

CANADA / JUDGMENT

R. v. Wasfi

2007 BCSC 725

COURT

Supreme Court of British Columbia

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2007 BCSC 725 R. v. Wasfi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wasfi,

2007 BCSC 725

Date: 20070523

Docket: CC991290

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REGINA

AGAINST

GEORGE WASFI

Before: The Honourable Madam Justice Morrison

Ruling on Voir Dire of Admissibility of Wiretap Evidence

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Date and Place of Hearing:

October 13, 16-20, 23-27,

November 1-3 and 6, 2006

Vancouver, B.C.

Cases Considered:

R. v. Thompson (1990), 59 C.C.C. (3d) 225 (S.C.C.)

R. v. Garofoli (1990), 60 C.C.C. (3d) 161 (S.C.C.)

Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.)

R. v. Duarte (1990), 53 C.C.C. (3d) 1 (S.C.C.)

Schreiber v. Canada (Attorney General) (1998), 124 C.C.C. (3d) 129 (S.C.C.)

R. v. Dymment (1988), 45 C.C.C. (3d) 244 (S.C.C.)

R. v. Finlay and Grellette (1985), 23 C.C.C. (3d) 48 (Ont. C.A.)

R. v. Grant (1993), 84 C.C.C. (3d) 173 (S.C.C.)

R. v. Chow, [2002] B.C.J. No. 3006 (B.C.S.C.)

R. v. Grant (1998), 130 C.C.C. (3d) 53 (Man. C.A.)

R. v. Araujo (2000), 149 C.C.C. (3d) 449 (S.C.C.)

R. v. Gill (1980), 56 C.C.C. (2d) 169 (B.C.C.A.)

R. v. Morris (1998), 134 C.C.C. (3d) 539 (N.S.C.A.)

R. v. G.B., [2003] O.J. No. 3335 (Ont. S.C.J.)

R. v. Chesson (1988), 43 C.C.C. (3d) 353 (S.C.C.)

R. v. Salituro, [1992] B.C.J. No. 1190 (B.C.S.C.)

R. v. Pires; R. v. Lising (2005), 201 C.C.C. (3d) 449 (S.C.C.)

R. v. Strachan (1988), 46 C.C.C. (3d) 479 (S.C.C.)

R. v. Mapara; R. v. Chow (2003), 180 C.C.C. (3d) 184 (B.C.C.A.)

R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.)

R. v. Cheung, [1993] B.C.J. No. 2917 (B.C.S.C.)

R. v. Wasfi, [2006] B.C.J. No. 239, 2006 BCCA 55

R. v. Wasfi, [2001] B.C.J. No. 2959 (B.C.S.C.) (Oppal J.)

R. v. Chow, [2005] 1 S.C.R. 384, 2005 SCC 24

R. v. Mapara, [2005] 1 S.C.R. 358, 2005 SCC 23

R. v. Chan, [2001] B.C.J. No. 1686 (B.C.S.C.) (Dorgan J.)

R. v. Vukelich (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)

R. v. Wasfi, 2003 BCSC 622 (Fraser J.)

R. v. Pham (2002), 165 C.C.C. (3d) 97 (B.C.C.A.)

R. v. Edwards, [1996] 1 S.C.R. 128

CanadianOxy Chemicals Ltd. v. Canada (Attorney General) (1998), 133 C.C.C. (3d) 426 (S.C.C.)

R. v. Chang, [1998] O.J. No. 1789 (Ont. C.J. - Gen. Div.)

R. v. Morrison (1989), 50 C.C.C. (3d) 353 (Ont. C.A.)

R. v. Perrier et al (1998), Oral Ruling on voir dire (S.C.B.C.)

R. v. Shalala [Voir dire number 6 - Garofoli review], [1997] N.B.J. No. 560 (N.B.C.Q.B. - Trial Division)

R. v. Tahirkheli (1998), 130 C.C.C. (3d) 19 (Ont. C.A.)

Regina v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C. (2d) 363 (Ont. C.A.)

