CITATION: R. v. Brounsuzian, 2019 ONSC 4481
COURT FILE NO.: CR-18-0518
DATE: 20190830

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	*Brendan Gluckman* and *Amanda Hauk,* for the Crown
HER MAJESTY THE QUEEN	)	
	)	*Gary Grill*, for the Defendant Marco Maric
– and –	)	
	)	*Greg Lafontaine* and *Carly Eastwood*, for the Defendant Giovanni Raimondi
MARCO MARIC, GIOVANNI RAIMONDI, ETHAN ECKSTEIN, ABDUL SHAHIN, VARTEVAR ED BROUNSUZIAN and TANG HIEN QUANH	)	
	)	*Robert Yasskin*, for the Defendant Ethan Eckstein
	)	
	)	*Enzo Battigaglia*, for the Defendant Abdul Shahin
Defendants	)	
	)	*Peter Zaduk*, for the Defendant Vartevar Ed Brounsuzian
	)	
	)	*Leonard Hochberg*, for the Defendant Tang Hien Quanh
	)	
	)	**HEARD:** September 14, 17, 18, 20, 21, 25, 27, 28, October 1, 2, 3, 4, 5, 10, 11, 12, 15, 16, 17, 18, 19, 22, 26, 29, 31, November 1, 5, 6, 7, 8, 9, 13, 15, 16, 19, 20, 21, 2018

REASONS FOR JUDGMENT

PRE-TRIAL *CHARTER* APPLICATION OF VARTEVAR ED BROUNSUZIAN

M. F. BROWN J.

BACKGROUND

[1] Five of the six defendants on this indictment (Mr. Maric, Mr. Eckstein, Mr. Shahin, Mr. Brounsuzian, and Mr. Quanh) brought pre-trial *Charter* applications before me seeking exclusion

of certain evidence at trial pursuant to s. 24(2) of the *Charter*. Four of the five accused, Mr. Maric, Mr. Eckstein, Mr. Shahin and Mr. Brounsuzian, brought *Garofoli*[1] applications before me challenging the constitutionality of various searches and the interception of private communications conducted under the authority of various wiretap authorizations, general warrants and search warrants.

[2] On November 20, 2018 I gave brief oral reasons dismissing the five defendants' *Charter* applications. At that time, I held that I was not satisfied that the evidence sought to be excluded by the various defendants should be excluded under s. 24(2) of the *Charter*. As well, I indicated that in order not to delay matters, I would provide more detailed written reasons at a later date. These are those reasons.

[3] Previously, on June 26, 2019, I released my written reasons regarding Mr. Quanh's pre-trial *Charter* application where I found there was no violation of his s. 9 *Charter* rights when he was arrested or his s. 8 *Charter* rights when the police searched Mr. Quanh incident to his arrest or subsequently obtained evidence from the search of a Toyota RAV4 motor vehicle. That decision is now reported at *R. v. Quanh*, 2019 ONSC 3887.

[4] In this case, all four defendants who brought *Garofoli* applications challenged various authorizations and warrants on both a facial and sub-facial basis. I granted leave to the four defendants to cross-examine certain affiants and, in some cases, sub-affiants of the various warrants and authorizations. I also granted the "Step Six" *Garofoli* application of the Crown to permit me to rely upon certain information that had been redacted in the original warrants and authorizations despite the inability of the four defendants to access it. See *R. v. Crevier*, 2015 ONCA 619 at para. 2.

[5] All four *Garofoli* applications were heard together by me as pre-trial applications. In order to make my reasons more manageable I am releasing four separate judgments today regarding the *Garofoli* applications of Mr. Maric, Mr. Eckstein, Mr. Shahin and Mr. Brounsuzian. I recognize that there will be some overlap in issues of fact and law given the submissions of counsel and the evidence admitted on the four applications. The citations for my reasons regarding the pre-trial *Charter* applications of the four defendants are: *R. v. Maric*, 2019 ONSC 4478; *R. v. Eckstein*, 2019 ONSC 4479; *R. v. Shahin*, 2019 ONSC 4480; and *R. v. Brounsuzian*, 2019 ONSC 4481. This judgment is in regard to Mr. Brounsuzian's application.

