. However, it is clear that the police here had probable grounds to investigate the serious crimes that they were investigating. This part of the test for wiretapping - probable grounds for believing that serious crimes would likely occur - removes the need for concern about the kinds of suspicions that the appellants raise. If the police have probable grounds to investigate a serious crime, then they may use wiretapping to do so, provided they meet the investigative necessity requirement. There is nothing pernicious about the fact that the objective of their investigation rightly informs the investigative necessity analysis. Here, the police had more need for wiretapping given that they were trying to move up the chain and catch the higher-ups in the operation. This rightly reinforces the investigative necessity made plain by the affidavit materials.

Designing the objectives of an investigation around problems and the practical realities of the investigation is not improper if reasonable and probable grounds exist to investigate the offences named in the affidavit (see *R. v. Schreinert* (2002), 165 C.C.C. (3d) 295 at paras. 34 and 39, 159 O.A.C. 174). Investigative necessity is to be determined in relation to the investigative objectives at "the point that it had evolved when the authorization was sought" (*R. v. Fraser*, 2010 BCSC 344 at para. 57).

- [49] Thus, the court in *Araujo* recognized that that the subjects, objectives and offences of an investigation rightly informs the investigative necessity analysis and that investigative necessity may be more easily established in cases involving large-scale crime organization, close-knit crime families, conspiracies, drug offences, or when there is evidence of wide spread counter surveillance by the targets of the investigation (*Araujo*, at para. 43). In *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97 at 127, 64 C.R. (3d) 193 (Ont. C.A.), the court considered the characteristics of the subjects of the investigations as relevant to the investigative necessity analysis, realizing that a person alleged to be in the upper echelons of a conspiracy to import or traffic narcotics and who is careful to insulate himself from direct contact with the narcotics or other distributors, was relevant to the unlikelihood of an undercover agent being able to penetrate a large conspiracy and to the ineffectiveness of surveillance which would merely provide evidence of meetings of the subjects.
- [50] In *Adam*, the accused argued that police had created an unreasonably ambitious goal for the investigation in order to sustain the wiretap intrusions when arrests were possible. *Romilly J.* did not find that this objective was unreasonable and said at para. 148:
- [148] The goal of the R.C.M.P. was to demolish, to the degree possible, a purported criminal ring. The arrest of individual perpetrators was delayed in pursuit of this overall goal. I do not find this objective to be artificially complicated or ambitious as suggested by the accused. It is common in such investigations not to close the net until the entire criminal organization, and particularly the leadership, are within grasp. I quote, by way of example, the police strategy approved by *Lebel J.* in *Araujo* at paras. 41 and 43: ...
- [51] *R. v. Sanghera*, 2012 BCSC 1197, is an example of the extent to which the objectives of an investigation may give rise to investigative necessity apart from an exhaustive investigation into all subsidiary or secondary offences. In that case, police had discussed the possibility and advantages of wiretap at various times and began to plan early for wiretap authorization. Police did not close the investigation earlier by arresting certain lower level suspects. In so acting, police did not create their own sense of investigative necessity and were not creating unreasonable goals for the investigation so to facilitate wiretap. Police were entitled to pursue the investigation to the objective of advancing a prosecutable trial of all involved, not just a few. The fact that other investigative techniques were under contemplation or in play also did not detract from the objectives of the investigation. *Holmes J.* concluded at paras.156-157:

- [156] Given the objective of reaching all of the individuals leading or involved in the conspiracies under investigation, the affidavit sufficiently explains why, at that stage, the interception of private communications was, practically speaking, the only available means of investigation.
- [157] Investigative necessity in relation to the main objectives of the investigation may be satisfied, in appropriate circumstances, without, first, an exhaustive investigation by conventional techniques of all subsidiary or secondary offences that may arise. To put it simply, the investigative objective was not to, for example, seize drugs from the suspected drug stash houses and, possibly, gain evidence against lower- or mid-level participants in a trafficking business; it was to gain evidence against the targets who were believed to lead the trafficking business. The record provides no grounds to support a belief that evidence against those targets would be gained from, for example, a search of the stash houses.
- [52] Similarly, in *R. v. Uppal*, 2002 BCSC 1379, the accused argued that wiretap was not necessary because police already had a complete case against some of the targets and were creating issues in order to obtain a wiretap authorization. Bauman J. rejected this argument, relying on para. 43 from *Araujo*, and concluding that there were still issues extant in the investigation, including identification of others involved in the conspiracy to murder.
- [53] Consideration should be given to the main focus of the investigation and not just on specific aspects of it. In *R. v. Wasfi*, 2006 BCCA 55 at para. 34, 206 C.C.C. (3d) 203 (*Wasfi*), the movement of heroin from Vancouver to Victoria and money laundering associated with this was only an aspect of the entire investigation which was focused on the detection and prosecution of criminals importing cocaine and heroin into Canada and a conspiracy to do so. The context of the nature of the investigation may give rise to common investigatory problems as described in *Wasfi* in relation to drug trafficking and drug conspiracy investigations. It may be apparent early into the investigation that wiretap will be required. Low J.A. stated at para. 49:
- [49] In my opinion, it is an error to suggest that police investigators must avoid anticipating early in an investigation that they will need to apply for a wiretap authorization. The nature of the case might make it plain to the officers early on that it is unlikely they will be able to make a strong case without wiretap evidence. The investigation of drug trafficking and drug conspiracy cases often leads to wiretap evidence becoming a matter of investigative necessity. The use of other means of investigation (recruiting of accomplices and use of undercover operatives, for example) in most drug cases involves a considerable risk of exposing police awareness of the illegal activity to the targets of the investigation before evidence sufficient to make a case is obtained. Such means of investigation also create the substantial potential of putting people in harm's way. The reviewing judge must look at the particular evidence in each case, but he or she should not do so without understanding the realities and risks associated with other means of investigation. Drug traffickers, particularly those at higher levels of the distribution ladder, can be expected to employ methods designed to counter police inquiry into their activities and to be willing to resort to violence

to avoid detection. It does not follow that every drug investigation will automatically entail sustainable judicial authorization of intercepted private communications, but the realities of this type of investigation must be recognized on review.

- [54] The disclosure requirement on an affiant is to provide "...full and frank disclosure of material facts..." (Araujo at para. 46 (emphasis in original)), to present "...all material facts, favourable or not" (R. v. Morelli, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 58 (emphasis in original)).
- [55] What is a material fact? In the context of wiretap authorization, a fact is material if it shows or tends to establish the criteria for the grant of an authorization in s.186 (1) or if it tends to disprove the existence of the criteria (R. v. Land (1990), 55 C.C.C. (3d) 382 at 417, 1990 CarswellOnt 729 (H.C.) (Land); R. v. Bogiatzis (2003), 108 C.R.R. (2d) 294, 2003 CarswellOnt 3272 at para. 11 (S.C.J.); R. v. Deacon, [2008] O.J. No. 5756 at para. 144 (S.C.J.) (Deacon); R. v. Nguyen, 2011 ONCA 465 at para. 51, 281 O.A.C. 118). The definition from Black's Law Dictionary, 7th ed., (Minnesota: West Group, 1999), that information is material if it has a logical connection with consequential facts in the sense that it would affect the decision-making process, is significant or essential, was adopted in Deacon at para. 144. In Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at para. 250, relevance is distinguished from materiality. Material evidence is "...offered to prove or disprove a fact in issue" and the concept of materiality "...requires the court to focus on the material issues in dispute in order to determine if the proffered evidence advances the party's case".
- [56] The obligation to make full, fair and frank disclosure of all material information does not require the disclosure of all information or every fact that might be relevant (Araujo at paras. 46-47; R. v. Ling, 2009 BCCA 70 at paras. 36 and 43, 266 B.C.A.C. 281). What is material depends upon the circumstances of the case. In the context of this case, an omission will be material if it is a matter of such significance as to be likely to influence the determination of the condition precedent of investigative necessity or to alter the character of the supportive affidavit (Land at 417; Adam at para. 48). There must be a nexus between the facts that were not disclosed and the requirement for investigative necessity (Land at 417). As stated in R. v. Villa, [1988] O.J. No. 10 (H.C.) and as approved in Adam at para. 48, much of the investigation need not be disclosed because, aside from disclosure of material information, the affiant need only give sufficient highlights of the investigation so that the judge can decide whether there have been reasonable attempts by other investigative means to obtain the information sought.
- [57] In addition to frank and full disclosure of material facts, the affiant must be clear and concise (Araujo at para. 46). The affiant exercises some judgment as to what should be included in a good and effective affidavit, based upon his proper understanding of the expectations placed upon him and the importance of the prior authorization process (R. v. Ebanks, 2009 ONCA 851 at para. 43, 249 C.C.C. (3d) 29). There is no requirement for an affiant to detail each and every investigative step taken by police up to the time that an