- [1] By way of direct indictment, George Wasfi is charged that at or near the City of Burnaby, B.C., on or about October 7, 1998, he did commit the first degree murder of Vikash Chand, contrary to s. 235 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] During a police investigation of another unrelated matter, telephone calls involving the accused were intercepted, without his knowledge. The Crown proposes to enter the wiretap evidence of those private communications of Mr. Wasfi.
- [3] The defence objects to the admissibility of the wiretap evidence, and this voir dire has been held to determine the admissibility of such evidence.
- [4] A previous trial was held on this charge, before Mr. Justice Fraser. After a voir dire on the admissibility of the wiretap evidence, Fraser J. ruled against its admissibility. (R. v. Wasfi, 2003 BCSC 622). The Crown called no further evidence and a directed verdict resulted in the acquittal of Mr. Wasfi. The Crown appealed the decision of Mr. Justice Fraser, and the Court of Appeal ordered a new trial (R. v. Wasfi (2005), 222 B.C.A.C. 130, 2006 BCCA 55).
- [5] At the request of counsel, the evidence on this voir dire consisted of the record of proceedings before Mr. Justice Fraser, approximately 12 days of hearings, plus additional viva voce evidence given by Corporal John Dunlop, the affiant of 11 affidavits used to obtain 11 authorizations in the unrelated criminal proceedings.

- [6] I have had an opportunity to read the entire transcript of proceedings before Mr. Justice Fraser, as well as review the exhibits, some of them voluminous in length.

Background

- [7] In early October 1996, the police were collecting information on illegal drug dealing in the Victoria area. On March 10, 1997, a drug investigation began, code named E-Page. The focus of the investigation was to obtain information and evidence against persons involved at the higher levels in the importation, distribution and sale of heroin and cocaine.
- [8] Around the middle to the end of April 1997, the investigators decided to consider obtaining an authorization to wiretap, and on May 22, Corporal Dunlop (then a Constable) was designated as the affiant, and a decision was made to seek to obtain an authorization for wiretap evidence. By June 3, the police had developed a preliminary operational plan, which set out their objectives and how they hoped to proceed. They needed the approval of E Division (British Columbia RCMP) to establish project status for the extra financial needs that would be required.
- [9] By July 3, 1997, the police had obtained the necessary authorization to search telephone records for certain numbers that were then known to them.
- [10] From early March to October 23, 1997, the date of the first authorization, the police conducted 66 days of surveillance on a number of persons within the Victoria area. They were also receiving information from 15 informants, through the informant police handlers.
- [11] The surveillance had enabled the police to identify a number of targets and known persons, as well as some vehicles, addresses and telephone numbers. It had also yielded six wrappings that had contained cocaine. No other evidence had been obtained by the date of the first authorization, being October 23, 1997.

Affidavit #1, sworn October 22, 1997

- [12] Constable Dunlop (as he then was) detailed in his affidavit that the police investigation began on March 10, 1997. He referred to an organization to import heroin and set out details of surveillance efforts from April 21, 1997 to September 18, 1997.
- [13] The police had conducted searches on CPIC (Canadian Police Information Centre) and PIRS (Police Information Retrieval System), collecting whatever information they could from those two sources for their investigation. Vehicle searches had also been carried out. Information had also been obtained from the RCMP and other police forces in the area since October 8, 1996.

- [14] According to the affidavit, the police began collecting information from informants and became aware that their investigation involved persons in Thailand, China and Hong Kong. One of the targets, Peter Wu, was being supplied with cocaine by persons from Asia. Wu and another person were noted to be going regularly from Victoria to Vancouver.
- [15] By July 1997, the police believed that Wu was trafficking mainly in cocaine and Barry Liu, another target, was trafficking mainly in heroin. It was also noted that Wu was using cocaine.
- [16] A number of other persons were mentioned in the affidavit, some of whom were known only by their first names.
- [17] A surveillance vehicle with a camera installed was operating in one of the neighbourhoods, and it was noted that the neighbours were getting suspicious. It was a Block Watch area. The surveillance cameras in the vehicle gave an incomplete view of the area.
- [18] The police noted a lot of cell phone activity by all persons who were being investigated. Those who were the subject of surveillance were also observed to be performing counter-surveillance activities, such as changing directions in their automobiles, apparently memorizing licence plates, and standing surveillance outside an obvious meeting place for some of the targets. One of the suspects was noted to wash his car often, and the police surmised that this was because of his fear that the police would plant a tracking device under his car.
- [19] Almost all the surveillance occurred in Victoria. On August 30, 1997, two vehicles were seen boarding the 10:00 p.m. ferry to Vancouver. Arrangements were made for the vehicles to be followed on the Vancouver side. One of the vehicles was observed going to a Burnaby address.
- [20] Through informants, the police were aware of some of the code expressions used by the targets and other knowns in referring to the drugs, amounts of money and quantity of drugs.
- [21] On one occasion, those conducting surveillance wondered whether there was a possible concealed gun on one of the persons being watched. On September 15, 1997, due to surveillance, the police obtained from a dumpster two garbage bags which contained the wrappings of six kilos of cocaine. The cocaine was not recovered.
- [22] On September 19, 1997, the investigators obtained a search from the licensing division of the Motor Vehicle Branch, which yielded photographs, birthdates and driver's licence numbers.
- [23] The affidavit of Constable Dunlop noted that a courier coming into Vancouver from Thailand was known to have swallowed heroin. The affidavit also revealed that a Mr. Au had been badly beaten, and it was surmised that it was because Au had failed to bring cocaine from Thailand on a return trip to Vancouver.