[1] See *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

OVERVIEW

[6] At the commencement of this pre-trial application, Mr. Brounsuzian ("the defendant") stood charged on an indictment before me with one count of conspiracy to traffic in cocaine and one count of possession of cocaine for the purpose of trafficking.

[7] The defendant submits that there have been violations of his *Charter* rights in relation to the following impugned warrants and seeks to exclude, on the basis of s. 24(2) of the *Charter*, the evidence obtained pursuant to the following searches:

i) The searches of May 4 and May 5, 2016 pursuant to the general warrant dated May 3, 2016 for 295 Adelaide St. W., unit 304.

ii) The search of June 28, 2016 pursuant to the search warrant dated June 27, 2016 for 295 Adelaide St. W., unit 304.

[8] As indicated earlier, I granted the Crown's "Step Six" *Garofoli* application in respect to certain redacted portions of the ITO (Information to Obtain) of Officer Chase dated May 3, 2016 in support of a general warrant dated May 3, 2016 and the ITO of Officer Chase dated June 27, 2016 in support of a search warrant dated June 27, 2016 that the Crown sought to rely upon in this *Garofoli* application. See Exhibits KK(3a) and KK(5). The defendant did not oppose this application on the basis of the admission by the parties in Exhibit Y that none of the confidential informers in the ITOs reference the defendant. As required by *Crevier,* at paras. 88 and 90, in objectively assessing the ITOs in this case, I have taken into account that the defendant could not see the redacted portions of the ITOs and directly challenge them.

[9] I will deal with each impugned warrant in order. Before doing so, I will make reference to some general legal principles regarding the standard and scope of review on a *Garofoli* hearing.

The Standard and Scope of Review on a *Garofoli* Hearing

[10] Challenges to the validity of a warrant are described as facial or sub-facial. On a facial challenge, counsel argues that the ITO, on its face, does not provide a basis upon which the issuing justice, acting judicially, could issue the warrant. A sub-facial validity challenge involves placing material before the reviewing judge that was not before the issuing justice. On a sub-facial challenge, counsel argues that the material placed before the reviewing judge should result in the excision of parts of the ITO that are shown to be misleading or inaccurate. The validity of the warrant must then be determined by reference to what remains in the ITO. On a

sub-facial challenge, counsel may also argue that the augmented record placed before the reviewing judge demonstrates that the affiant deliberately, or at least recklessly, misled the issuing judge, rendering the entire ITO unreliable as a basis upon which to issue a warrant: see *R. v. Morelli*, 2010 SCC 8 at paras. 40-41; *R. v. Sadikov*, 2014 ONCA 72 at paras. 37-38; *Crevier* at para. 74; and *R. v. Araujo*, 2000 SCC 65 at para. 57.

[11] The central consideration in the review of a warrant is whether, on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there remains a sufficient basis upon which the warrant could be issued. See *R. v. Nguyen*, 2011 ONCA 465 at para. 57.

[12] Like the issuing justice, the reviewing justice is entitled to draw reasonable inferences from the contents of the ITO. That an item of evidence in the ITO may support more than one inference, or even a contrary inference to one supportive of a condition precedent, is of no moment. The inquiry begins and ends with an assessment of whether the ITO contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued. See *R. v. Nero*, 2016 ONCA 160 at para. 71.

[13] When the information to support the warrant comes from a confidential informant, the totality of the circumstances inquiry focuses on three questions. Does the material before the reviewing judge demonstrate that the confidential informant's information was compelling? Does the material demonstrate that the confidential informant was credible? And, finally, does the material demonstrate that the confidential informant's information was corroborated by a reliable, independent source? See *R. v. Debot*, [1989] 2 S.C.R. 1140 at para. 53; *R. v. Shivrattan*, 2017 ONCA 23 at para. 27.

