ONTARIO COURT OF JUSTICE

COURT FILE No.: Niagara Region 2111-998-18-S2433-00
DATE: 2020 07 24

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

MICHAEL SHADA

Before Justice D. L. Wolfe
Application heard on August 19, 2019, November 29. 2019, December 23, 2019, February 7 2020
Reasons for Ruling on Charter application released on July 24, 2020

Darren G. Anger .....counsel for the Crown
Jordana H. Goldlist.....counsel for the applicant/defendant, Michael Shada

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Ruling on Charter application

WOLFE J.:

1. Overview

[2] The applicant, Michael Shada, is charged with possession for the purpose of trafficking both heroin and fentanyl, possession of crystal methamphetamine, possession of proceeds of crime and counts relating to a prohibited weapon. The defense has brought an application seeking to set aside the judicial authorization for a tracking warrant on the basis that there were material omissions and misrepresentations by the affiant who did not provide full, frank and fair disclosure. The applicant also argues that with excision of inappropriate information from the Information to Obtain (ITO) it is insufficient to support issuance of the warrant. If successful, the defense seeks to exclude evidence obtained as a result of two CDSA search warrants for which the ITO was supported by evidence obtained as a result of the tracking warrant.

[3] The test on review is whether the issuing justice could have concluded there were reasonable grounds to issue the warrants. There is a presumption of validity of the warrants; however, this application challenged the reliability of the contents of the Information to Obtain (ITO) and whether the affiant made full, frank and fair disclosure.

[4] The applicant brought a Garofoli application and counsel was granted leave to cross-examine the affiant who prepared the ITOs which led to the issuance of the tracking warrant and search warrants.

[5] The applicant has brought an additional argument alleging that the manner of arrest and search was unreasonable and did not follow the principles of proportionality, necessity and reasonableness. The remedy sought is the exclusion of all evidence located as a result of the arrest and search.

[6] The Crown position is that even if inaccurate information is excised from the ITO the remaining balance supports the issuance of the warrants. The Crown argues that in evaluating the information provided by the confidential informant (CI) consideration of whether it was compelling, credible and corroborated the ITO's indicates it is sufficient support of the warrants.

[7] The Crown argues that the manner of execution of the search warrants and arrest of the applicant was not unreasonable and was not a violation of the applicants rights.

[8] The Crown further argues that having regard to the seriousness of the offences the evidence should not be excluded pursuant to s. 24(2) of the Charter. That due to the serious nature of the offences a trial on the merits is appropriate and exclusion of the evidence would cause harm to the administration of justice and tend to bring it into disrepute.

[9] The issues are as follows:

1. Were the applicants's. 8 *Charter* rights breached by the manner of arrest and search?

2. Should any information be excised from the ITO's sworn in support of the tracking warrant dated May 22, 2018, or the search warrants dated June 18, 2018 for 69 Tiller Trail, Brampton and the Silver 2013, Dodge Journey?

3. Could the tracking warrant dated May 22, 2018 have issued?

4. Did the affiant provide full, fair and frank disclosure and should the court apply it's residual power to set aside the warrant?

5. Could the search warrant for 69 Tiller Trail have issued?

6. Could the search warrant for the Dodge Journey have issued?

7. Should any or all of the evidence be excluded under s. 24(2) of the *Charter*

2. Background

[10] On May 22, 2018, the affiant, Detective Constable Jordan Meffe of the Niagara Regional Police Service prepared an ITO seeking a tracking warrant for Mr. Shada's motor vehicle, a Dodge Journey. The tracking warrant was issued on the same day.

[11] The ITO contained information provided by a confidential source for whom D.C. Meffe was the handler. DC Meffe conducted surveillance and included his observations in the ITO to corroborate the information provided by the informant.

[12] Evidence obtained as a result of the tracking warrant was used to supplement the information previously contained in the tracking warrant ITO. Surveillance was conducted on Mr. Shada. Two search warrants were then obtained under the *Controlled Drugs and Substances Act* for a residence at 69 Tiller Trail in Brampton and for the Dodge Journey that was the subject of the tracking warrant. Both warrants were issued and executed on June 18, 2018 and evidence gathered as a result led to the charges Mr. Shada is now facing.

[13] I will first review the applicants argument regarding the manner in which the arrest and search were conducted.

3. Manner in which arrest and search were conducted

[14] Mr. Shada was arrested on June 18, 2018 at 4pm in a parking lot at 1 Eastchester Ave in St. Catharines. His vehicle was boxed in by police vehicles. Impacts between vehicles damaged both the front and rear bumpers of Mr. Shada's vehicle. A flash bang distraction device was deployed, the windows of his vehicle smashed out and Mr. Shada was ordered to exit the vehicle. When he did not immediately respond, he was struck on the face as a distraction technique, and then pulled from the vehicle.

[15] The applicant argues that his section 8 Charter right to be secure against unreasonable search or seizure was violated. It is well established law that a lawful search must be carried out in a reasonable manner and the police have the onus to justify the use of exceptional force.

(i) ETU planning for the arrest

[16] Joseph Garvey of the Niagara Regional Police Service (NRPS) testified as the inspector in charge of emergency services. He indicated that the Emergency Task Unit (ETU) is requested where there is a situation that is more dangerous than the typical frontline officer should be handling. On June 18, 2018 he was briefed by Staff Sergeant Gord Nash regarding planning for a high risk potentially dangerous arrest.

[17] It was Garvey's responsibility to determine whether to authorize the involvement of the ETU where there was a concern for the safety of the public, the subject or suspect, or the police. His role was to evaluate the specifics of an operational plan generated by the staff Sergeant, sergeants and team leaders and decide whether to approve the level of force.

[18] Garvey had been briefed by Sergeant Arsenault with respect to the location of 1 Eastchester Avenue in St. Catharines, and a 2013 Dodge Journey vehicle with tinted-out windows. He reviewed CPIC records and contacted Sergeant Paul Blakeley to confirm the information about the takedown.

[19] Under cross examination Garvey advised that he recalled the last CPIC conviction to be 2010 and the fact that there were no weapons offences would have assisted him in determining whether a high risk take down was appropriate. He confirmed that a history of flight from police or assaults against police would also have informed his decision.

[20] He was aware that there was a CDSA warrant for a residence. His decision to authorize controlled force was based on safety and informed by information provided by Sergeant Blakeley. He was not certain if some of that information came from a confidential source.

[21] He authorized a high risk arrest which allowed blocking the vehicle in, smashing windows out, and the use of distraction including light and sound devices.

[22] He was asked if he authorized "police vehicles to not just block in Mr. Shada's vehicle but to actually smash into it with such force that the front bumper became dislodged" and said that he did not. In his view once a high risk take down was approved it was necessary for it to be employed. He conceded that if a person was complying with the police demands that there would be no need to use force in order to secure that compliance.

[23] In re-examination he clarified that he had received information specific to Mr. Shada that informed his authorization of force, information that he had not been able to disclose in his testimony.

[24] Detective Matthew Whiteley of the NRPS ETU explained that when a request for assistance comes from another branch of the police, his Sergeant, Staff Sergeant and inspector must approve. With respect to Mr. Shada he was not directly involved in preparing the plan. His understanding was that given Mr. Shada's background and information received they were going to use vehicles to deny mobility and conduct a high risk takedown.

[25] As a team leader he was aware of operational planning and the preparation of an estimate plan. "... with Mr. Shada, we would look at the subject's background, his anticipated behaviours, any sort of prior incidents he's had with police, any of those factors."