- [24] Constable Dunlop deposed that shipments of cocaine were expected from Vancouver to Victoria every couple of days.
- [25] The strategy that the police hoped to use included continued surveillance, camera surveillance, and interceptions of telephone calls. Their purpose was to gather evidence to prosecute the targets named in authorization #1, namely, Barry Liu, Peter Wu, Hugh Lang, Keith Cheng, Allan Lau, Mark Lowe and Ken Tran.
- [26] In this first affidavit, Constable Dunlop deposed that surveillance had been of limited value, as events were occurring within places where the police could not be present. The police also feared detection of their surveillance, and felt that their camera surveillance was of limited value. He also stated that it was the belief of the investigators that long term surveillance was not wise because of the fear of detection.
- [27] Although there were 15 informants who had been providing information, Constable Dunlop deposed that the confidential informants were afraid, and there was a need to protect their identity. The affidavit also pointed out that the investigators could not always act on information of informants, given risk of exposure, time delays, etc. Further, the police were unwilling to introduce undercover agents to the targets out of fear. The police believed that the targets would deal only with people that they had known for a long time. Meetings were held in residences. It was unlikely that an undercover agent or officer could infiltrate. A search warrant would also not aid in identifying all unknown conspirators, in Dunlop's view.
- [28] The primary focus of the investigation was to show the full extent of the organized criminal activities. This would include laundering of proceeds of criminal activities.
- [29] There was a need to intercept communications by way of wiretaps on telephones, cell phones, pagers and payphones. The affidavit also sought authorization to enter premises to install devices or to install devices in vehicles. That affidavit was sworn October 22, 1997 and authorization #1 was obtained the next day, October 23, 1997.

Subsequent Authorizations

- [30] On December 19, 1997, authorization #2 was obtained, and on February 12, 1998, authorization #3. Meanwhile, on December 18, 1997, Peter Wu and another were arrested on cocaine charges. From that time on, the investigators concentrated on charges pertaining to the importation and distribution of heroin. By authorization #3, Barry Liu was the only target still named from authorization #1. Authorization #3 listed four targets, Barry Liu, Simon Chow, David Au and Vicker Seto.
- [31] Chronologically, the subsequent authorizations were as follows: authorization #4 was obtained April 9, 1998; authorization #5 - June 3, 1998; authorization #6 - July 31, 1998; authorization #7 - September 28, 1998; authorization #8 - November 25, 1998; authorization #9 - January 21, 1999; authorization #10 - March 21, 1999; authorization #11 - May 13, 1999.

- [32] According to the defence, by the time authorization #3 had expired, the investigators had sufficient evidence to lay charges of conspiracy to import heroin, and there was no further need for the police to seek subsequent authorizations.
- [33] The police obtained 11 authorizations in total, but it is authorizations #6 and #7, along with authorization #1, that the defence argues against.
- [34] The intercepts involving George Wasfi that are of interest to the Crown, and whose admissibility is objected to by the defence, begin August 16, 1998, during the currency of authorization #6 and proceeding through the currency of authorization #7. It must be noted that at no time was George Wasfi ever named as a target in any of the 11 authorizations, nor was he listed as a "known" in any of the authorizations.