[14] The first question addresses the quality of the confidential informant's information. For example, did the informant purport to have first-hand knowledge of events or was the informant reporting what he or she had been told by others? The second question examines the confidential informant's credibility. For example, does the informant have a long record which includes crimes of dishonesty, or does he or she have a motive to falsely implicate the target of the search? The third question looks to the existence and quality of information independent of the confidential informant that offers some assurance that the informant provided accurate information. The answers to each of these questions are considered as a whole in determining whether the warrant was properly issued in the totality of the circumstances. For example, particularly strong corroboration may overcome apparent weaknesses in the confidential informant's credibility: See *Crevier* at paras. 107-108; *Shivrattan* at para. 28.

A. GENERAL WARRANT OF MAY 3, 2016

[15] The defendant raised a number of issues relating to the ITO filed in support of the general warrant of May 3, 2016. I will deal with them in order.

a) Errors, Omissions and Misleading Statements in the ITO

[16] A general warrant was obtained by the Toronto police on May 3, 2016 in regard to a number of different properties including 295 Adelaide St. W., unit 304. The defendant seeks to exclude from his trial the fruits of the searches of unit 304, 295 Adelaide St. W., on May 4 and May 5, 2016, pursuant to the general warrant of May 3, 2016. The defendant submits that the ITO of the affiant, Officer Chase, contains false, misleading and erroneous information that needs to be excised from the ITO or in certain cases amplified to reflect the evidence heard at the *Garofoli* hearing and the admissions of fact by the parties. As well, the defendant submits Officer Chase failed in his duty to be full, frank and fair by failing to include various material facts in the ITO. The defendant submits that Officer Chase is not permitted to pick and choose among relevant facts to achieve a desired outcome. I will deal in order with the various issues the defendant raised regarding Officer Chase's failure to be full, frank and fair in the ITO.

(i) No connection to the defendant and drug dealing before April 29, 2016

[17] The defendant submits that the issuing justice should have been told that there was absolutely no evidence to connect the defendant to drug dealing before April 29, 2016. The defendant submits that this was a serious omission on the part of Officer Chase. As admitted by the parties in Exhibit Y, an agreed statement of facts, the first date on which the defendant came to the attention of the police in this investigation was April 29, 2016. Mr. Maric was subject to judicially authorized wiretapping as of April 18, 2016. The defendant did not surface in any police surveillance before April 29, 2016. None of the confidential informants in the ITO reference the defendant.

[18] In my view, Officer Chase was not required to outline to the issuing justice all of the evidence he did not have in relation to the defendant. Rather, Officer Chase's burden was to be full, frank and fair with respect to the evidence he did have in relation to the defendant. See *Nguyen* at paras. 48-51.

[19] Officer Chase testified it was not a matter of picking and choosing evidence. He was putting in information he had, not information he did not have. He described the defendant as an unknown male, which he testified meant that prior to this date he was unknown. He testified that he was transparent in this regard. The fact that the defendant was unknown prior to this point would be obvious to anyone reading the ITO. This would have been apparent to the issuing

justice. The obligation on an affiant such as Officer Chase is not to commit the error of material non-disclosure. See *Nguyen* at para. 51. This was not a material omission.

(ii) London arrest of Mr. Maric and Mr. Eckstein

[20] In the ITO Officer Chase references a London police occurrence where Mr. Maric and Mr. Eckstein were arrested along with other parties in 2013. Officer Chase also refers to a kilo of cocaine being seized. Officer Chase indicates that both parties are not before the courts on these charges, nor are the charges registered as convictions on their criminal records. Officer Chase also indicates that the outcome of their arrest is unknown. Officer Chase repeated these references on two other occasions in the ITO.

[21] The defendant submits that Officer Chase erred in indicating that a kilo of cocaine was seized. In fact, what was seized was an adulterant. As well, the defendant submits that it is important to understand that the defendant's involvement only has cogency in this ITO to the extent that there are reasonable grounds against Mr. Eckstein and indirectly against Mr. Maric. The defendant submits there is no evidence that the defendant had any contact with Mr. Maric and his contact with Mr. Eckstein only has significance because of Mr. Eckstein's dealings with Mr. Maric. Therefore, submits the defendant, the reference by Officer Chase to the London arrests in 2013 has oversized significance and is extremely misleading.

