IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Cater, 2011 NSPC 86

Date: November 17, 2011

Docket: 1997518 to

1997550; 2035773 - 2035784

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Kyle Cater, Paul Cater and Torina Lewis; Kyle Cater

DECISION ON APPLICATION FOR DISCLOSURE

JUDGE: The Honourable Anne S. Derrick

HEARD: November 17, 2011

DECISION: November 17, 2011

CHARGES: Sections 86(1) x3; 88(1) x3; 95(1) x 2; 92(1) x 2; 92(2) x 1of the *Criminal Code* (Cater, Cater and Lewis); Sections 100(2) x 6 ; 99(2) x 6 (Kyle Cater)

COUNSEL: Shauna MacDonald and Richard Hartlen, for the Crown

DEFENCE: Elizabeth Cooper, for Kyle Cater

Alfred Seaman, for Paul Cater

Cameron MacKeen, for Torina Lewis

By the Court:

Introduction/Background

[1] Kyle Cater is charged with a number of weapons possession and weapons trafficking offences. His co-accused on the weapons possession charges are his father, Paul Cater, and his stepmother, Torina Lewis. He is charged alone on the weapons trafficking offences. In this decision where I refer to "Mr. Cater" I am referring to Kyle, not Paul, Cater.

[2] The weapons possession and weapons trafficking charges are being tried together, by consent of all parties, in one trial at which I am presiding. The trial started on October 24, 2011 with the hearing and determination of a preliminary issue of plea negotiation privilege (*2011 NSPC 75*). On November 10 I dismissed Kyle Cater's section 11(b) *Charter* application for a stay of proceedings based on delay. (*2011 NSPC 80*)

[3] The trial on the merits, subject to the outcome of the preliminary *Charter* motions, is scheduled to be heard from February 13 to March 1, 2012. The Crown advises that at the trial proper it will be tendering into evidence a series of intercepted communications obtained pursuant to a *Criminal Code* Part VI Authorization dated November 18, 2008.

[4] Kyle Cater was arrested on the weapons possession charges on January 15, 2009. He was released on January 21 on strict house arrest conditions under a recognizance with a surety. The weapons trafficking charges were laid on April 29, 2009. On May 4, 2011 Mr. Cater was arrested on new charges. He was detained after a bail hearing and his releases on the weapons possession and weapons trafficking charges were revoked.

The Application for Additional Disclosure

[5] Kyle Cater has brought a *Stinchcombe* application for the disclosure of additional information from the Crown. This is my decision concerning that application.

[6] The disclosure being sought by Mr. Cater is, as reproduced from Ms. Cooper's brief of November 14, 2011, as follows:

1) All records of occasions on which Mr. Cater was searched or stopped by the police, the name of the officer who searched him and the name of the person who produced these reports, for the period prior to the swearing of the information to obtain the authorization for the wiretaps in this case, sworn on November 14, 2008, as well as after November 14, 2008 up until his incarceration on May 4, 2011;

2) Whether the police ever searched the red Honda Accord referred to in para. 90 (c) at p. 75 [of the Affidavit and Information to Obtain] for drugs? If the answer is yes, please provide the records, including the name of the officer that searched him and the name of the person who produced the reports;

3) Whether any undercover police officer or police agent ever attempted to buy any controlled substance from Mr. Cater, and if so, please provide any notes or reports of that;

4) Amplification of the contents of a "Profile Page" contained in the disclosure, in relation to Mr. Kyle Cater, which states that Mr. Cater was the subject of numerous searches, and no charges laid, as well as the name of the author of this document;

5) Further information regarding confidential sources who provided information in relation to Mr. Cater in the Information to Obtain…for the wiretaps in this case. (Ms. Cooper attached to her Brief an Appendix of questions in relation to two confidential sources whose information is included in the Information to Obtain.)