Affidavit #6, sworn July 30, 1998

- [35] In his affidavit seeking authorization #6, Constable Dunlop referred to 17 persons whose activities the police were investigating. Full names were not always known, some individuals had other names by which they were known, and most were Asian. He set out the history of the previous authorizations, and referred to the known persons as being involved in the importation and trafficking of heroin and cocaine. He listed nine persons as being involved in the importation and trafficking of heroin, seen as primary targets, along with their associates.
- [36] The affidavit deposes that as affiant for the investigation, Constable Dunlop had received information obtained by other members of his section, as well as from other police agencies. Information was also obtained from surveillance activities and inquiries conducted. There had been private communications intercepted pursuant to authorizations #1, #2, #3, #4 and #5.
- [37] Constable Dunlop indicated a male person whose name was believed to be Srisomwong was believed to be the individual responsible for procuring and shipping large quantities of heroin from Thailand, distributing it internationally through contacts in Hong Kong and China. The affidavit identifies Srisomwong's association to Simon Chow of Vancouver, and it listed others assisting Chow in the organization and importation of units of heroin into Canada. There was reference to a supply of multiunits of heroin from Asia. A person by the name of Wilson Wong was believed to be responsible for distribution and collection of money in the absence of Simon Chow.
- [38] The targets were known to use pagers, cell phones and payphones. Constable Dunlop referred to problems of counter-surveillance, and problems of other names being listed as the owners or the users of certain telephones, residences, vehicles or cell phones. The police also encountered problems with aliases or other names used by the targets in question.

- [39] On April 1, 1998, in a telephone call between Simon Chow and Srisomwong, there was discussion of a heroin shipment that was ready to ship the next day. They discussed a hundred and fifty units of heroin, plus 46 additional units. Chow indicated he would take 150 units, and did not think the extra 46 would be a problem. There were further telephone calls and discussions with regard to the money being invested in the shipment, and also talk that the price of heroin was falling.
- [40] The affidavit relates that Simon Chow was arrested in Thailand on April 27, 1998, where he was found to be in possession of 171 false credit cards. He was apparently released on bail from jail in Thailand on June 22. Chow was then desperate for money, apparently not only to pay for the shipment of heroin but also to repay bail and bribing funds in Thailand.
- [41] Constable Dunlop was of the opinion that Simon Chow, in remaining in Asia, was going to China where his heroin may have been sitting since his incarceration. He believes Chow was taking steps to speed up the heroin importation, after it had come to a halt during his incarceration. There were complaints from David Au that there had been no work in two months because there was no access to Simon Chow's heroin.
- [42] On July 21, 1998, in discussions between Simon Chow and one of his associates, there was talk of borrowing money for their loan sharking operation. They also spoke about the competition in loan sharking and counterfeit money in Vancouver.
- [43] In that affidavit, Constable Dunlop also stated why the investigators believed that surveillance was of limited value, given the present status of the investigation at that time.
- [44] Constable Dunlop's affidavit was sworn July 30, 1998, and authorization #6 was granted on July 31, 1998.

Affidavit #7, sworn September 24, 1998

- [45] Constable Dunlop swore an affidavit on September 24, 1998 and authorization #7 was granted on September 28, 1998.
- [46] In this affidavit, Constable Dunlop deposed that the investigation had not yet revealed the identities of the suppliers or importers of heroin, or the methods of transportation and delivery from the source countries. He also stated that counter-surveillance techniques had been used by the suspects. There were 25 days of surveillance between July 31 and September 23, 1998. International calls were intercepted by the police with Teleglobe Canada intercepting all outgoing calls originating in Canada.
- [47] In an intercept on July 30, 1998, David Au advised Barry Liu that the heroin had completely dried up in Vancouver. Liu advised that he needed more heroin.
- [48] There were a number of intercepts involving Ken Chan, who, along with Wilson Wong, appeared to be taking care of business for Simon Chow during Chow's absence from Canada. Chow did not return to Vancouver from Asia until August 7, 1998.