[22] The parties admitted in Exhibit Y that with respect to the London charges laid against Mr. Maric and Mr. Eckstein on June 5, 2013, the charges against Mr. Maric were withdrawn on April 25, 2014 and the charges against Mr. Eckstein were withdrawn on May 30, 2014. The defendant submits that it was a serious error and omission on the part of Officer Chase not to indicate that these charges were withdrawn. The effect was to create a misleading picture of the defendant's interactions with Mr. Eckstein on April 29, 2016. Without the reference to the 2013 incident, submits the defendant, there is nothing to suggest that Mr. Eckstein is connected with cocaine and what was presented as a suspicious meeting then becomes innocuous. The defence submits that Officer Chase was content to present an entirely misleading picture of the defendant's interactions with Mr. Eckstein, and that his failure to clear this up is suggestive of wilful blindness. It had the effect of seriously misleading the issuing justice by casting the events of April 29, 2016 in an unjustified and sinister light. The defendant also submitted Officer Chase was negligent in not following up on whether charges were still pending.

[23] In my view the mistake regarding the cocaine was made in good faith. Officer Chase admitted he made a mistake when he read the occurrence report incorrectly. I accept his evidence on this issue. This was a good faith error and the ITO should be amplified to read "kilogram of cocaine cut or adulterant". Where the erroneous information results from a simple error and not from a deliberate attempt to mislead the issuing justice, amplification may be ordered. See *Araujo* at para. 59. In regard to the reference to the outstanding charges against Mr.

Maric and Mr. Eckstein, I also believe that Officer Chase was acting in good faith. There was no attempt to mislead the issuing justice. Officer Chase exercised good faith in attempting to ascertain the status of these charges. He called the clerk's office at the London police detachment because they were best situated to give him this information. He did not mislead the issuing justice. He made clear that there was no basis to believe that Mr. Maric and Mr. Eckstein had been convicted. As he indicated in the ITO, "both parties are not before the courts on these charges, nor are they registered as convictions on the criminal record. The outcome of this arrest is unknown". As well, in my view this is also an appropriate case for amplification to indicate that the 2013 charges were withdrawn.

(iii) Mr. Eckstein putting bag into the trunk and secreting it in the tire well with the defendant on April 29, 2016

[24] In the ITO Officer Chase made reference to a surveillance report of Officer Hildebrand of the Toronto police. He summarized the report and made reference to observations on October 29, 2016 of Mr. Eckstein exiting a vehicle with an unknown male (later identified as the defendant) and both males attending the rear of the vehicle where Mr. Eckstein put a bag into the trunk under the floor mat where the spare tire would be.

[25] The defendant submits that this is a very misleading statement by Officer Chase. The defendant submits the suggestion that the defendant was with Mr. Eckstein at the time that Mr. Eckstein was putting a large shopping bag under the floor mat is not what happened at all. The defendant submits that the photos show that the defendant was back in the condo well before Mr. Eckstein went to the trunk of his vehicle and that the defendant was not a party to hiding anything. As a result, the issuing justice was seriously misled. The defendant submits that the secreting of the bag in the tire well makes it seem not just that this bag was suspicious but that the defendant was a party to hiding this suspicious bag. The defendant submits that the photos taken by Officer Swart show that the defendant was not at the trunk when Mr. Eckstein puts the bag into the trunk which is contrary to the statement in the ITO. The ITO only references Mr. Eckstein going to the trunk once. The defendant submits that despite Officer Swart's evidence that Mr. Eckstein went to the trunk twice, the ITO does not mention Mr. Eckstein going to the trunk twice, only once. There is no mention in the ITO of Mr. Eckstein subsequently going to the trunk by himself. The defendant submits that the court should be wary of accepting Officer Swart's evidence because the evidence of Mr. Eckstein attending at the trunk twice is not supported by either Officer Swart's notes or the photos.