6) Information as to whether the sources who provided the information, in relation to Mr. Cater, in the [Information to Obtain]…are themselves named in the Information to Obtain…for the wiretaps as people the police have included in

the Information to Obtain because they are people who are suspicious to the police.

[7] It is common ground that the Affidavit and Information to Obtain sworn by Cst. Jadie Spence on November 14, 2008, which I refer to alternately as “the Affidavit” or “the Information to Obtain” or “ITO”, contains information from two confidential sources - Sources “E” and “F” - about Kyle Cater, and an anonymous, handwritten two page note from Source “V” received at the Halifax Integrated Drug Section office on February 25, 2008 alleging that Mr. Cater was selling “coke, crack and marijuana, usually around the Spryfield area.”

[8] Ms. Cooper appears to be seeking, in the first instance, a stay of proceedings on the grounds that the non-disclosure of the sought-after material has breached Mr. Cater’s fair trial rights and his right to make full answer and defence. In the alternative, she is seeking “a proper response to the information being sought in this disclosure request.” (*Kyle Cater Brief, paragraph 36*)

[9] In addition Ms. Cooper is seeking the answers to a number of questions concerning Sources “E” and “F”. The following is a recital of the 20 questions Ms. Cooper has posed at the end of her Brief:

> 1) Please provide any source de-briefing notes, source qualification forms and source de-briefing reports that have not been provided in the ITO;
>
> 2) Were the sources coded sources?
>
> 3) Do the sources have convictions for any type of dishonesty offences, such as fraud, perjury, misleading police etc.?
>
> 4) Are the police aware of any actions of the sources, either through their own knowledge or through any police reports or data bases, that could support a dishonesty offence such as fraud, perjury, misleading police, for any of the sources, but for which the source was not charged?

5) Were any of the sources a target of the investigation themselves?

6) Were any of the sources named in the ITO along with offences they were charged with or convicted of?

7) Was any of source E, F or V's information, in relation to Mr. Cater, found to be wrong or in error?

8) Was any of source E, F, or V's information found to be wrong or in error, in general?

9) Did source F or E get leniency with respect to charges of their own at the time of providing their information to the police?

10) Did source F or E get leniency with respect to charges of their own at the time of providing their information to the police in relation to Mr. Cater?

11) Did source F or E get leniency with respect to their sentence with respect to charges of their own at the time of providing their information to the police?

12) Did source F or E get leniency with respect to their sentence with respect to charges of their own at the time of providing their information to the police in relation to Mr. Cater?

13) Was source F or E paid for the information that they provided to the police in relation to Mr. Cater?

14) Was the information provided to the police by source F or E, provided the same day as that they themselves were charged, or shortly thereafter? When in relation to charges they themselves faced at the time, did they provide information to the police in this case? What leniency did they receive in exchange for the information provided?

> 15) How many other cases did source F provide information to the police about before this one?
>
> 16) Was there any reason to distrust the reliability of the sources in this case?
>
> 17) How many times [has] the sources's information…not produced an arrest or conviction?
>
> 18) For how long did the source know Mr. Cater?
>
> 19) Was there anything else that the police did to confirm the source's information, other than what is in the Information to Obtain the search warrant in this matter?
>
> 20) Was the source a rival to Mr. Cater or in a rival group or gang to Mr. Cater?

The Request for a Stay of Proceedings

[10] I am first of all going to address Ms. Cooper's submission that the remedy in this disclosure motion should be a stay of proceedings. This is expressed as follows at paragraphs 24 and 25 of her Brief:

> [24] It is alleged that [Kyle Cater's] right to make full answer and defence, a principle of fundamental justice under section 7 of the Charter, has been breached by the failure of the Crown to disclose the material requested in this Brief.
>
> [25] [Kyle Cater] further alleges that his right to a fair trial under section 7 of the Charter, another principle of fundamental justice that is linked to the right to make full answer and defence, has been violated in that denying him this disclosure is a breach of his right to a fair trial.