- [49] In one call, Chan ended a payphone call abruptly, saying that people were watching him. On August 1, 1998, Ken Chan made a number of calls from different payphones, one at 3:00 p.m. at one location, at 4:30 from another location, then again at 10:14 at a third location and at 11:30 from a payphone at a fourth location. He also used two different cars that day; there were two different registrations of those vehicles, neither in the name of Ken Chan. The next day, August 2, Chan made another payphone call from a fifth location. Again, the shortage of heroin was discussed.
- [50] After Simon Chow returned to Vancouver, he was intercepted discussing his problems in getting the money he owed to Srisomwong. Chow said he needed more heroin until the money was paid off.
- [51] The affidavit detailed that the intercepts indicated that Srisomwong's partners were pressing for Simon Chow's money.
- [52] An informant had provided some information to the investigators. The informant's information was apparently voluntary, and considered reliable.
- [53] There was reference to a "mountain man" in Asia, an individual whom the investigators believed to be at the top of the pyramid, above Srisomwong.
- [54] There was reference in the affidavit to Srisomwong and Chow being involved in fake Cartier watches. There were also more indications that Simon Chow was anxious for money to pay his debts.
- [55] On September 8, 1998, Chan told Simon Chow that Chan had cancelled all his phones. Later, Simon Chow estimated that his debt would be paid in full by the end of September and he would be looking at October to begin negotiations for more heroin.
- [56] The affidavit revealed that Simon Chow was a target in another investigation, one involving conspiracy to commit murder. This authorization sought to install monitoring devices at the Club Dynasty, which was possibly owned and operated by Simon Chow, plus certain residences and vehicles. However, no monitoring devices were ever installed.

Intercepts Involving George Wasfi

- [57] Exhibit 79 is a compilation of intercepts from authorization #6 involving the accused. It begins August 16, 1998 and ends September 27, 1998. Authorization #7 was obtained on September 28, 1998.
- [58] The Crown seeks to tender intercepts that occurred during authorizations #6 and #7. The defence argues that authorization #7 fails to meet the statutory preconditions set out in s. 186(1) of the Criminal Code, which states as follows:
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.
- [59] The defence argues that the affiant failed to make full and frank disclosure in the supporting affidavits used to obtain all prior authorizations. The defence says that the affiant has not been credible in stating that the granting of the authorizations would further the E-Page investigation and that it was necessary to conduct the investigation as set out in his affidavits.
- [60] The defence maintains that by failing to make full and frank disclosure to the authorizing judge in any of the affidavits in support of authorizations #1 - #7, the affiant and the Crown are subverting the authorization process. And that investigative necessity was not established in authorization #1. Finally, the defence argues that the affiant failed to name George Wasfi as a "known" in authorization #7, as it should have done, and that the manner in which the authorizations were implemented did not comply with the terms of the authorizations themselves.
- [61] Corporal Dunlop testified at this voir dire that Mr. Wasfi meant nothing to him with regard to the E-Page investigation. "George" was not known to the E-Page investigators. He regarded Wasfi as someone involved in a mixed bag of crime.
- [62] During his testimony, Corporal Dunlop was taken through each of the 77 intercepts in Exhibit 79, and he again concluded that Mr. Wasfi should not have been identified as a "known". Mr. Wasfi was never charged with regard to any drug offences, and the E-Page investigators were never included in the murder investigation in Burnaby, to the matter before the court now. As far as Corporal Dunlop was concerned, Mr. Wasfi just did his business locally with Simon Chow, and Mr. Wasfi was one of many. Neither he nor the others would be named, nor would they be targets.
- [63] The evidence would seem to support the conclusions drawn by Corporal Dunlop from the intercepts in that the person identified as "George" played a role only in domestic crimes, and almost solely in association with Simon Chow. The intercepts refer to Mr. Wasfi's person being in Seattle, and that Simon Chow wants all the money that Mr. Wasfi can get. There is considerable talk about the money that Chow needs. On August 26, 1998, in a telephone conversation between Simon Chow and the accused, the accused says he will take as much as he can get. The product is not disclosed.