[26] In my view this reference in the ITO does not require excision or amplification. The statement is not false, inaccurate or misleading. I accept the evidence of Officer Swart who was also conducting surveillance at the time with Officer Hildebrand. Officer Swart testified that he observed Mr. Eckstein at the trunk twice. He stated that on the first occasion Mr. Eckstein and the defendant were observed placing something in the rear spare tire compartment. He explained

that he was unable to take a photograph at that time because the camera he was using was in and out of focus at times and there were times the camera would pause. In addition, he testified that he was broadcasting things to other members of the team at the same time. Officer Chase testified that he never saw the photographs. He testified that he did not know they existed. Officer Chase testified that he relied on the surveillance report of Officer Hildebrand for this event and he summarized the contents of that report accurately. The surveillance report relied on by Officer Chase clearly states that after Mr. Eckstein placed the bag in the trunk, both Mr. Eckstein and the defendant entered Mr. Eckstein's vehicle.

(iv) Exposed trunk area

[27] The defendant submits that Officer Chase had an obligation to inform the issuing justice that Mr. Eckstein's vehicle had an exposed trunk area. If Mr. Eckstein was hiding a bag in a vehicle with an exposed trunk area, he therefore would have had a good reason to do so and it should have been stated to the issuing justice.

[28] Mr. Eckstein's vehicle was an SUV with tinted windows. He was observed/photographed placing something in the spare tire compartment. There was nothing misleading or erroneous in Officer Chase's description of the vehicle. The obligation on Officer Chase was not to commit the error of material non-disclosure. This is not a material omission. No amplification is required.

(v) Contents of the bag never recovered

[29] The defendant submits that the bag that Mr. Eckstein placed into the trunk area of his vehicle was never recovered. There is no evidence that there were drugs in the bag. Mr. Eckstein was never stopped by the police, nor did the police ever explain why they never attempted to stop him. There is no evidence that anything in the bag was contraband.

[30] Officer Chase was never cross-examined on this issue during the *Garofoli* hearing. Again, he was not required to outline to the issuing justice all the evidence he did not have. This is not a material omission. No amplification is required.

(vi) Small package versus paper towels

[31] The defendant submits that the description in the ITO of events at 295 Adelaide St. W. is significantly misleading, inaccurate and incomplete. The defendant submits the degree of misstatement is, at the very least, highly negligent and is more likely deliberate. As such, it should be excised from the ITO and no amplification permitted. The defendant submits that there was an admission by the parties in Exhibit Y that the only object that the defendant was seen to

carry into 295 Adelaide St. W. on April 29, 2016 was a package of paper towels. This is also clear in the photos. In the ITO Officer Chase described the item the defendant was carrying as a small package.

[32] The defendant submits there is a world of a difference between a small package and paper towels. The defendant submits that it is very important to be clear in this case, where the ITOs are voluminous and involve numerous parties and places. The defendant submits it is simply not fair to dump such a confusing mass of information in front of the issuing justice and expect him/her to absorb everything. It is especially unfair, submits the defendant, where important evidence, such as the meeting at 295 Adelaide St. W., is presented in such a convoluted and distorted fashion that the issuing justice would have thought crucial facts were different than they really were.

[33] The defendant submits that the descriptions of the incidents concerning a small package and the paper towels are so confusingly drafted that the issuing justice would have thought they were two separate incidents. The defendant submits the facts are that there was only one incident and that the police knew that the package was in fact paper towels and that there was no suspicious second package. The defendant submits that Officer Chase presented the facts in such a way as to obscure this truth and invited the issuing justice to proceed on a slanted, pejorative and misleading version of the events. The defendant submits that the justice would have mistakenly thought there were two different events, one innocuous involving paper towels and one highly suspicious involving a small package. The defendant submits that this was just not an innocent misstatement but negligence on the part of Officer Chase.