[26] He was aware of a police caution on the system that in the past Mr. Shada had access to firearms and so one of the purposes of the plan was to distract him as much as possible. With respect to this particular arrest he testified " In this case we anticipated that Mr. Shada could be armed and we wanted to make sure that we would be as safe as possible. There was a caution on our system that he was, had in the past has access to firearms"[1].

[27] Mr. Shada's vehicle was boxed in, a flash bang distraction device was thrown towards the drivers side door at the ground and 3 to 4 members of the ETU approached from the rear and used a carbide-tipped window punch to break the tinted driver and passenger side windows. The windows were described as having limo tint with the result that police could not see inside the vehicle. The windows were smashed so the officers could determine if the tint was concealing a threat inside the vehicle and for the additional distraction value.

[28] Det. Whitley described the in vehicle arrest as difficult to coordinate but ultimately safer for the public, the accused and the police than conducting an in residence arrest. He agreed with the description of the arrest as involving the minimal amount of force necessary to safely arrest Mr. Shada.

[29] Cst Ryan Cirillo testified that he was involved in the planning of the takedown. His decisions were informed by what the police database specifically described in relation to Mr. Shada

[1] Transcript of proceedings on November 29, 2019 Matthew Whiteley page 21

as "a male from Toronto, gang affiliate, I believe he was caution firearms, and right now he'd been selling cocaine and fentanyl in the Niagara area."[2] Cst Cirillo was at the drivers door giving commands to Mr. Shada to shut the vehicle off out of concern that he had already tried to reverse out of the police pinch and there were now officers out on foot that he did not want to endanger by the possibility of being run over. He delivered a quick distraction device, open hand hit to Mr. Shada's left cheek who then shut the vehicle off. From that point on Mr. Shada was described as cooperative and compliant. Cst Cirillo testified that the police "use as little force as necessary on him depending on what he does".

(ii) Whether the use of force during the arrest was unreasonable

[30] The applicant bears the onus on a balance of probabilities of establishing excessive force by the police in contravention of his Charter rights. Excessive force by a police officer can contravene s. 7 of the Charter if it endangers a person right to life and security of the person or the section 8 right to be secure against unreasonable search.

[31] Section 25 of the Criminal Code authorizes police acting on reasonable grounds, to use only as much force as is necessary to conduct an arrest.

[32] The Supreme Court of Canada in *R v. Nasogaluak*[3] held that the allowable degree of force used by police is constrained by the principles of proportionality, necessity and reasonableness. In evaluating police conduct the court observed "Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances."[4] Cst Whitely indicated his awareness of those requirements and in testifying that the minimal amount of force necessary was employed he stated "...we are accountable to all levels of force that we use, and the mandate at emergency task unit is to use the minimal amount of force possible to resolve a high-risk situation."[5]

[33] Several officers testified that they had received information about Mr. Shada that required the involvement of the Emergency Task Unit (ETU) and a proactive approach to his arrest. Contingencies were considered, a plan established and approval obtained throughout the NRPS chain of command. Police actions were motivated by the need to insure the safety of Mr. Shada, the police, and members of the public during the dynamic arrest scenario that was anticipated. Officers with extensive field and operational experience were involved in the preparation for the plan for arrest which was ultimately implemented.

[34] Although the precise details of what informed the police decision to involve the ETU in planning and execution were not revealed, Inspector Garvey testified that he had reviewed C.P.I.C. information, called Sergeant Paul Blakely to confirm that information and was aware of information specific to Mr. Shada that was protected by informant privilege.

[35] The contact between the vehicle causing the bumper of Mr. Shada's Dodge Journey to become dislodged was not pre planned. Cst Whitely described the start of the take down as

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[2] Transcript of proceedings on November 29, 2019 Ryan Cirillo page 66
[3] *R v. Nasogaluak*, [2010] 1 S.C.R. 206 at para 32
[4] *R v. Nasogaluak*, [2010] 1 S.C.R. 206 at para 35
[5] Transcript of proceedings on November 29, 2019 Matthew Whiteley page 23

follows: Our vehicle pulls out in front, activates it's emergency lights, which are very bright and then stops. He basically stopped in front of our vehicle, at that point immediately threw his vehicle into reverse, tried to back out, came into contact with the vehicle from behind at which time he moved forward. We moved forward to prevent him from escaping and that's when our vehicles contacted together."[6] The situation confronting the officers was that "A determined person could respond to a vehicle being pinched, as Mr. Shada did, he tried to escape[7]" and "he put the car in reverse and turned his wheel and then tried to escape immediately, very quick reactions on the part of Mr. Shada"[8]. Cst Whitley testified that there was not a dynamic or strong collision and it didn't meet the threshold for an airbag deployment. He described the contact in the following terms; "our vehicle came into contact with Mr. Shada as he was driving forward into us on a turning movement which caused a lateral force, snapping the bumper down. As you can see the bumper is not crushed in or pushed in... "[9]

[36] The modified objective test is applied looking to the reasonable officer in similar circumstances to those faced by the subject officer. As Justice Hill in *R. v. DaCosta*[10] describes the test the court considers "not only the external conditions including urgency and the imminence of the threat, the risk posed by the threat, the time to react, the unknowns and limited information available (*Hill*, at para. 73), but also such factors as the knowledge, training and experience of the officer: *MacKenzie*, at paras. 61-4"

[37] After a review of all the circumstances the applicant has failed to establish that the force used was excessive. Even taking into account the distraction blow that was administered to Mr. Shada's face when he was still occupying the drivers seat of his motor vehicle, and although not actively resisting, neither was he following instructions of uniform officers. I note that immediately before being boxed in by NRPS unmarked pickup trucks, he had reacted to the presence of a police vehicle in front of him by quickly reversing his motor vehicle in an apparent attempt to escape whatever situation he perceived to be unfolding. The police carefully planned and reviewed the procedure to be followed for the arrest given the information they had concerning Mr. Shada. The arrest employed a forceful, intimidating takedown that I find was necessary, reasonable and proportionate in all the circumstances. The Crown has established an evidentiary framework that demonstrates the police concern and consideration of the potential for harm to themselves, Mr. Shada and the public and the plan employed to address those concerns.

[38] The evidence provided a reasonable justification for the forceful arrest and execution of the search warrant. I am satisfied that the force used during the lawful arrest was reasonable and therefore find the manner in which the arrest and search were conducted was not a violation of Mr. Shada's right under s. 8 of the *Charter*.

4. Should any information be excised from the ITO sworn in support of the tracking warrant and Judicial review of whether the tracking warrant could have issued

(i) Applicable Standard for Tracking Warrant to Issue

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[6] Transcript of proceedings on November 29, 2019 Matthew Whiteley pages 44-45
[7] Transcript of proceedings on November 29, 2019 Matthew Whiteley page 22
[8] Transcript of proceedings on November 29, 2019 Matthew Whiteley page 25
[9] Transcript of proceedings on November 29, 2019 Matthew Whiteley page 28
[10] *R v DaCosta*, [2015] OJ No 1235, 2015 ONSC 1586 at para 105

[39] Pre-conditions for the issuance of a tracking warrant are set out in s. 492.1(1) of the *Criminal Code* as follows:

> 492.1(1) A justice who is satisfied by information on oath in writing that there are reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed and that information that is relevant to the commission of the offence, including the whereabouts of any person, can be obtained through the use of a tracking device, may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant (a) to install, maintain and remove a tracking device in or on any thing, including a thing carried, used or worn by any person; and (b) to monitor, or to have monitored, a tracking device installed in or on any thing. [Emphasis added.]