- [64] There was a reference in the intercepts of wanting to play "golf". Corporal Dunlop believed that golf was a reference to marijuana, as in "grass". Later, in an intercept on September 10, there is a clear reference to crystal meth. Again, many references to money. There are subsequent references to what Corporal Dunlop believes are crystal meth, and also to cocaine.
- [65] On September 15, 1998, there was reference to possible use of a fraudulent credit card to buy furniture.
- [66] On September 16, 1998, an unknown male tells Mr. Wasfi that he wants to be paid in money, not dope, which the police inferred was marijuana.
- [67] There were one or two calls where the product being discussed could have been heroin, or it could have been cocaine. The amount of \$33,000 could indicate either one apparently. Corporal Dunlop testified that he felt the intercepts had nothing to do with heroin or heroin importation.
- [68] There was a reference to "BB" and "B-Boy". While BB at other times and in other circumstances had been a reference to Srisomwong, Corporal Dunlop felt that in the intercept of September 26, 1998, the reference to BB could not mean Srisomwong, as Srisomwong was still in Thailand. The intercept said, "BB is looking for you, he is waiting for you." Srisomwong was not in Canada; Corporal Dunlop concluded this could not be a reference to Srisomwong.
- [69] The evidence did disclose that Simon Chow had a number of business activities, none of them legitimate. The Crown has referred to Simon Chow as a veritable "Wal-Mart of crime". The evidence showed Chow was involved in the following activities: in Club Dynasty, the locale of some suspicious activities; the importation and distribution of heroin; counterfeit money; fake Cartier watches; mortgage scams; stolen property; fake credit cards; the trafficking and distribution of cocaine; trafficking in ecstasy; a loan sharking operation; transporting money illicitly over international borders; conspiracy to commit murder; trafficking or distribution of marijuana; and dealing in bear gallbladders.
- [70] On reading the transcripts of the intercepts in Exhibit 79, the 77 intercepts where George Wasfi was involved, I found myself in the same position Corporal Dunlop did, unable to say in most instances what was being discussed.

Position of the Defence

- [71] The defence has advanced several arguments. First, the interception of Mr. Wasfi's communications pursuant to authorizations #6 and #7 breached his rights under s. 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

- [72] Second, the authorizations are invalid. They did not satisfy the statutory requirements set out in s. 186(1)(a) and (b) of the Criminal Code. This constitutes a Charter breach as well.
- [73] Third, the defence maintained that the affidavits of Constable Dunlop sworn in support of the authorizations failed to make full, frank and fair disclosure, and that such disclosure is necessary in an ex parte process pursuant to s. 185(1) of the Criminal Code.
- [74] Fourth, the defence says there was a failure to satisfy the conditions precedent for the authorizations, and the authorizations therefore breached the accused's rights under s. 8 of the Charter. Specifically, the granting of the successive authorizations was contrary to the best interests of the administration of justice as required by s. 186(1)(a) of the Criminal Code; the failure of the affidavits to make full disclosure subverted the ex parte process; and the Crown failed to establish investigative necessity for authorizations #6 and #7, pursuant to s. 186(1)(b) of the Criminal Code.
- [75] Finally, the defence argues that authorizations #4 to #7 inclusive failed to comply with s. 186(4) of the Criminal Code in that the accused was not named as a known in authorization #7, as is required pursuant to s. 186(4)(c); further, the E-Page investigators did not comply with the clear terms of the authorizations which were granted. Therefore, the defence says authorizations #6 and #7 were unlawful. Mr. Wasfi had constitutional standing to challenge the authorizations.
- [76] The defence concludes that the seriousness of the breaches dictates that the intercepts must be excluded.

Discussion

- [77] I agree with counsel for the defence with regard to the importance of full, frank and fair disclosure when the Crown seeks to obtain authorizations such as those which are in question here. As counsel for the defence has pointed out, wiretap applications are made in camera and on an ex parte, basis, and the authorizing judge must have all the relevant facts before him or her.
- [78] However, there is nothing to suggest that Corporal Dunlop was anything other than honest and diligent and acting in good faith in the affidavits leading up to the authorizations in question.
- [79] In this instance, the affidavit prepared to obtain authorization #1 was a proper basis to test the affiant's credibility and reliability, and to determine whether the Crown has made full and frank disclosure. This is especially true because the affidavits in subsequent authorization applications contained portions from that first affidavit.
- [80] Section 185(1) of the Criminal Code sets out that where an application for an authorization is made, the application is to be accompanied by an affidavit to be sworn on the information and belief of a police officer, deposing to the following matters:

- (c) the facts relied on to justify the belief that an authorization should be given together with particulars of the offence,
 - (d) the type of private communication proposed to be intercepted,
 - (e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used,
 - (f) the number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit pursuant to paragraph (e) and on which the application was withdrawn or no authorization was given, the date on which each application was made and the name of the judge to whom each application was made,
 - (g) the period for which the authorization is requested, and
 - (h) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that 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.
- [81] In my view, there has been no violation of Mr. Wasfi's Charter rights. The affidavits of Constable Dunlop which were made in obtaining the authorizations provided full and frank disclosure. I found the affiant, Corporal Dunlop, to be credible.
- [82] The material before me satisfied me that the Crown has met the statutory preconditions that were set out in s. 186(1) of the Criminal Code. Other investigative procedures were attempted by the police in the E-Page investigation, and while some were successful in a limited way, other investigative procedures were unlikely to be successful in the long run. Given the international scope of the investigation and the importance of the investigation, it would have been impractical to stay with the previous procedures that the police had been trying, including surveillance, without seeking authorizations to wiretap.
- [83] Necessity has been established in authorization #1, and all subsequent authorizations. While police procedure following the authorizations was not perfect, there were no errors so serious by the police in complying with the terms of the authorization as to amount to a Charter violation, or non-compliance with the terms of the authorizations. The manner in which the authorizations were implemented complied with the terms and conditions of the authorizations.
- [84] There was no imperative to name George Wasfi as a "known" in authorization #7. The police in the E-Page investigation were not interested in him as a target in their investigation.

- [85] The evidence discloses that the police were not just relying on obtaining wiretap intercepts. Their surveillance began March of 1997 and took place over 66 days prior to the authorizations. They had telephone records beginning July 3, 1997. Further, there were 15 informants prior to the authorizations, and the police did searches through CPIC and PIRS.
- [86] The police had also obtained information since October 1996 from other police forces. They had identified a number of persons, vehicles, addresses and phone numbers, and they had obtained the wrappings from cocaine bricks. This was all accomplished by October 23, 1997, the date of the first authorization. The evidence does not indicate that the police were sitting back in any way and waiting to rely only upon wiretap evidence.
- [87] In my view, the international scope of the investigation and the makeup of the various targets and knowns made wiretap interceptions essential in the E-Page investigation. However, George Wasfi was never regarded as important to the police in this investigation. Corporal Dunlop testified that their team was very experienced. He also spelled out the futility of trying to use agents on an undercover operation, given the actors involved in these illegal activities.
- [88] *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161, established that a wiretap does not have to be the "last resort". The police do not have to exhaust all and every possible steps before seeking wiretap authorizations. However, the authorizing justice needs to be convinced that the wiretap will be more than just a "useful tool". In my view, the police conclusions were amply supported by the facts that were placed before the authorizing judge in this case.
- [89] The nature of the offences is also an important factor to consider. Corporal Dunlop testified to a drug king being insulated from contact with strangers. He also stated that their investigation revealed that the targets were acting with great caution.
- [90] Some of the counter-surveillance techniques used by the targets and their associates, observed by the police included the following: checking of their cars, one target referring to doing "heat checks"; washing a vehicle frequently; noticeably checking for police surveillance; changing a vehicle's colour; going to different banks in one day on different occasions; changing vehicles; changing cell phones; cancelling landlines and cell phones.
- [91] In establishing investigative necessity, the Crown has produced sufficient evidence to satisfy me that no other practical or reasonable means of furthering the investigation existed at the time that the authorizations were obtained, and that the warrants were not obtained to cover unknown crimes, or to prevent crimes from occurring in the future.
- [92] It must also be observed that the police do not have unlimited resources, as Inspector Convey testified. Inspector Convey set out the difficulties that the police face with undercover operations, particularly with targets who are higher up in the "food chain". It was his evidence that undercover agents were not available to the police throughout the entire investigation.