[11] Ms. Cooper cites *Dersh v. Canada (Attorney General), [1990] 2 S.C.R. 1505* and *R. v. Rose, [1998] 3 S.C.R. 262* in support of these statements. *Dersh* dealt with the entitlement of accused persons to access the sealed wiretap packet. Mr. Cater has already received the unsealed Information to Obtain so the issue of opening the sealed ITO is not relevant in this case. *Rose* confirmed the Supreme Court of Canada's finding in *Dersh* that "section 7 incorporates procedural fairness

as an element of fundamental justice and in particular the right to make full answer and defence." (*Rose, paragraph 16*) *Rose* also stands for the settled principle that the right to full answer and defence encompasses the right to full and timely disclosure. (*Rose, paragraph 98*) As noted in *Rose*, referencing *Dersh*, "the right to make full answer does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence." (*Rose, paragraph 99*)

[12] Ms. Cooper's invoking of Kyle Cater's right to make full answer and defence and right to a fair trial in the context of not having been successful in getting certain information from the Crown does not lead inexorably to a finding that he should either get the material being sought or that he should be entitled to have the proceedings against him stayed. There is no evidence before me that Mr. Cater's rights to make full answer and defence and have a fair trial have been violated. All I have been presented with is a bald assertion to this effect.

[13] Not only has Mr. Cater not presented any evidence to support his claim that his *Charter* rights have been breached because he does not have disclosure of the information he is seeking from the Crown, even if he had established a right to the disclosure, this does not mean he would be entitled to a stay of the proceedings. *R. v. Dixon, [1998] S.C.J. No. 17* is a complete answer on this issue:

> **23**…Similarly, the initial test which must be met in order to establish a breach of the right to disclosure is analytically distinct from the burden to be discharged to merit the remedy of a new trial. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. It follows that the Crown may fail to disclose information which meets the Stinchcombe threshold, but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process. In those circumstances there would be no basis for granting the remedy of a new trial under s. 24(1) of the Charter, since no harm has been suffered by the accused.
>
> **24** It will be necessary later to explore in greater depth the nature of the burden to be discharged to merit a new trial. Now it will suffice to observe that for the purposes of this first stage of the analysis, an appellate court may well find that an accused's Charter right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility the result at trial might have been different had the undisclosed

> material been produced. The right to full disclosure is just one component of the right to make full answer and defence. It does not automatically follow that solely because the right to disclosure was violated, the Charter right to make full answer and defence was impaired.

[14] There is no basis for ordering a stay of proceedings in relation to this application for certain disclosure. In an application of this nature, if a *Charter* violation was made out, an order for production directed to the Crown and/or an adjournment would be the appropriate remedies. (*Dixon, paragraph 31*) A stay of proceedings would only be granted where an accused had established, on a balance of probabilities, that his or her right to make full answer and defence was impaired and that irreparable prejudice to that right has also occurred. (*Dixon, paragraph 35*) Although the remedy of a stay could be granted in a prosecution that had not yet proceeded to a trial, there is nothing before me that even begins to make out a case of impairment of Ms. Cater's full answer and defence and consequent irreparable prejudice as a result of the Crown's refusal to produce the material Ms. Cooper is seeking.

[15] As for Ms. Cooper's claim that Mr. Cater's *Charter* rights entitle him to the disclosure he is seeking, that too must established on an evidentiary basis and not merely the assertions of counsel. As noted in *Dixon*:

> It is trite but worth repeating that in all cases where a person claims that a Charter right has been violated, he or she must prove on a balance of probabilities that the violation occurred. Thus, before granting any sort of remedy under s. 24(1), it must be found that it was more likely than not that the Charter right in question was infringed or denied. (*Dixon, paragraph 32*)