[40] The standard of reasonable grounds to suspect is less exacting than 'reasonable grounds to believe' that is required for a conventional search warrant.[11] It is a subjective belief "supported by factual elements about which evidence can be adduced and permit an independent judicial evaluation".[12]

[41] The Supreme Court of Canada has described the reasonable suspicion standard as:

> **75** "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. As observed by P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123:
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> - [T]he fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment. [p. 125]
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> - What distinguishes "reasonable suspicion" from the higher standard of "reasonable and probable grounds" is merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts which, in both cases, must exist to support the search. [p. 126][13]

[42] It was conceded that Det. Meffe's investigation would be assisted by the issuance of a tracking warrant which would potentially allow police to:

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[11] *R. v. Mahmood,* [2011] O.J. No. 4943 (C.A.), 2011 ONCA 693, at paras. 113-114:
[12] *R. v. Bilelic, Flammia,* et al 2018 ONSC 6676 at para 40
[13] *R v Kang-Brown,* [2008] SCJ No 18, 2008 SCC 18, [2008] 1 SCR 456, [2008]

- maintain a strategic distance from Mr. Shada while he was operating his vehicle,
- monitor Mr. Shada without being subject to counter-surveillance techniques,
- identify when Mr. Shada was entering Niagara so surveillance could be conducted,
- identify the use and location of a stash house by Mr. Shada

[43] The applicant did not argue that the tracking warrant would not assist in the investigation of Mr. Shada but rather that with excision of offending paragraphs all that remained was a fishing expedition.

[44] The applicant argues that the tracking warrant did not meet the standard of reasonable grounds because it relied upon a single confidential informant whose credibility and reliability were unknown and that the affiant's corroboration efforts were tainted by the failure to make full, fair and frank disclosure. The defense disputes the Crown assertion that only minor errors or omission made in good faith are in issue. Rather the defense argues that DC Meffe included statements that were not accurate or reliable, that the information included was not balanced since he picked and choose what to include.

[45] The ITO may be corrected by the reviewing Judge to remove what the affiant ought to have known was false, inaccurate or misleading and insert what ought to have been included as part of full, fair and frank disclosure. The ITO must then be evaluated and the authorization set aside only if upon review there is no longer any basis for the issuing justice to authorize the warrant.

(ii) Investigation into 81 Carlton Street

[46] Paragraphs 14 to 19 of the ITO relate to 81 Carlton Street in St. Catharines where three people were under investigation as drug dealers. DC Meffe observed a brief visit to the rear of the property at 1:23 pm on April 17, 2018 by a black male identified as Mr. Shada driving a silver Dodge Journey. DC Meffe wrote "that was a believed drug deal".

[47] In cross examination DC Meffe admitted that he did not see anyone leave, or attend at the motor vehicle. There was no observed interaction with the suspected drug dealers occupying the rear apartment at that location.

[48] The ITO described the location as a known drug house. In cross examination DC Meffe acknowledged that there was a "makeshift" division of the residence into a front and rear unit at that address, only the rear unit was under investigation, and that the two units shared a common driveway. DC Meffe accepted the suggestion that he should have elaborated or emphasised that it was only the rear unit that was under investigation. However the visit by Mr. Shada was to the rear of the property which contained only the entrance to the rear apartment.

[49] At Paragraph 15 of the ITO DC Meffe wrote that shortly after the visit by the Dodge Journey, police observed what was believed to be seven drug deals at that unit and an additional six mobile deals. In cross examination he acknowledged that the believed drugs deals took place from April 17 to April 19, 2018. The first took place at 4:48 pm on Elmwood Street where officers were watching L.B. a resident of 81 Carlton Street. The first observed believed drug transaction at 81 Carlton Street did not occur until approximately 5:55 pm four and one-half hours after Mr.

Shada attended, however L.B. had just returned to the residence. None of this information was included in the ITO.

[50] Paragraph 19 asserted a surge of foot traffic occurred after the visit by the Dodge Journey presumed to be operated by Mr. Shada. The affiant note that immediately followed indicated that is when an "influx foot traffic began" The suggestion contained in those statements was that the occupants of 81 Carlton Street had been resupplied by Mr. Shada and were open for business. However DC Meffe acknowledged that he had only begun watching the residence one hour before the Dodge Journey visit and had not established a refence level for traffic from which he could state there had been a "surge" or "influx".

[51] The defense argues that DC Meffe exaggerated his observations to invent a scenario in which Mr. Shada was a supplier to 81 Carlton street.

[52] I agree that this portion of the ITO was potentially misleading with respect to a surge or influx of foot traffic because a baseline had not been established for traffic, and because it was described as taking place shortly after the Shada visit when in fact over four hours had elapsed and the traffic pattern was then observed over a period of days. Therefore the reference in the second sentence of para 29 to observations following his attendance at 81 Carlton Street should be excised.

[53] Paragraphs 16 and 17 describe a search warrant executed at 81 Carlton Street 2 days after Mr. Shada was seen in the driveway, the arrest of 3 people and a quantity of fentanyl and cocaine that was seized.

[54] In his testimony the officer indicated that he did not find it relevant to advise in the ITO that there were two units at 81 Carlton Street, that only the rear unit was part of the investigation and the search warrant only allowed entry from the rear. The failure to advise the issuing justice that there were two units has significance when considering paragraph 16 of the affidavit which refers to "the arrest of the parties associated to 81 Carlton Street" reinforcing the image of there being a single residence at that address. However on the evidence heard on the application I cannot find that the officer was engaged in a deliberate attempt to mislead the issuing justice on that point. In paragraph 15 of the affidavit the detective refers to the Carlton Street address as "the unit" which by implication suggests that there were more than a single unit at that location.

[55] The defense argued that the ITO should have stated that nothing was found at the Carlton St. address that belonged to Mr. Shada. I do not agree that failure to state a negative in this regard was significant or required from the affiant.

(iii) Mr. Shada's criminal record

[56] Detective Meffe did not include a copy of Mr. Shada's criminal record but did reference it at paragraph 26 of the ITO. DC Meffe did not advise that the record was dated with the last conviction 12 years previous because he did not find that relevant.

[57] The last conviction was for robbery, uttering threats and possession of property obtained by crime however in the ITO it is simply described as possession. The defense argues that the issuing Justice could have been mislead into thinking the possession charge was in relation to drugs contrary to the CDSA rather than the actual property offence. The defense alleges that the officer

purposely listed the offence as only "possession" in an attempt to mislead and by suggesting Mr. Shada was convicted of possession of drugs and therefore he was tied to drug trafficking.

[58] The dated aspect of the record is relevant and could have been made clear in the body of the affidavit or by attaching a copy. However a nexus to the current allegations is not made out by the actual convictions. While I do not find an intention to mislead, the careless reference to only possession had the potential to mislead the issuing justice into thinking that it was a CDSA possession rather than property offence. In considering that potential however I am not prepared to assume that the issuing Justice would not have been aware that the vague reference meant that it could only be a CDSA offence and not a property offence.

[59] DC Meffe also listed that Mr. Shada had been arrested for "assault peace officer, obstruct, trafficking drugs, numerous firearms offences, dangerous driving and fail to comply" without indicating that he was never charged or convicted of those offences. The defense seeks that paragraph be excised relying upon *R. vs. Bernabe*[14] for the authority that "the potential for this information to be corroborative is dependent upon the reliability of it's source, it recency, whether it resulted in convictions and its nexus to the current accusations". Paragraph 29 of the ITO indicated that Mr. Shada was affiliated to weapons and narcotics related offences however DC Meffe acknowledged in cross examination that was untrue. Accordingly that reference should also be excised from the ITO.

