IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Cater, 2011 NSPC 100

Date: November 21, 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 CROWN APPLICATION FOR SUMMARY DISMISSAL OF *GAROFOLI* MOTION and DEFENCE APPLICATION FOR LEAVE TO CROSS-EXAMINE THE AFFIANT ON THE AFFIDAVIT AND INFORMATION TO OBTAIN

JUDGE:	The Honourable Anne S. Derrick
HEARD:	November 21, 2011
DECISION:	November 21, 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

Introduction

[1] Kyle Cater has brought a *Garofoli* application in relation to the Authorization granted on November 18, 2008 for a Part VI interception of his and others' private communications.

[2] The investigation for which the Part VI intercepts were granted led to charges against Mr. Cater, his father, Paul Cater, and stepmother, Torina Lewis, for weapons possession, and against Kyle Cater alone for weapons trafficking. Paul Cater and Ms. Lewis have not joined in Kyle Cater's *Garofoli* application. Consequently where I refer to "Mr. Cater" in this decision I mean Kyle, not Paul Cater.

[3] As part of his *Garofoli* application, Mr. Cater is seeking leave to cross-examine the Affiant to the Affidavit and Information to Obtain ("ITO") sworn on November 14, 2008.

[4] The Crown asks for a summary dismissal of the *Garofoli* application and, should I allow that application to proceed, a denial of leave to cross-examine the Affiant.

The Crown's Application for Summary Dismissal

[5] The Affidavit and Information to Obtain is 247 pages long and identifies 13 targets of the police investigation, including Kyle Cater.

[6] In the Crown's submission, "A review of the material submitted by [Kyle Cater] reveals that there is no basis in fact or law for the [*Garofoli* application]." (*Crown Section 8 Brief*) The Crown has submitted Mr. Cater has failed to meet the minimum threshold required for establishing that a *Garofoli* hearing be held. As the Crown puts its position in its Brief:

> The alleged deficiencies advanced by the Defendant ignore procedural and evidential requirements, and are often misleading and exceedingly biased in analysis. (*paragraph 10, Crown Brief*)…Defence counsel's confusing and unsubstantiated arguments do not provide a basis for the initiation of [a *Garofoli* review.] (*paragraph 15, Crown Brief*)

[7] The Crown submits that Mr. Cater has failed to make a case for the court having any concern about the Affidavit used to obtain the authorization. Nothing complained about by Mr. Cater is sufficient to trigger the need for a review.

Kyle Cater's Response to the Summary Dismissal Application

[8] Ms. Cooper filed a Brief of which 240 paragraphs deals with the Affidavit and authorization. She submits that the source information about Kyle Cater contained in the Affidavit is nothing more than rumour and gossip. In her submission it is unconfirmed and lacks any reliability. Ms. Cooper submits that a *Garofoli* review is required in order to assess whether, once what she describes as misleading information is excised and material omissions are included, the authorizing justice could not have granted the authorization. It is Ms. Cooper's submission that had information about the many police stops and searches of Mr. Cater, with negative results, been included in the Affidavit, it would have discredited the source information that alleged he was involved in the drug trade.

Providing a Factual and Legal Basis for the Exclusion of Evidence

[9] A *Garofoli* application is an application that has as its objective the exclusion of the evidence obtained under the authorization. If the authorization can be successfully attacked then the authorized intercepts can be excluded under section 24(2) of the *Charter*.

[10] Where an accused bears the burden of establishing that evidence is inadmissible "it is incumbent on counsel to put forward a factual and legal basis" to discharge this onus. (*R. v. Kutynec, [1992] O.J. No. 347, paragraph 32 (Ont. C.A.)*) As the Ontario Court of Appeal has held:

> …If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a Charter infringement, or a finding that the evidence in question was obtained in a manner which infringed the Charter, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence. (*Kutynec, paragraph 31*)

[11] The approach to *Charter* motions needs to be one of "flexibility on the part of counsel and the exercise of discretion on the part of the trial judge." (*Kutynec, paragraph 37*)

Determining the Summary Dismissal Issue

[12] The Crown's summary dismissal application creates a conundrum. In order to assess whether there is any basis to Ms. Cooper's complaints about the Affidavit, I found myself having to engage in a careful review of a detailed Affidavit while paying close attention to Ms. Cooper's very lengthy Brief. As I said to counsel during oral submissions, this has had the effect of blurring the margins between the summary dismissal application and an actual review of the Affidavit, amounting to a *Garofoli* review. As the Crown acknowledged, the practical implications are that whatever benefits may be achieved by way of a summary dismissal of an unworthy *Charter* motion are really not achievable where the court inevitably must conduct a substantive review of the material before it in order to deal with the issue of summary dismissal.

[13] I have concluded that I am not going to summarily dismiss Mr. Cater's *Garofoli* application. As doing so will accomplish nothing and as I have already had to immerse myself in the substance of the Affidavit and Ms. Cooper's objections to it, the fairest approach in my view is to undertake the *Garofoli* review, which has bled into the summary dismissal application in any event.