The Law Governing a *Garofoli* Application

[16] The disclosure Mr. Cater is seeking appears to be related to his prospective attack on the Affidavit and Information to Obtain that was used to secure the Authorization for the intercepts. Notice has been given by Ms. Cooper that she intends to make a *Garofoli* application. She is proposing to argue that the information from confidential sources in the Information to Obtain was unreliable and inadequate for grounding an authorization to intercept Mr. Cater's private communications. The disclosure she is seeking appears to be directed at

establishing that the police had no evidence Mr. Cater was a drug dealer as alleged by the confidential sources. Ms. Cooper has repeatedly referred to Mr. Cater as an innocent young man who was unfairly targeted by police seeking "to put Mr. Cater in jail without evidence because they do not like the people with whom he associates." (*Kyle Cater Brief on Abuse of Process, paragraph 42*)

[17] *Garofoli ([1990] S.C.J. No. 115)* establishes that the only applicable test is whether at the time of granting the authorization there existed, on an objective basis, reasonable grounds to believe that:

> (a) an offence was or will be committed and;
>
> (b) information concerning the offence will be obtained by the proposed interception.

[18] The Crown identifies this as the test on a *Garofoli* application at paragraph 11 of its 28 paragraph section 8 Brief.

[19] The *Garofoli* review hearing is simply an evidentiary hearing to determine the admissibility of relevant evidence about the offence obtained pursuant to a presumptively valid court order. The *Garofoli* review hearing is not intended to test the merits of any of the Crown's allegations against Kyle Cater. The truth of the allegations asserted in an Affidavit and Information to Obtain as they relate to the essential elements of the offences with which an accused is charged remain to be proved by the Crown beyond a reasonable doubt at the trial proper.

[20] The test for authorizing Part VI intercepts is whether the interception of a named person's private communications may assist the investigation, not whether there are reasonable grounds to believe that the person is a party to an offence. (*see, R. v. Schreinert, 2002 O.J. No. 2015, paragraph 43 (Ont. C.A.)*)

[21] And, as *Garofoli* makes clear:

> **56** The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant,

> but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[22] The law is settled that a *Garofoli* review (which Ms. Cooper has indicated she is seeking to have undertaken in what will be Mr. Cater's *Garofoli* application) "is to be based on the material before the authorizing judge." (*R. v. Barzal, [1993] B.C.J. No. 1812, paragraph 35 (B.C.C.A.)* referring to *Garofoli*) Furthermore, *Garofoli* establishes that if the Crown can support the authorization on the basis of the material, as edited, that went before the authorizing judge, the authorization is confirmed. (*Garofoli*, paragraph 79)

[23] *Garofoli* is explicit about the approach to be taken in the event that the authorization cannot be supported on the basis of the edited material. In such an event, "the Crown may apply to the trial judge to consider so much of the excised material as is necessary to support the authorization." The trial judge should agree to do this "only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence." (*Garofoli, paragraph 79*) This is where a summary of the judicial edits could potentially come into play. There is such a summary available in this case which will have permitted Mr. Cater to be "sufficiently aware of the nature of the excised material..." Mr. Cater has not referred to the summary of judicial edits for any purpose nor suggested that its contents are relevant to his proposed *Garofoli* application.

[24] Ms. Cooper has made it clear that she wishes to mount an attack, in her *Garofoli* application, on the reliability of the confidential police sources who are indicated in the ITO as having told police that Mr. Cater was dealing drugs, had purchased a handgun and wore a bullet proof vest. Her disclosure requests are intended to serve this objective. In a case where the authorization has been obtained on the basis of information from confidential police informers,

> Sufficient reliability is established, or not established, by reference to the material filed in support of an application for an authorization. The right to make full answer and defence in this context is a right to the disclosure of material which had been before the authorizing judge. It is not a right to embark on a fishing expedition of all the material in the possession of the police. Such an enquiry could be endless…(*Barzal, paragraph 44*)

[25] The *Garofoli* review does not take on the character of a trial, "where the truth of the allegations is explored." (*R. v. Ebanks, [2009] O.J. No. 5168, paragraph 21(Ont.C.A.)*) The reviewing judge is not assessing whether