[60] A list of contacts with the police that did not result in convictions has no probative value and should not have been included. The last part of paragraph 26 listing offences for which he had been arrested, but did not result in convictions and were no longer outstanding, should be excised from the ITO

(iv) The robbery/shooting incident at 1 Eastchester Avenue

[61] Paragraph 28 references the May 1, 2015 robbery and shooting incident at 1 Eastchester Ave in St. Catharines. DC Meffe wrote that Mr. Shada was the victim of a robbery/shooting. He was aware that Mr. Shada was considered by police as a victim in the robbery incident and that the shooting was directed at the police and did not involve Mr. Shada. Nothing in the 2015 investigation indicated that Mr. Shada was on the date in question at the address to sell drugs.

[62] DC Meffe's affiant note after ITO para 28 indicated that Mr. Shada's involvement was a "tell tale sign that further substantiated that Shada is a drug dealer" however he acknowledged in cross examination that nothing about that incident indicated he was there to sell drugs.

[63] DC Meffe was aware that Mr. Shada told police he worked for a record label and had gone to that location to purchase marijuana. He acknowledged in cross examination that his work project for the record label contradicted information that he was a drug dealer.

[64] The affiant note following paragraph 28 describes the events from Eastchester as a "tell tale sign" that substantiated the CI information that Mr. Shada was a drug dealer. That conclusion is not supported by the facts, it was not a situation of rival drug dealers using violence and in fact Mr. Shada did not have convictions for weapons offences. That entire affiant note should be

[14] *R v Bernabe*, [2014] OJ No 5617 at paras 30-35

excised from the ITO. The reference in paragraph 28 should be restricted to "victim of a robbery at 1 Eastchester" with the word shooting deleted.

[65] The applicant has revealed some flaws in the ITO and statements by the affiant that I have excised from the information and excluded from consideration in this review. What remains however is the confidential informants physical description of Mr Shada, his point of origin and vehicle that he uses in Niagara. Mr. Shada resided in the GTA but was observed to visit to a residence from which there was subsequent drug dealing, later confirmed by a separate exercise of a search warrant,

(v) The CI information

[66] The Supreme Court of Canada in *R v. Debot* set out three requirements for reliance on a CI tip: that the information be compelling, come from a credible source and be corroborated by police investigation. All the circumstances must be considered and weakness in one category can be compensated for by strengths in the other two.

[67] A single confidential informant (CI) provided general information that included:

- The name Michael Shada
- Was a dealer of heroin/fentanyl
- Was operating in the Niagara Region
- A physical description: male, black, African, tall, thick, bald head, 32 years old, 6'1"
- The motor vehicle he drove: a silver Dodge Journey SUV
- That he was from the Greater Toronto Area

[68] The applicant argues that part of the information from the CI was that Mr. Shada was a male from TO. In fact the police believed he resided in Brampton and this portion of the CI information was incorrect. From the perspective of the Niagara Region, Brampton is commonly understood to be a part of the Greater Toronto Area and I do not consider that the distinction the applicant makes has much weight.

[69] The applicant argues that the CI had the age of Mr. Shada incorrect describing him as being 32 years of age when he was in fact a year different in age. I do not consider this distinction to be significant

[70] A CI tip alone is not a sufficient basis upon which a search warrant can be obtained There are three factors to consider when evaluating the information:

Whether compelling

[71] The informant's physical and other descriptions of Mr. Shada and his vehicle includes meaningful detail. Other information is of a more general nature. Much of what is contained in the tip would be known to anyone in the community familiar with the accused. There is no

indication of a recent purchase from Mr. Shada or how the informant gained the knowledge shared with the police. Certainly there was sufficient detail to arouse suspicion by the police, details concerning physical descriptors and that Mr. Shada travels from the GTA to Niagara, but I disagree with the affiants assertion that the information by itself was compelling. It is not clear whether the tip is based upon anything more than rumour or gossip and the information with respect to his status as a drug dealer is no more than a bald assertion.

Whether credible

[72] There was no evidence in the body of the affidavit or testimony of the affiant as to the informants motive or criminal record although the information was apparently available to the issuing Justice in redacted appendix "B". The affiant indicated that he was the handler for this informant whom he considered credible. Concerning this CI the affiant stated he was a registered informant, and at para 13(c) "the "confidential informant has provided information in the past that is believed to be accurate". At paragraph 21 in reference to credibility the affiant stated "I have not learned anything concerning the CI assisting this investigation that would lead me to believe otherwise". The affiants conclusions as to credibility are of no value to this courts assessment of credibility since they are little more than saying that nothing came up to undermine what the CI has said. While the informant may be registered with the police there is nothing in the ITO about the CI's past history to support the credibility of the informant.

[73] There is no indication of the source of the informants knowledge, whether from first hand observation or third hand reports, or how recent or reliable was the information.

Whether corroborated

[74] The police were able to corroborate certain aspects of the description provided by the CI. The personal information as to the physical description and identity of Mr. Shada and his presence in the Niagara area by means of the Dodge Journey were determined to be accurate. This confirmation of innocuous general information is of limited value.

[75] However subsequent police investigation revealed Mr. Shada's brief 5 minute attendance at the rear of the driveway at 81 Carleton Street, a two unit residence from which it was confirmed following the execution of a warrant two days later in another investigation, the occupants of the rear unit were involved in the sale of Fentanyl and Cocaine. Viewed though the lens of an experienced drug officer the visit has greater significance and is some corroboration of the confidential informant.

[76] It is the cumulative effect of the three *Debot* factors or as it has been stated the "totality of the circumstances" that must be considered and that are sufficient to meet the standard of reasonable suspicion for the issuance of a tracking warrant.

[77] I am aware that review is not a rehearing of the application for the warrant. "The question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued."[15] Fraud, non-disclosure, and misleading evidence

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[15] *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at para. 56:

[15] *R v Mahmood*, [2011] O.J. No. 4943, 2011 ONCA 693 at para. 99:
R. v. Araujo, [2000] 2 S.C.R. 992, 2000 SCC 65 at para. 51:

only relate to whether after excision there remains any basis to support issuance of the warrant. On that limited test I am satisfied that there was evidence remaining before the issuing justice that could have led to the authorization of the warrant. The requirement of reasonable grounds to suspect that the searches sought to be authorized by the warrant would assist in the investigation has been established.

5. Full frank and fair disclosure and duty of the affiant and the courts residual power

[78] In R v. Ngo[16], Justice Hill reviewed instructive guidelines for courts in the role of constitutional review starting at para 34

> In performing its role of constitutional review of an ITO, various instructive guidelines have been applied by courts including:
>
> - (1)The warrant is presumptively valid unless the challenging party establishes that there was no basis for its issuance: *R. v. Campbell,* 2010 ONCA 588, at para. 45. (aff'd, 2011 SCC 32).
>
> - (2)"[T]he review is not an exercise in examining the conduct of the police with a fine-toothed comb, fastening on their minor errors or acts or omissions, and embellishing those flaws to the point where it is the police conduct that is on trial rather than the sufficiency of the evidence in support of the application": *R. v. Nguyen*, 2011 ONCA 465, at para. 57.
>
> - (3)As noted in *R. v. Cunsolo*, [2008] O.J. No. 3754 (S.C.J.)(QL), at para. 135:
>
> - The appropriate approach for judicial review of the facial validity of a search warrant and related ITO is scrutiny of the whole of the document, not a limited focus upon an isolated passage or paragraph. Reference to all data within the four corners of the information, a common sense review not line-by-line word-by-word dissection, provides the fair and reasonable context for the assertions in question: *R. v. Grant* (1999), 132 C.C.C. (3d) 531 (Ont. C.A.) at 543 (leave to appeal refused [1999] S.C.C.A. No. 168 (Q.L.), 150 C.C.C. (3d) vi); *R. v. Chan*, [1998] O.J. No. 4536 (Q.L.) at para. 4, 40 W.C.B. (2d) 143 (C.A.); *R. v. Melenchuk and Rahemtulla*, [1993] B.C.J. No. 558 (Q.L.) at para. 15-18, 19 W.C.B. (2d) 194 (C.A.); *Simonyi Gindele et al. v. British Columbia (Attorney General)* (1991), 2 B.C.A.C. 73 (C.A.) at 79.
>
> - (4)Police officers are not legal draftspersons and cannot, in an ITO, be expected to "spell out things with the same particularity of counsel": *Re Lubell and the Queen* (1973), 11 C.C.C. (2d) 188 (Ont. H.C.), at p.190; *R. v. Durling* (2006), 214 C.C.C. (3d) 49 (N.S.C.A.), at para. 19; *R. v. Sanchez*