- [93] It would be a mistake, given hindsight, to presuppose unlimited police resources, both financial and personnel, and to presuppose instant analysis of the massive amounts of material collected, and then the ability to connect the dots instantly, as if based on totally reliable information from paid informants. The evidence here indicates that the police were experienced, on the spot, and making informed decisions, as a team, as the information became available to them.
- [94] Prior to receiving the authorizations for wiretap, the police, through surveillance, informants and other investigation procedures were able to ascertain quite a bit. For example, with regard to authorization #6, there was surveillance of 40 days, between June 3, 1998 and July 28, 1998. There was an identification of subjects and associates, an identification of residences, location of financial institutions where the targets and their associates were dealing, certain meetings were observed, drug transactions were observed, and there was an identification of one or more stash houses, possible identification of a business which might be involved in laundering proceeds, and targets were observed at certain payphones. There was also voice identification by this time.
- [95] Previously, there had been motor vehicle searches which had disclosed certain information to certain vehicles and licence numbers. However, the targets kept changing cars and cell phones as time proceeded.
- [96] The police were also frustrated by the counter-surveillance techniques that were being used by the targets and their associates. The affidavit to obtain authorization #6 pointed out problems of other names being shown as the owners of certain cell phones, residences and cars. Plus there was the frequent use by targets of payphones. The affidavits leading up to authorizations #6 and #7 never referred to any of the telephone calls where George Wasfi was involved. I do not agree with the defence that George Wasfi should have been named by the E-Page investigators as either a target or a known.
- [97] There were some special problems with regard to the use of wiretaps on payphones. The police were well aware of and observed generally the safeguards with regard to wiretapping a public payphone. Before a wiretap can be made on a public payphone, the police must ensure that a target is using or about to use that phone. Next, there must be voice identification and minimization in the monitoring room if an unknown person, rather than a target, is using the telephone during the time that the payphone is being intercepted. The police procedures in their wiretapping of the payphones in the case at bar did not amount in any way to providing a basis for exclusion of evidence under s. 241(2) of the Charter.
- [98] The defence did point out some errors made by the police, but in my view, the errors were not of great significance, and made little difference to the overall weight to be given to the affidavits of Constable Dunlop.

- [99] R. v. Edwards, [1996] 1 S.C.R. 128, 132 D.L.R. (4th) 31, sets out the two questions to be asked with regard to a s. 8 Charter violation. One, did the accused have a reasonable expectation of privacy? Two, was the wiretap an unreasonable intrusion on his right to privacy? In the facts of this case, there was no violation of Mr. Wasfi's s. 8 Charter rights. Both questions elicit a negative answer.
- [100] In Garofoli, supra, the court recognized that with wiretap authorizations, there is a possibility of invasion of rights of third parties. The court stated at para. 94, that it is "an unfortunate cost of electronic surveillance, but one that Parliament has judged is justified in appropriate circumstances in the investigation of serious crime." As mentioned previously, in this instance, the police followed sufficient procedure and safeguards in undertaking the wiretaps in question. In the circumstances of this case, I find that the cost of electronic surveillance with respect to any right of privacy that Mr. Wasfi may have had is not so great as to render the authorizations unreasonable. Accordingly, there was no violation of Mr. Wasfi's right under s. 8 of the Charter.
- [101] There are two preconditions that must be met before a person can be named and lawfully identified and named in an authorization as a "known". The existence of that person must be known to the police, and there must be reasonable grounds to believe that the wiretap of that person will assist in the investigation of the offence. Mr. Wasfi does not fit into either of those preconditions.

Conclusion

- [102] I am satisfied the Crown has met the statutory preconditions of s. 186 of the Criminal Code in obtaining authorizations #1 to #7. It was in the interests of the administration of justice to grant the authorizations in question, and the investigative necessity requirement has been met by the Crown.
- [103] I find there has been no breach of Mr. Wasfi's rights under s. 8 of the Charter. There is little evidence to support the defence claim that Corporal Dunlop and the Crown have failed to make full and frank disclosure.
- [104] There is no evidence to suggest that the police acted here other than in good faith. Affidavits to obtain authorizations #1 to #7 gave sufficient evidence of the existence of probable grounds and investigative necessity.
- [105] In my view, Mr. Wasfi has no standing to challenge the legal validity of authorization #1, and as a result, I agree with the Crown that it is not necessary to establish investigative necessity for authorization #1. But in these circumstances, the court can and should look at the earlier authorizations on the basis that they may be factually relevant to determine the issue of investigative necessity with regard to authorizations #6 and #7. Each authorization should be looked at individually. In any event, I am satisfied that investigative necessity was well established with regard to authorization #1.

"Morrison J."

Madam Justice Morrison

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