> …there were reasonable grounds to lay charges against the individual but rather whether there were reasonable grounds to believe that interception of his communications may assist in the investigation of the offence…It is not necessary for the trial judge in effect to conduct a trial as to whether the reliability of the anonymous tipsters, the reliability and veracity of what the witnesses told the police, and the other evidence could be established beyond a reasonable doubt. (*Ebanks, paragraph 33*)

[26] *Garofoli* establishes the procedure to be followed for disclosure of materials used to obtain an authorization to intercept private communications. "It is incumbent upon the trial judge to follow that procedure, which takes into account both the police informer secrecy rule and an accused's constitutional right to make full answer and defence." (*Barzal, paragraph 53*)

Other Relevant Principles of Law

[27] Ms. Cooper's disclosure claims must be reviewed against this backdrop of jurisprudence as it relates to wiretap authorizations. There is also the issue of relevance: the Crown need not produce "what is clearly irrelevant." (*R. v. Stinchcombe, [1991] S.C.J. No. 83, paragraph 20*) Relevance means there is "a reasonable possibility of being useful to the accused in making full answer and defence." (*R. v. Chaplin, [1994] S.C.J. No. 89*) The Crown also has a duty to protect the identity of informers and respect the rules of privilege. (*Stinchcombe, paragraph 20*) I will discuss the informer privilege issue in due course in these reasons.

The Specific Disclosure Demands in this Case - Relevance

[28] I will now return to Ms. Cooper's specific disclosure demands. It is my view that records concerning police stops and searches of Mr. Cater, prior to the swearing of the Affidavit and Information to Obtain the Authorization for the intercepts, are not relevant to Mr. Cater's full answer and defence to the charges nor are they relevant to his intended *Garofoli* motion. The ITO refers to the

contacts police had with Mr. Cater: whether there were other stops or even searches that produced nothing – no drugs and no charges – is irrelevant.

[29] I take the same view of the inquiries about whether the police ever searched the red Honda or attempted to buy drugs from Mr. Cater. There is no suggestion in the ITO of either occurring. The ITO contains an allegation in paragraph 90 (c) that "Kyle Cater and Everette Macneil travel in an older model red Honda Accord and are dealing from their car." There is no indication in the ITO that Mr. Cater was ever arrested by police for selling drugs from a red Honda or that he was ever found in possession of drugs in a red Honda, so there is nothing that must be countered.

[30] The "Profile Page" document which was disclosed to Ms. Cooper by the Crown indicates "Several files on system, many street checks with no charges." There is no more relevance in "amplifying" this information, as Ms. Cooper is seeking, than there is in the information she is seeking about police stops and searches. It says what it says and furthermore this is in keeping with what Ms. Cooper indicates on behalf of her client, that he was stopped many times by police and searched, with negative results. (*Kyle Cater's Stinchcombe Brief, paragraph 7: "He was persistently stopped and searched by police for no reason."*)

[31] Ms. Cooper has submitted a 262 paragraph Brief setting out the substance of Mr. Cater's claim that he has been subjected to a lengthy and oppressive campaign of harassment by police that has infringed his section 7 *Charter* rights and justifies the ordering of a stay of proceedings on the basis of an abuse of process. The disclosure I have just reviewed and found to be irrelevant is intended for use in support of Mr. Cater's abuse of process application. I want to be clear that I am fully aware of what Mr. Cater wants to use this disclosure for – an attack on the authorization and in support of his abuse of process motion. In relation to the abuse of process claim, evidence of police stops and searches, of Mr. Cater and of a red Honda he may have been in at some point, is irrelevant to this prosecution. And it is this prosecution that has to be the focus of any claims of abuse of process. (*R. v. O'Connor, [1995] 4 S.C.R. 411, paragraph 63*) *O'Connor* makes it plain that it is the conduct of the specific proceedings that is examined in an abuse of process claim in a criminal trial. That can include police conduct during the investigative stage (*R. Regan, [2002] S.C.J. No. 14*), but I have been provided with nothing to

show that what Ms. Cooper wants disclosed – information about the police stops and searches of Kyle Cater prior to November 14, 2008 and up to May 4, 2011 - is relevant to the proceedings before me. The stopping of Mr. Cater and searching him, including on occasions when he was in a red Honda, all with negative results, does not establish an abuse of police authority or powers. Exploring the issue would necessarily lead to my having to address the issue of whether the stops and searches were lawful, a wholly irrelevant and diversionary inquiry.