[16] R v Ngo, [2011] OJ No 5023, 2011 ONSC 6676, 97 WCB (2d) 645, 2011 CarswellOnt 12142

(1994), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.), at p. 364; *Re Chapman and the Queen* (1983), 6 C.C.C. (3d) 296 (Ont. H.C.), at p. 297.

- (5)It will not be surprising that an ITO will have some flaws - "[f]ew applications are perfect": *Nguyen*, at para. 58. The question remains whether the core substance of the ITO could support the justice of the peace's exercise of discretion to issue the warrant.

- (6)While it is expected that an ITO will present reliable, balanced and material facts supporting the asserted grounds of belief, an ITO affiant need not attempt to replicate a Crown disclosure brief - the document should be clear, concise, legally and factually sufficient, and "need not include every minute detail of the police investigation": *C.B.C. v. A.-G. for New Brunswick* (1991), 67 C.C.C. (3d) 544 (S.C.C.), at p. 562; *R. v. Araujo* (2000), 149 C.C.C. (3d) 449 (S.C.C.), at p. 470; *R. v. Ling* (2009), 241 C.C.C. (3d) 409 (B.C.C.A.), at para. 43 (leave to appeal refused, [2009] S.C.C.A. No. 165).

[79] Regarding the role of the affiant K.L. Campbell J observed in Boussooulas :

> a police officer drafting an ITO must always act with integrity and reasonable diligence, being mindful of his or her duty to make full and frank disclosure in *ex parte* proceedings, and being careful to guard against making inaccurate statements or exaggerated assertions likely to mislead the reviewing justice. See *R.v. Araujo*, at paras. 46-47; *R.v. Morelli*, at paras. 99-103.[17]

[80] Justice Hill observed in R v. Ngo[18]

(4) "It is trite law that an applicant for a search warrant has a duty to make full, frank and fair disclosure of all material facts in the ITO supporting the request" for a search warrant: *Nguyen* (2011), at para. 48. In *R. v. N.N.M.* (2007), 2007 CanLII 31570 (ON SC), 223 C.C.C. (3d) 417 (Ont. S.C.J.), at para. 320, the court stated:

> Because a search warrant application is generally an *ex parte* application, there is a "legal obligation" to provide "full and frank disclosure of material facts" with the relevant facts set out "truthfully, fully and *plainly*": *Araujo*, 2000 SCC 65 (CanLII), [2000] 2 S.C.R. 992, at 469-470 (emphasis of original). A justice can only perform the judicial function of issuing a warrant if "provided with accurate and candid information": *R. v. Hosie* (1996), 1996 CanLII 450 (ON CA), 107 C.C.C. (3d) 385 (Ont. C.A.) at 399; *R. v. Agensys International Inc.* (2004), 2004 CanLII 17920 (ON CA), 187 C.C.C. (3d) 481 (Ont. C.A.) at 491. The "requirement of candour is not difficult to understand; there is nothing technical about it": *R. v. Morris* (1998), 1998 NSCA 229 (CanLII), 134 C.C.C. (3d) 539 (N.S.C.A.) at 551. An affiant for a warranted search is under a duty

[17] R v Boussoulas, [2014] OJ No 4525, 2014 ONSC 5542, 320 CRR (2d) 64, 2014 CarswellOnt 13487
[18] R. v. Ngo, 2011 ONSC 6766 (CanLII) at para 34

> to avoid drafting which attempts to trick the reader, for example by the use of boiler-plate language, or which could mislead the court "by language used or strategic omissions": *Araujo*, at 470. Careless language in an ITO "deprives the judicial officer of the opportunity to fairly assess whether the requirements of a warrant have been met" and "strikes at the core of the administration of justice": *Hosie*, at 398-400

[81] The affiant Det. Cst. Jordan Meffe testified that he was an experienced writer of search warrants and understood his obligation to make full, frank and fair disclosure. He acknowledged that the ITO cannot mislead, must provide all material information and cannot overstate observations. He testified in a forthright manner, acknowledged some errors and not surprisingly stated he did not intend to mislead the issuing Justice.

[82] The applicant argues that the errors of the affiant were not minor and technical or made in good faith and that the appropriate review is to correct the ITO by excising the relevant paragraphs. The applicant argues that the flaws in the ITO are the product of a deliberate attempt to exaggerate the facts and mislead the issuing Justice.

[83] The officer denied any intention to mislead and acknowledged that he should have been more careful and complete with the preparation of the ITO. The affiant is not to be held to the same standard as a lawyer drafting legal documents and I accept that it is rare that an ITO will be without flaws. From evaluating any single inaccuracy it is apparent that at times the officer was at a minimum careless with his use of language.

[84] The Garofoli process allows for an assessment by the reviewing Judge whereby erroneous information is excised from the ITO. A determination is then made whether there is sufficient reliable information from which the decision to issue that warrant could be made. Garofoli removes from consideration information that resulted from fraud or non disclosure or misleading evidence and allows errors made in good faith to be corrected but only for the purpose of determining whether what remains is sufficient to ground the warrant.

[85] The applicant asks this court to consider its residual power to set aside the tracking warrant arguing that police conduct subverted the pre-authorization process.

[86] For the application of the residual power there must be a finding that "the police conduct amounted to a subversion or corruption of the pre-authorization process"[19]. The Court of Appeal provided guidance in evaluating subversion as follows[20]:

> [74] Third, abuse of process. I am not persuaded that the trial judge's occasional reference to "abuse of process" is misplaced or reflects error in this case. The appellant accepts that he must demonstrate that the police conduct *subverted* the pre-authorization process in order to bring his case within the sweep of the residual discretion. Subversion connotes undermining, corrupting, weakening, destroying or disrupting a system or process. In plain terms, an abuse of the pre-authorization process by non-disclosure or misleading disclosure or their like. Mere mention of the phrase "abuse of process" does not reflect self-misdirection. After all, this court in *Vivar* considered whether irrelevant and

[19] R. v. Paryniuk, 134 O.R. (3d) 321
[20] R. v. Paryniuk, 134 O.R. (3d) 321 para 74

improper references in an ITO were "so subversive of the search warrant process as to, in effect, amount to an abuse of process and require that the warrant be quashed": *Vivar*, at para. 2.

[87] The onus is on the applicant to establish an intent to subvert the authorization process. It is a high threshold to meet.