authorization is applied for (R. v. Moore (1993), 81 C.C.C. (3d) 161 at 168, 27 B.C.A.C. 253, leave to appeal ref'd [1995] 1 S.C.R. 756).

- [58] An example of immateriality pertinent to the facts in this case arose in R. v. Welsh, [2007] O.J. No. 2432. The accused sought to cross-examine the affiant who swore an information in support of a wiretap authorization on the grounds of non-disclosure or misleading disclosure related to the failure to disclose source materials from another murder investigation that were relied upon in support of the authorization. The affiant had only provided a summary of the related, joint investigation. O'Connor J. pointed out that the other homicide was a separate investigation, albeit connected to the investigation at issue through the Crown's theory of motive. Motive need not be proven by the Crown on a charge of murder and was not an essential element to the murder case at bar. At para.15, cross-examination was denied on what was considered to be an issue peripheral to the central issues in the case, citing R. v. Pires; R. v. Lising, 2005 SCC 66, [2005] 3 S.C.R. 343 at para. 68. The other investigation did not go to the foundation of the authorization and was unrelated to the essence of the case.
- [59] In R. v. Readhead, 2008 BCCA 193 at para. 10, the failure to disclose the full extent of an investigation did not deprive the justice of the peace of the ability to balance competing interests when what was not disclosed was neutral in the sense that it did not negate the existence of the offence in question.

Application of the Principles

(a) Material Facts Not Disclosed in the ITO

- [60] The applicants argued that the ITO failed to disclose the general nature of the investigation, including that it involved the UN gang and the international drug trafficking activities led by Roueche, that the investigation of cocaine importation which started with the Leclerc seizure continued at the time of P66, and that the investigation was a joint investigation with U.S. authorities and involved other police agencies. The applicants also said that there was material non-disclosure related to the scope and nature of the U.S. involvement in the investigation and the means available to E-Prada investigators as a result, particularly that the U.S. had indicted Roueche, that certain Canadians arrested in the U.S. in relation to Roueche's marijuana smuggling operation were potential witnesses in Canada, that the U.S. had successfully established an undercover operative within the Roueche organization in the U.S., and that there was a plan to obtain wiretap in the U.S. of the Los Angeles movie producer who was in Toronto for a time.
- [61] These allegations of material non-disclosure must be considered in light of the grounds established in the ITO related to offences of trafficking, possession, and conspiracy to traffic in controlled substances. Rayner said that there were not reasonable and probable grounds to proceed on importation or exportation charges, despite extensive work on drafting an ITO to support an authorization for these offences. This belief was not substantially attacked in cross-examination. It remains that police concluded that they did not have enough evidence

to satisfy the authorizing judge that the first criteria within s. 186(1)(a) would be established in relation to importation charges and, as a result, police went with what they did have. There is nothing wrong with that. It then necessarily follows that material disclosure related to investigation of the named offences, with the focus on the Ngo operation and his suppliers. It is in this legitimate context that the ITO should be considered.