[32] I do not accept Ms. Cooper's submission that silence in the ITO about police stops and searches of Mr. Cater with negative results was a material omission in the material put before the authorizing justice. That information, whatever it may have consisted of, was irrelevant information. As *Ebanks* held: "The affiant must exercise some judgement in deciding what should and should not be included in a good and effective affidavit." (*Ebanks, paragraph 43*)

The Specific Disclosure Demands in this Case – Informer Privilege

[33] As for the "further information" Ms. Cooper is seeking about the confidential sources referenced in the ITO who supplied information concerning Mr. Cater, whether they are named in the ITO, and the series of questions Ms. Cooper wishes to have answered about them, the disclosure being sought, if ordered, risks exposing the identity of the confidential police informers. This raises the issue of informer privilege.

[34] I note that information about confidential source "F" was already edited from the ITO by the authorizing justice to protect his/her identity. (*Judicial Summary of Edits for Operation Intrude*) [*On November 17, immediately after rendering my decision, I was informed in court by Shauna MacDonald for the Crown that the "judicial summary of edits" was not prepared by the authorizing justice but by the Crown agent during the editing of the ITO after its unsealing.]*

[35] The information being sought by Ms. Cooper could potentially identify the confidential sources. The Crown is obliged to prevent their identities from being disclosed. As discussed in *R. v. Hunter, [1987] O.J. No. 328 (Ont. C.A.)*:

> **11** The rule against the non-disclosure of information which might identify an informer is one of long standing. It developed from an acceptance of the role of informers in the solution of crimes and the

> apprehension of criminals. It was recognized that citizens have a duty to divulge to the police any information that they may have pertaining to the commission of a crime. It was also obvious to the courts from very early times that the identity of an informer would have to be concealed both for his or her own protection, and to encourage others to divulge to the authorities any information pertaining to crimes. It was in order to achieve these goals that the rule was developed.
>
> **12** The principle admits but one exception -- namely, where the disclosure of the identity of the informer could help to show that the accused was innocent of the offence…

[36] The Supreme Court of Canada has referenced *Hunter* with approval, adding its own commentary on the issue:

> **16** Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers. (*Named Person v. Vancouver Sun, [2007] S.C.J. No. 43*)

[37] The Supreme Court of Canada in *Named Person* emphasized the "extremely broad and powerful" nature of the informer privilege rule:

> Once a trial judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applied. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time. (*Named Person, paragraph 30*)

[38] As noted by the Supreme Court of Canada in *Named Person*, there is to be no disclosure of a confidential informer's identity in public or in court. And no matter what their motivations may be, confidential informers are entitled to have

their identities protected, their positions being "always precarious and their role…fraught with danger." (*R. v. Scott, [1990] S.C.J. No. 132, paragraph 31*)

[39] It is settled law that the only exception to informer privilege is the "innocence is at stake" exception. (*R. v. Leipert, [1997] S.C.J. No. 14; Named Person v. Vancouver*) The innocence at stake exception applies only where disclosure of the informer's identity is the only way that the accused can establish innocence. (*Named Person, paragraph 27*) The innocence at stake test is a "stringent" one that is engaged "only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction." (*R. v. McClure, [2001] S.C.J. No. 13*) Specifically, in the context of informer privilege, "there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused." (*Leipert, paragraph 21*) The innocence at stake exception is not made out by bald assertions from counsel. (*Named Person, paragraph 27; Liepert, paragraph 21*)