[88] The Ontario Court of Appeal in considering the courts residual discretion in the face of fraudulent or misleading material had this to say in *R. v. Paryniuk*[21]:

> [62] In this province, courts, including this court, appear to have recognized a discretion to set aside a warrant, despite the presence of reasonable and probable grounds for its issuance, where non-disclosure was for some improper motive or to mislead the issuing judicial officer: *R. v. Colbourne*, [2001] O.J. No, 3620, *157 C.C.C. (3d) 273* (C.A.), at para. 40. Where an affiant has been shown to have deliberately provided false material statements, or to have deliberately omitted material facts from an ITO, with the intention of misleading the issuing judicial officer, the warrant may be set aside. But the threshold for setting aside the warrant in these circumstances is high: *Lahaie v. Canada (Attorney General) (2010), 101 O.R. (3d) 241*, *[2010] O.J. No. 3100*, *2010 ONCA 516*, at para. 40, leave to appeal to S.C.C. refused *[2010] S.C.C.A. No. 371*. In at least one brief endorsement, this court has described the conduct necessary to engage [page336] this discretion as "so subversive of the search warrant process as to, in effect, amount to an abuse of process and require that the warrant be quashed": *R. v. Vivar*, *[2009] O.J. No. 2126*, *2009 ONCA 433*, at para. 2. See, also, *R. v. Evans*, *[2014] M.J. No. 129*, *2014 MBCA 44*, *306 Man. R. (2d) 9*, at paras. 17, 19.

And

> [69] What is clear, however, is that previous authority in this court has recognized a residual discretion to set aside a warrant despite the presence of a proper evidentiary predicate for its issuance where police conduct has subverted the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like: *Colbourne*, at para. 40; *R. v. Kesselring*, *[2000] O.J. No. 1436*, *145 C.C.C. (3d) 119* (C.A.), at para. 31; *Lahaie*, at para. 40; *Vivar*, at para. 2. Courts of appeal in other provinces have reached the same conclusion: *Bacon*, at para. 27; *Evans*, at paras. 17, 19; *R. v. McElroy*, *[2009] S.J. No. 416*, *2009 SKCA 77*, *337 Sask. R. 122*, at para. 30, leave to appeal to S.C.C. refused *[2009] S.C.C.A. No. 281*; *Morris*, at paras. 90, 92.
>
> [70] These same authorities, both in Ontario and elsewhere, describe the standard to be met to invoke this discretion as high. Indeed, some require that the conduct amount to an abuse of process: *Vivar*, at para. 2; *Bacon*, at para. 27.

[89] The defense argues that "the police conduct has subverted the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like"[22]. The defense then seeks that upon review a residual discretion be applied to set aside the authorization. The onus is on the applicant on a balance of probabilities to prove an intention to subvert the authorization process.

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[21] R. v. Paryniuk, 134 O.R. (3d) 321

[22] R. v. Paryniuk, 2017 ONCA87 at paras 62 and 69 and R. v. Araujo at para 54

[90] In the case before me the affiants description of observations by the police reveals more than minor deliberate exaggeration and non-disclosure.

[91] The cumulative effect of the language used, the implausibility of the justifications for the many errors does not inspire confidence that full frank and fair disclosure was a part of the process. In that regard I note the following faults in the ITO:

[92] 1. The statement that Mr. Shada had a record for Robbery, utter threats and possession, leaving open whether possession was a CDSA or property offence, in the context of an ITO for drug offences. Under cross examination Det Meffe acknowledged "I should've put possession of property obtained by crime" and that "Possession could've meant a number of different things." And that "I believe I should've elaborated on the possession of property obtained by crime ... absolutely" The problem would have been avoided if Det Meffe had included a copy of the record with the ITO and when asked about that he acknowledged not including a copy of the record and stated in three different responses to questions that he was not sure what the issuing Justice would have access to. His repeated answer seems to be an unsupported suggestion that the issuing Justice would independently have access to police maintained criminal record databases and might retrieve data therefrom while evaluating the ITO. When asked in re-examination if he intended to mislead he said "No, not at all. I did mean to emphasize possession of property obtained by crime and that was my error for not putting more than that". It is unclear how he meant to emphasize possession of property obtained by crime and his answer to that question raises more doubts about his intention than it resolves. I did not consider this to be something that required correction in evaluating whether the warrant could have issued, but raise it again now as a minor factor but one which plays a role in a pattern of missteps and therefore informs the process of reviewing the application of the courts residual power.

[93] 2. Det Cst Meffe in cross examination acknowledged that Mr. Shada's criminal record was dated but did not find it relevant to advise the issuing justice that it was 12 years since the last conviction. A 12 year gap in a criminal record is significant, and ought to have been disclosed or the record itself attached to the ITO so the issuing Justice would be aware. Det Meffe did not give an explanation for why he choose to not include the criminal record or reveal the gap, a decision on his part that also undermines his "full, frank and fair" approach to writing the ITO.

[94] 3. The ITO referenced offences for which Mr. Shada had been arrested, including trafficking drugs and numerous firearms offences which were no longer outstanding and for which he had not been convicted, some of for which he had not been charged. When asked "do you think you should've clarified that for the issuing justice?" he replied "yes". This portion of the ITO is potentially misleading because it leaves the improper impression that Mr. Shada was still facing related charges at the time the ITO was sworn. That potential is however diminished given that the issuing Justice would know the difference between mere allegations and conduct established by convictions forming part of a criminal record. While relatively minor this is however another example of a pattern of deficiencies in the ITO that were potentially misleading.

[95] 4. Stating that the applicant was the "victim of a robbery, shooting" when in fact he had only been victim of a robbery and police responding were targets of the shooting incident. When asked whether he intended to mislead the justice to think that the applicant had a conviction for a weapons offence he said "No, absolutely not. Meant to put robbery". When he was asked later "Did you intend for the issuing justice to think that Mr. Shada was the victim of a shooting? He replied "That's what the report stated, that he was a victim of a robbery but the shooting I meant

shooting investigation. In hindsight I should've put robbery as it relates to a – and give further elaboration on the shooting portion 'cause that was shooting at the officers." The reference to shooting was not with respect to an incident where Mr. Shada was the victim and should not have been included. The explanations given are incongruous given the emphasis he attached to the shooting in the affiant note that followed and affect his credibility on other explanations he gave for apparent errors and does not give confidence in the reliability of the balance of the ITO.

[96] 5. DC Meffe included an affiants note emphasising the shooting was a "tell tale sign that substantiated CI information that he was a drug dealer", and referencing that rival drug dealers use violence". The affiant note was clearly an attempt to draw upon the misleading statement that Mr. Shada was the victim of a shooting incident, and build upon that falsehood by arguing it was a indication that he was involved in the drug trade. The affiant note indicates falsely that a conviction for weapons offences correlate his lifestyle to that of someone involved in the drug subculture when in fact he had no weapons convictions. When asked in cross examination the officer said "... I made an error in writing that. It was a robbery offence not a weapons offence." Det Meffe claimed to have read sufficient of the police report to know that Mr. Shada was victim of a robbery and not shooting incident and his explanation that he meant to state robbery only is not supported by the emphasis he choose to place on the relevance of gun violence and falsely connect that directly to Mr. Shada. The inclusion of a reference to a shooting incident involving Mr. Shada when full disclosure of the incident would reveal it was not relevant to the suggestion that he was a drug dealer, and the emphasis that the ITO places on that incident can only lead to the conclusion there was an intent to mislead the issuing Justice. The irrelevant reference to the shooting incident was highly prejudicial given the emphasis placed upon it in the affiant note and one which I conclude was a deliberate fraudulent misrepresentation.

[97] 6. On the issue of not revealing in the ITO that Mr. Shada had indicated to police at the time of the robbery he worked for a record label while under cross examination Det Meffe acknowledged "I believe I should've elaborated more on that point, hundred percent". The apparent employment working for a record label tended to contradict the suggestion that Mr. Shada was a drug dealer at the time of the robbery.