[14] Although I have already heard, in the *Stinchcombe* application and this summary dismissal application, submissions of a substantive nature about the Affidavit, I will invite Crown counsel and Ms. Cooper to make any further, focused submissions for the *Garofoli* review I will be conducting. I also want to reiterate that I carefully read Ms. Cooper's extensive written submissions about the content of the Affidavit.

[15] Before hearing from counsel further, I will address the request for permission to cross-examine the Affiant, Cpl. Jadie Spence.

Cross-Examination of the Affiant

[16] *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…

[17] *Pires and Lising* also discusses the issue:

> **3** There is no question that the right to cross-examine is of fundamental significance to the criminal trial process. However, it is neither unlimited nor absolute. The extent to which it becomes a necessary adjunct to the right to make full answer and defence depends on the context. The *Garofoli* threshold test requires that the defence show a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge. It is grounded in two basic principles of evidence: relevance and materiality. It is also born out of concerns about the prolixity of proceedings and, in many cases, the need to protect the identity of informants. The rule does not infringe the right to make full answer and defence. There is no constitutional right to adduce irrelevant or immaterial evidence. Further, the leave requirement strikes an appropriate balance between the entitlement to cross-examination as an aspect of the right to make full answer and defence, and the public interest in the fair, but efficient, use of judicial resources and the timely determination of criminal proceedings.
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> **30** …the *Garofoli* review hearing is not intended to test the merits of any of the Crown's allegations in respect of the offence. The truth of the allegations asserted in the affidavit as they relate to the essential elements of the offence remain to be proved by the Crown on the trial proper. Rather, the review is simply an evidentiary hearing to determine the *admissibility* of relevant evidence about the offence obtained pursuant to a presumptively valid court order…

> **31** …There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. The *Garofoli* threshold test is nothing more than a means of ensuring that, when a s. 8 challenge is initiated, the proceedings remain focused and on track. Even on the trial proper, the right to cross-examine is not unlimited. In *Lyttle*, the Court reiterated the principle that counsel are "bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value" (para. 44; emphasis added). The *Garofoli* threshold test is all about relevancy. If the proposed cross-examination is not relevant to a material issue, within the narrow scope of the review on admissibility, there is no reason to permit it.
>
> **32** The accused remains free to make submissions and elicit relevant evidence on whether the interception constitutes an unreasonable search or seizure within the meaning of s. 8.

[18] The Supreme Court of Canada in *Pires and Lising* emphasized that the reviewing judge, in determining whether cross-examination should be permitted, must remain strictly focused on the *Garofoli* review issue, that is, whether there is a basis upon which the authorizing judge could grant the authorization. “If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted.” (*paragraph 40*)

[19] Ms. Cooper has submitted that some of the material in the Affidavit is set out in a misleading way, that there was no basis for finding the sources who provided information about Mr. Cater were reliable, and that there were material omissions, notably with respect to unproductive searches of Mr. Cater during the period when the sources were alleging he was dealing drugs. She submits that her cross-examination of the Affiant would permit her to get at whether any of the named persons in the Affidavit (or the targets) were also the sources of the information about Mr. Cater and that, if permitted to cross-examine, she would also be able to ask the basis for tying Mr. Cater into the offences being investigated.

[20] Ms. Cooper’s arguments for cross-examination have failed to persuade me that cross-examining the Affiant will assist in a determination of the question of whether there was a basis upon which the authorizing justice could grant the order

for the intercepts. I am satisfied that in this case, the *Garofoli* review can and should be conducted on the basis of my examination of the material that was before the authorizing justice.

[21] On the issue of exploring through cross-examination whether named persons in the Affidavit or targets were also confidential police sources, I note that in my decision on Mr. Cater's *Stinchcombe* application (*R. v. Cater, 2011 NSPC 86*) I made the following finding in relation to questions Ms. Cooper was seeking answers to as disclosure about the confidential police sources:

> [43]…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.

[22] As for the issue of using cross-examination of the Affiant to determine how Mr. Cater was connected into the offences being investigated, I refer to the Ontario Court of Appeal's reasons in *R. v. Schreinert, 2002 O.J. No. 2015* where the Court held that 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. (*paragraph 43*) I will further note that in this case, Kyle Cater's involvement is described by the Affiant in the Affidavit to a sufficient degree that I cannot see how cross-examination would add anything.

[23] Finally, in terms of what Ms. Cooper describes as material omissions - the searches of Mr. Cater by police with negative results – I determined in my decision on Mr. Cater's *Stinchcombe* application that this information is not relevant to Mr. Cater's full answer and defence or his intended *Garofoli* application. I said the following:

> [28]…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.
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> [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.

Conclusion

[24] In conclusion, Mr. Cater's *Garofoli* review will go forward without any cross-examination of the Affiant. No basis has been established for permitting cross-examination. The issue I must address as the reviewing judge will not be assisted by cross-examination and the review will be conducted on the basis of my assessment of the contents of the Affidavit that was before the authorizing justice.