[40] The questions Ms. Cooper wishes to have answered seek to elicit information that could potentially identify the confidential sources. Certain of the inquiries are such that there is a very strong likelihood Mr. Cater would be able to identify who these sources are. Even the smallest or most innocuous of details can be identifying. (*Leipert, paragraphs 16, 35; Garofoli, paragraph 78; R. v. Omar, [2007] O.J. No. 541, paragraph 44, (Ont.C.A.)*) Even the disclosure of the "existence or absence of a criminal record" may be enough to enable an accused to identify a confidential informant. (*R. v. Medina-Mena, [2007] O.J. No. 1926 (Ont. C.A.)*)

[41] Categories of information that would be identifying of a confidential informer were laid out in evidence in *Omar*:

> 18 Detective Heaney testified as to fifteen categories of information that would serve to identify an informer: (1) age; (2) gender; (3) occupation; (4) socio-economic status; (5) health-related issues; (6) lifestyle choices; (7) associates; (8) connection with the arrest of other persons; (9) dates, times, locations, and the fact of contact with the police as an accused, victim, or witness; (10) criminal convictions, discharges, acquittals, and withdrawals; (11) any indication that the informer is or has been bound by a recognizance, undertaking, probation order, or prohibition order or is or has been on parole; (12) geographical areas

> frequented; (13) length of time in the community; (14) length of time as an informer; and (15) motivation for providing information.

[42] I agree with the Crown that these categories were not set out in *Omar* as exhaustive.

Garofoli and the Leave to Cross-Examine

[43] Furthermore, Ms. Cooper is seeking to obtain answers to questions where there has been no leave granted for her to do so. The questions posed are in the nature of questions that might be put, subject to the issue of informer privilege and the protection of informer identities, in a *Garofoli* application if leave had been granted to question the Affiant to the Affidavit and Information to Obtain. Leave has not been granted and no basis has been established that would justify granting such leave. *Garofoli* sets out the approach to be taken to the issue of cross-examination on the Affidavit and Information to Obtain:

> **88** …Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.
>
> **89** When permitted, the cross-examination should be limited by the trial judge to questions that are directed to establish that there was no basis upon which the authorization could have been granted…

[44] There is an informer privilege dimension to the cross-examination issue. It was delineated in *Garofoli* by McLachlin, J. (as she then was, dissenting, but not on this point) in the context of opening the sealed packet. The concerns identified are just as relevant to a proposed cross-examination at a *Garofoli* hearing:

> **146** An evidentiary hearing and cross-examination of deponents is potentially much more detrimental to the administration of justice than is opening the packet. Cross-examination is much more likely to reveal the details of investigative operations and the identity of informers than affidavits, which can be carefully drafted to avoid such pitfalls. How can one cross-examine an officer on the reliability of an informant without

> probing details that might reveal that informant's identity, for example? Once a damaging statement is made in answer to a question in cross-examination, editing is to no avail. Attempts to restrict the scope of cross-examination are notoriously fallible. Since effective cross-examination usually depends on considerable latitude in questioning, a restricted cross-examination may be of little value. Moreover, it is often difficult to predict when a particular question will evoke a response that trenches on a prohibited area…

Conclusion

[45] Kyle Cater has not made out a case for the disclosure of the information he is seeking. As noted earlier in these reasons, the principle of relevance applies to his requests. Significantly, Mr. Cater is not entitled to information that could reveal the identities of the confidential police informers and, even aside from that, he is not entitled to obtain answers to questions about the content of the ITO that he could only ask if leave was granted to do so. Nothing has been offered to demonstrate that cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization and the inquiries being advanced by Ms. Cooper are effectively a circumvention of the requirement to obtain leave to question the Affiant.

[46] Mr. Cater's application for additional disclosure as set out in Ms. Cooper's November 14 Brief is dismissed.