[98] 7. 81 Carlton and Mr. Shada's visit there

a) Only the rear unit was under investigation and not the front unit, Mr. Shada stopped his vehicle in a common driveway and was not seen to interact with anyone so it was not clear which unit the visit related too. When asked why he didn't advise there were two units with only one under investigation he replied "I should've emphasized the rear", stating that he didn't mean to be inaccurate but acknowledging that "there is some spots where now mentioning I should've elaborated."[23]

b) The affiant had only observed the residence for 1 hour prior and had only a limited baseline of activity from which to measure and conclude that there was a "surge" or "influx" of foot traffic.

c) The subsequent foot traffic did not commence until 4 ½ hours later and after one of the occupants of the rear unit had returned, but was described in

[23] Transcript: August 19, 2019 pg 55 and 56.

paragraph 15 as being "shortly thereafter" the arrival of Mr. Shada. The language used was either intended to overstate and mislead or at least had a disregard for the impression it would create.

d) Seven drug deals were described as taking place at the unit however these took place over a period of two days although they were referenced in the same paragraph as being "shortly thereafter" the arrival of Mr. Shada. The officer explained that he had included in the ITO for 81 Carlton street that the seven deals were over two days but had condensed the information specific to Mr. Shada.

e) In the ITO he stated " I observed Michal Shada to attend the residence and facilitate a drug deal" when in fact the officer was only able to observe Mr. Shada in his vehicle attend the rear of the driveway at the property and was not aware of any contact with the occupants (para 32). During cross examination he acknowledged that he had not seen Mr. Shada exit his vehicle or anyone attend the vehicle and that he was offering an opinion in the ITO. When asked if he should have made it clear in the ITO that it was his opinion he replied "Should've elaborated on that point for sure." and that from his vantage point he was not able to see if anybody went up to the vehicle.

[99] When asked about the statement in the second ITO that the affiant was able to verify that Mr. Shada spent each and every night at 69 Tiller Trail he acknowledged he meant in the area of the residence and that "well looking back at it now I should've been more careful with my wording." This is not a situation of a careless choice of words but rather an exaggeration of what could be gleaned from the tracking warrant data and writing to promote a theory by stating it as a fact.

[100] I do not accept that the pattern of misleading references in the ITO were innocent errors but rather that they demonstrate a concerted effort to obtain the tracking warrant without regard to the requirement of full frank and fair disclosure. The number of misrepresentations on material points indicates a deliberate effort to mislead the issuing Justice. This is a case in which it is appropriate to apply the courts residual discretion to set aside a properly issued authorization for a tracking warrant in response to the police conduct which was subversive to the pre-authorization process that led to the issuance of the warrant. I cannot conclude otherwise than that the affiant deliberately provided false material statements and deliberately omitted material facts with the intention to mislead. The tracking warrant is set aside, the evidence obtained as a result was unconstitutionally obtained.

6. Whether the CDSA warrants could have issued or should be set aside

Applicable Standard for issuance of warrant

[101] The Supreme Court of Canada provided guidance in *Morell*[24]*i*, at paras. 39-41.

[24] R. v. Morelli, 2010 SCC 8 (CanLII), [2010] 1 SCR 253

(1) Under the Charter, before a search can be conducted, the police must provide reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search. These distinct and cumulative requirements together form part of the minimum standard consistent with s. 8 of the Charter for authorizing search and seizure.

(2) In reviewing the sufficiency of a warrant application, however, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued. The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

(3) The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, the reviewing court must exclude erroneous information included in the original ITO. Furthermore, the reviewing court may have reference to "amplification" evidence - that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO - so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.

The Tracking Data and police surveillance

[102] Paragraphs 32 to 42 of the ITO include data obtained from the tracking warrant and surveillance conducted by the police. Observations were made of 5 believed drug deals involving Mr. Shada.

[103] On May 24, 2018 Mr. Shada was observed to park in the driveway at 69 Tiller Trail, Brampton, open the garage door and enter the residence.

[104] On May 29, 2018 Mr. Shada was detected in Oakville travelling toward Niagara. He stopped and purchased gas in St. Catharines, then attended the Fairview Mall parking lot where he sat in his idling vehicle for ten minutes, then attended the parking lot of an apartment complex at 1 Eastchester Avenue and walked to the front of the building where he was buzzed in. Eight minutes later he left and entered the QEW highway Toronto bound.

[105] May 31, 2018, Mr. Shada was detected in Oakville travelling to Niagara. He attended the apartment complex at 1 Eastchester Avenue at 2:13 PM and after trying the locked center door, entered the building through the locked rear side door. 25 minutes later he left the building, purchased gas and entered the QEW highway Toronto bound.

[106] June 5, 2018, Mr. Shada was detected in Oakville travelling to Niagara. He attended the apartment complex at 1 Eastchester Avenue at 3:35 PM and sat alone in a parking spot. 23 minutes later a vehicle arrived beside Mr. Shada, a female jumped into his front passenger seat and left within twenty seconds while over heard to say "Okay Thanks, talk to you soon." Both vehicles left the parking lot and Mr. Shada entered the QEW highway Toronto bound.

[107] June 11, 2018, Mr. Shada was detected in Oakville travelling to Niagara. He parked his vehicle at the curb in front of 28 Cherie Road which was known to the affiant as a drug house. A male was seen to exit the passenger side of Mr. Shada's vehicle and walk in the direction of 28 Cherie while Mr. Shada drove away and entered the QEW Toronto bound.

[108] The affiant believed each of the 4 visits to St. Catharines to have involved a drug deal, and each time Mr. Shada was operating his Dodge Journey SUV.

[109] The applicant argues that if the tracking warrant was found to have been properly issued the tracking data should nevertheless be excised. The argument is based on the fact that DC Meffe did not have notes in relation to the data obtained from the tracking warrant and the credibility and weight to be attached to his evidence is at issue.

[110] Det Meffe testified that he reviewed "ICU workbench destination reports, weekly printouts and data that appeared on the screen of his mobile phone. He did not have detailed notes or screenshots of the information conveyed to his phone. He did not explain why it was not possible for him to note or retrieve the information that came to his phone by way of alerts. From this information Det Meffe indicated in the ITO that Mr. Shada returned to the residence at 69 Tiller Trail and from May 24 to June 12, 2018 he attended that address 65 times for an average stay of 5 hours and 21 minutes. The ITO further indicated that Mr. Shada attended that address after each suspected drug deal and that he remained there each night.

[111] At paragraph 16 of the warrant DC Meffe states that he was able to verify that Mr. Shada remains at 69 Tiller Trial in Brampton each and every night. The raw data from the tracking warrant that was included with disclosure did not contain information in support of that statement. In DC Meffe's testimony he acknowledged that only on the one occasion was Mr. Shada actually watched and on that occasion he was seen to enter the residence. Information about the attendance of his vehicle came from the data transmitted to DC Meffe's phone which was not made available for examination.

[112] In his testimony Det Meffe acknowledged that he should have been move careful with his language and that it would have been more accurate to say that the accused returned to the area of the residence. I cannot conclude that the Det. attempted to mislead the issuing Justice about the attendance at this address or with his description of 13 Aster Court as Mr. Shada's family home and his use of 69 Tiller Trail.

Address on Cherie road/street

[113] The address is misstated and it was not clear whether it was in fact Cherie Road or Cherie Street. Paragraphs 36 and 37 and the affiants note following paragraph 39 describe it as alternately Cherie Road and Cherie Street. Ultimately whether the address was properly described as Road or Street was of no real consequence as to whether the court was mislead. What was important was the activity in relation to the Cherie address.