- [62] It was not necessary for Rayner to have disclosed all of the details of the investigation, including particulars of U.S. involvement. It was apparent within the ITO that there had been extensive cooperation with other police agencies, including the U.S. and Australia. It was also apparent that the investigation concerned international cocaine importation and that specific assistance had been obtained from U.S. authorities in relation to the Leclerc seizure. Further, there was nothing specific to the U.S. investigation that was established to have been material to the named offences that was not disclosed. There was no evidence that Leclerc, any of the Canadians arrested in the U.S., or any of the U.S. undercover operatives and agents were offered or were prepared to assist in the Canadian investigation beyond the interview that was disclosed with Leclerc and CFSEU investigators. Rayner said that the U.S. information related to events in 2005 and 2006 and was too dated to be relevant to the ongoing Canadian investigation, particularly the confined investigation into the Ngo operation as the focus of strategy to secure charges against Roueche and others suspected of supplying Ngo with cocaine. It is not up to this reviewing judge to re-evaluate that investigative conclusion. Rayner also said that nothing had come of the U.S. stated plan to intercept the movie producer. There was nothing material to report about this in the ITO.
- [63] There is nothing sinister in changing the focus of an investigation to provide a realistic opportunity to obtain a wiretap authorization when other investigative means had failed, as here. The necessity to obtain wiretap was reasonably contemplated from the outset given the nature of the charges and the organized sophisticated nature of the UN gang and their operations as revealed in the Leclerc seizure. Surveillance had been unsuccessful in relation to the suppliers of Ngo. It is a big jump to say that U.S. evidence related to an indictment alleging drug importation in 2005 and 2006 in the U.S. should have led police in Canada to conclude that the suppliers of Ngo's dial-a-dope operation were obvious or within reach from U.S. sources. Once the objectives of the investigation changed, so too did the particulars of the disclosure required to satisfy the requirement for full, fair and frank disclosure of material facts.
- [64] In my view, the authorizing judge would have been aware from the ITO that police had been investigating the drug importation activities of the UN gang with Roueche as the leader with the assistance of the U.S. authorities, amongst others, and that the focus of the investigation was now centered upon the named offences and the suppliers of drugs to Ngo as stated in paragraph 7. The general nature of the investigation and the involvement of U.S. authorities in a cooperative effort was disclosed. There was no need to provide further details that were not material to the particular investigation that was narrowed to specific goals after investigation into broader offences proved problematical and impractical.

- [65] The applicants also alleged material non-disclosure in the failure to provide full details of the Leclerc information. In my view, there was sufficient detail provided, which was headed "Roueche's Alleged Conspiracy to Import Cocaine, September 27, 2006", to alert the authorizing judge to the international scope of the UN gang operations. More details would not have changed the fact that there was sufficient reliable information here to support the authorization. The judge could reasonably have assumed from the ITO that the investigation of broader charges related to the UN gang drug activities was underway and ongoing. This did not preclude investigative necessity in relation to the named offences.
- [66] In a more particular vein, the applicants said that the affiant failed to disclose that, on the very day that the ITO was sworn, CFSEU investigators planned to ask VPD to execute a search at the Milross address of the Ngo dial-a-dope operation and to arrest Ngo, Leung, and others, thus "passing on" those targets to VPD. The applicants said that this demonstrated the sham, tactic and strategy to focus on Ngo when the real focus of the investigation related to importation offences. However, this was not material non-disclosure. Rayner stated in the ITO that searches would be conducted as required. Milross was only one of several drug houses alleged to be supplied by Roueche. The fact that VPD was asked to execute the lower level searches and arrests does not detract from the continuing investigation of the suppliers to Ngo and the goal of gathering evidence against those above street level trafficking. Closure of Milross would not compromise the investigative objective of obtaining evidence against the supplier targets. From details on the drug operations from other houses, it was apparent that when one drug house was crashed, another one opened. Arrest of Ngo would not necessarily mean that his operations were at an end. VPD had been used in the past as stated in the ITO to stop a person after he was observed to have purchased drugs from one of Ngo's drug deliverers and to stop one of the deliverers. Neither of these events ended the dial-a-dope operation. Use of assisting police forces such as the VPD could be anticipated as ongoing.

(b) Misleading Aspects of the ITO

- [67] The applicants asserted that there were many misleading statements in the ITO that were carefully crafted to leave the impression that police were seriously investigating the Ngo dial-a-dope operation and to divert attention away from the real purpose of the investigation which was aimed at the importation activities of Roueche and the UN gang. In this manner, the authorizing judge was deprived of the ability to make a judicial decision on investigative necessity related to the real objective of the investigation. As concluded above, narrowing the scope and objectives of an investigation to reflect the practical reality of reasonable and probable grounds and to deal with problems with investigation of the full scale of criminal activity, is not objectionable. Therefore, the general emphasis on domestic drug offences was not misleading. Nor was it misleading not to name all of the suspected UN gang members who had come to the attention of investigators or to fail to identify Lee Tanaka as a gang member in paragraph 65.c.ii.