[114] Para 37 described 28 Cherie Road as having a lot of foot traffic and comings and goings and that the occupants were suspected to be trafficking drugs from the residence. Para 38 and 39 reference Levele Willis who was charge on May 2, 2018 with numerous drug offences and had been observed the day before on May 1, 2018 conduct a drug transaction at 28 Cherie Road.

[115] However Mr. Shada's contact with that residence is only that he apparently dropped off a male on one occasion.

[116] At para 36 Mr. Shada attended the Niagara area and his Dodge Journey was observed parked in front of the residence at 28 Cherie Road/Street when an unknown male was observed to exit the vehicle and walk toward the residence. Det Meffe indicated the reference to the arrest of Levele Willis was in support of establishing that the Cherie address was an ongoing part of the drug dealing subculture. I cannot agree with the applicant suggestion that the Det was seeking to mislead the issuing Justice into thinking there was a direct connection between Willis and the applicant.

[117] Paragraphs 32 to 42 of the ITO include data obtained from the tracking warrant the led to the police surveillance in Niagara and Tiller Trail in Brampton. It is the position of the applicant that the tracking warrant should not have issued and that this data was therefore unconstitutionally obtained. I have determined that the tracking warrant ought not to have issued the therefore unconstitutionally obtained data should be excised from the ITO. Accordingly the surveillance by the police of Mr. Shada's activities that resulted from the tracking warrant must be excised from the ITO's seeking search warrants.

[118] After excising the portions from the two search warrants the were the fruit of the tracking warrant which has been set aside what remains is the same flawed statements that were contained in the tracking warrant ITO and which must also be subject to excision. The balance of the ITO's is insufficient to satisfy the requisite reasonable and probable grounds for the issuing Justice to believe that an offence had been committed and evidence would be found. What remains does not demonstrate a credibly based probability that evidence of drug trafficking would be found at 69 Tiller Trail or in Mr. Shada's vehicle.

[119] The information to obtain the search warrants was built upon the same foundation as the tracking warrant ITO and supplemented by the evidence obtained as a result police surveillance aided by the use of the tracking device.

[120] Having already determined that the tracking warrant could have been approved but applying the courts residual power to set it aside, any of the evidence obtained by use of the tracking warrant was unconstitutionally obtained. Much of what was contained in the tracking warrant ITO was repeated in the ITOs for the CDSA search warrants. Applying a similar analysis the same excisions of information apply.

[121] With both the search warrants found to be invalid the subsequence searches of the home on Tiller Trail and of Mr. Shada's vehicle were a warrantless and a breach of the applicants right to be free from unreasonable search and seizure under s. 8 of the *Charter*.

7. *Charter* s.24(2) analysis

[122] To determine admissibility under s. 24(2) of the Charter the court must consider, the seriousness of the Charter-infringing state conduct, the impact of the breach on the accused Charter-protected rights, and society's interest in the adjudication of the case on it's merits. A balancing of the three assessments guides the courts decision whether admission of the evidence would bring the administration of justice into disrepute from the perspective of a reasonable man, dispassionate and fully apprised of the circumstances of the case.

Seriousness of the Charter-infringing conduct

[123] The police attempt to obtain a search warrant indicates regard for the accused's Charter rights. However I have already determined in setting aside the tracking warrant, the conduct of the police was at the intentional end of the spectrum in its use of false and misleading information and not mere inadvertence or carelessness.

[124] The misleading content of the ITO strikes at the heart of the pre-authorization process. It was a clear breach of the duty of full, frank and fair disclosure, and consequently subverted the process. The errors cannot be characterized as minor or through carelessness or resulting from inexperience but rather were created by an officer who described him self as experienced in drafting ITOs.

Impact of the breach on Mr. Shada's Charter protected interests

[125] The seriousness of the impact of the breach is that police conducted a search of what they regarded as Mr. Shada's home and planned and conducted a violent arrest of Mr. Shada.

Society's interest in adjudication on the merits

[126] The allegations against Mr. Shada are significant and serious, including possession for the purpose of trafficking in fentanyl/heroin a dangerous combination of illicit drugs that have caused death by overdose and considerable misery across Canada, and possession of a loaded handgun in his vehicle also extremely dangerous.

[127] The Crown's case is wholly dependant on the evidence obtained as a result of the searches and the drugs and weapon that were discovered. Possession for the purpose of trafficking fentanyl and a firearm are very serious offences. The cost to society of excluding this crucial evidence is high and the community has a strong interest in the prosecution proceeding which militates in favour of including the evidence.

[128] In balancing the Grant factors I must take into account the long term interests of the administration of justice. If the court was to condone what happened in this case, the courts future confidence in sworn material in an ITO would be compromised and the pre-authorization process for obtaining warrants would be undermined. As the Supreme Court of Canada indicated in R. v. Morelli[25]:

> **102** The repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct. Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in *ex parte* proceedings. In discharging those duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. They must refrain from concealing or omitting relevant facts. And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant.

[25] R. v. Morelli, 2010 SCC 8 (CanLII), [2010] 1 SCR 253

[129] The *ex parte* application process precludes the ability of the adversarial system to test statements made for their veracity and therefore is dependant on the judiciary's confidence of the affiants compliance with the duty to provide full and frank disclosure.

[130] Pursuant to the duty to provide full frank and fair disclosure, an affiant should never make a misleading statement whether though the use of language included or by strategic omission of information. The use of language and the misleading statements contained in these ITO's demonstrates at best a cavalier attitude to the affiants responsibility and at worst an intention to mislead. The ITO's omit relevant facts, misstate other facts and exaggerate the relevance and importance of information. In the context of seeking judicial preauthorization neither is appropriate and the court cannot be indifferent to unacceptable police conduct.

[131] There were reasonable and probable grounds for the issuance of the search warrants, those grounds were established by the tracking warrant for which there were grounds that the warrant could issue. The warrants were obtained through a prior authorization process established to protect from unreasonable intrusion into peoples lives by the state. The nature of the process requires truthfulness and candour by the affiant that does not leave a false impression. The police statements excised from the ITO were directly relevant to the issuing Justices assessment of the warrant application and would have given a false impression to that judicial officer. The pattern of flaws in the application process and their cumulative effect are such that I cannot conclude they were simple errors or the result of carelessness. I am persuaded of this in particular by the officers incongruous testimony seeking to explain why he included a robbery/shooting incident in the ITO and the affiant note that followed attempting to persuade the Justice of the significance of the shooting in a manner clearly not supported by the facts know to the affiant. Upon review of the ITOs and testimony at the Garofoli it cannot be said that the officer complied with the duty to make full frank and fair disclosure.

[132] The many faults in the ITO would improperly lead the issuing Justice to be influenced in favour of issuing the tracking warrant. The circumstances surrounding the obtaining of the tracking warrant may not directly reveal intentional deliberate deception, but they reveal police conduct that was on its face careless or negligent in neither a minor or technical manner and that in this case rises to the level at which I must conclude there was a willingness to subvert the pre-authorization process.

[133] The conduct of the state authorities in this case was so subversive of the process that in order for the justice system to dissociate itself from the police actions the only remedy is to set aside the warrants and with the substantial impact on the accused Charter rights and the seriousness of the Charter infringing conduct the evidence must be excluded

[134] The application seeking to set aside the judicial authorization for the warrants and exclude the evidence obtained from the searches is granted.

Released: July 24, 2020

"D. L. Wolfe"
Signed: Justice D. L. Wolfe