- [68] The applicants criticized inclusion of Jennifer Szabo ("Szabo") as a primary known person in the ITO as an example of skillfully bolstering the domestic aspect of the investigation as part of the contrivance to achieve the authorization. Szabo was named as present with Coulter during exchange of \$97,680 in bundles of low denomination Canadian currency that was observed to have come from Leung and Ngo and was believed to have been drug money. Although she was only observed as a passenger, this was a significant transaction that resulted in a seizure and a statement that the money was "work related". The details of this surveillance, search, and seizure were fully set out in the affidavit and there was nothing misleading about it.
- [69] Paragraph 14 set out a summary of surveillance to date. It could be misleading in the sense that it implied that surveillance had been conducted on all of the suspects during the period from December 2006 to November 2007, when the reality was that only Roueche had been under surveillance throughout this period. However, the affiant immediately pointed out the number of times that each of the primary named persons had been surveilled. This put context to the first statement and clearly indicated that Roueche and Ngo had been the main targets. The circumstances of the particular surveillances were described elsewhere in the ITO. The suggestion that this paragraph was designed to focus on the local investigation and so hide the overwhelming details of the international investigation is without merit. Upon review of the whole of the information, it cannot be concluded that paragraph 14 was substantially misleading so to have affected whether the authorizing judge could have granted the authorization.
- [70] The same can be said about paragraphs 34-35. These paragraphs relate to a number recorder warrant for Roueche's phone obtained in January 2007 and valid for the period from January 24 to March 23, 2007, and a production order for Roueche's historical call records also obtained in January 2007 and valid for the period from September 1, 2006 to January 30, 2007. The affiant stated that there was no contact between Roueche's numbers and those of either Ngo or Leung during the course of the warrants. The fact is that investigators did not know the numbers for Ngo or Leung during the course of the warrants, but only learned of them between April and August 2007. While it is true that there was no contact between those numbers during the warrant periods, the applicants said that the statement implied that investigators knew Ngo's and Leung's numbers at the time of the warrant and were interested in Ngo and Leung since January 2007, when this was not the case. True, perhaps: but what of it? Nothing turns on this and the misleading impression is not material.
- [71] The applicants failed to establish that the statements related to the use of informants, agents, and undercover operatives in paragraph 244 of the ITO were misleading. It was true that "No agents [had] been cultivated with respect to this investigation and none [had] been identified who could gain knowledge of the offences under investigation". While the U.S. did have an agent and undercover operators in 2006 in relation to the U.S. indictment, there was no evidence that these were available to Canadian investigators or that they could be useful in the 2007 investigation related to the supply to Ngo's operations. Failure to disclose the 60

day clearance for U.S. investigators to be in Canada is not sufficient to lead to an inference that the U.S. had an agent operating in Canada, especially when there was some suggestion that the 60 day clearance related to the attendance of U.S. investigators at meetings in Canada with the longer period of clearance established for practical purposes unrelated to actual attendance here.

(c) Conclusion

[72] There was no material non-disclosure in the affidavit sworn in support of P66. It was legitimate for the affiant to have narrowed the contents of the ITO to reflect the offences for which the affiant believed that he had reasonable and probable grounds and to narrow the goals or objectives of the investigation accordingly. It was not material non-disclosure not to outline the whole of the broader investigation related to offences that were not the subject of the authorization, even when it was contemplated that the authorization would lead to evidence related to broader criminal activities. In any event, the ITO did disclose the international aspect of the investigation and the consideration of conspiracy to import cocaine. It was not necessary to outline the details of the broader investigation in detail. The authorizing judge was not deprived of the ability to consider whether investigative necessity was established in relation to the named offences.

[73] Upon consideration of all of the material presented, and after consideration of all of the circumstances, I am satisfied that there was sufficient reliable information in the ITO upon which the authorizing judge could have granted the authorization. The applications are dismissed.

"Dillon J."

The Honourable Madam Justice Dillon

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