[34] Officer Chase testified he relied on the surveillance report for this event. In my view he summarized the contents of the report accurately. He testified the entire interaction informed his opinion that a drug transaction had occurred, not just the reference to a "small package". He testified that he never intended to leave the impression that the small package was a reference to payment for the delivery of drugs. He said he didn't make mention of what the package could have been. He testified that nothing was hidden or concealed in the ITO. He testified he laid everything out as it appeared it in the surveillance report.

[35] Officer Chase testified that the difference between the two versions (small package versus paper towels) was a result of the source of the information. One was from the surveillance report prepared by Officer Hildebrand and the other was the information report prepared by Officer De Sousa. The surveillance report was from the vantage point of the surveillance officers observing the interaction firsthand. The information report was from a different view, captured by the CCTV footage from April 29, 2016, and viewed by Officer De Sousa on May 2, 2016. Officer Chase testified that the CCTV footage captured portions of the event not viewed by the surveillance officers. It was meant to be a clarification of what occurred. In my view Officer Chase accurately described the reports and summarized them. He also testified that his opinion

with respect to this being a drug transaction did not change as a result of learning the small package was paper towels. His opinion was based on a number of factors.

[36] In my view, a review of the ITO as a whole makes it clear that Officer Chase was describing one event from two different vantage points. The first, officers conducting surveillance on April 29, 2016 and the second, Officer De Sousa viewing the CCTV footage from April 29, 2016 on May 2, 2016. The different recitations follow one another in the ITO because Officer Chase was detailing the chronology as to when and how this information was obtained. The issuing justice would have been aware of this and not misled. That being said, in my view this is an appropriate circumstance for amplification of the ITO to substitute a "package of paper towels" where the ITO reads "small package".

(vii) Entire ITO was misleading

[37] As mentioned earlier, the defendant submits that the description of the events at 295 Adelaide was significantly misleading, inaccurate and incomplete. The degree of misstatement was, at the very least, highly negligent and was more likely deliberate. The defendant submits that with an ITO of this length with vast volumes of material, there is a special need to be precise and clear.

[38] The defendant accepts that an affiant's misstatements and omissions are typically addressed by way of amplification or excision, and then, a sufficiency assessment predicated on the amended ITO. However, submits the defendant, there are cases, and this is one, where the misstatements and material omissions in the ITO are so subversive of the warrant process as to, in effect, amount to an abuse of process and require the warrant to be quashed. At the very least, submits the defendant, the significant deficiencies in the ITO must be addressed in the context of the global sufficiency assessment of the ITO. See *R. v. Herdsman*, 2012 ONCJ 739 at paras. 31-32.

[39] As I indicated in my decision regarding Mr. Maric and Officer Chase's ITO of May 3, 2016 in support of the general warrant regarding 85 Queen's Wharf, unit 3802, while Officer Chase made some mistakes in the ITO, which is not to be condoned, I would not view the conduct of Officer Chase as negligent. Nor do I find that Officer Chase intended to mislead the issuing justice. The review of a warrant 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 on trial rather than the sufficiency of the evidence in the application. See *Nguyen* at para. 57; *R. v. Lao*, 2013 ONCA 285 at para. 54.

[40] In my view, the substance of the information in the ITO would have been clear to the issuing justice. Officer Chase was attempting to concisely summarize a very large investigation.

He was acting in good faith. Whatever errors occurred were not intentional and certainly did not rise to the level of unacceptable negligence as in *Morelli,* or *R. v. Szilagyi,* 2018 ONCA 695.

b) Lost evidence of elevator video from 85 Queen's Wharf Rd.

[41] The defendant seeks to have Officer Ho's observations of the elevator video from 85 Queen's Wharf Rd. excised from the ITO. The defendant submits that the ITO refers in various places to observations made of Mr. Maric and Mr. Eckstein at 85 Queen's Wharf on April 29, 2016 by Officer Ho. These include inspection of a surveillance video of alleged activities on an elevator. The defendant requested production of this video and was informed by the Crown that the police did not obtain the video. The defendant submits the failure of the police to preserve the evidence in the circumstances of this case constitutes an interference with the defendant's right to make full answer and defence as guaranteed by s. 7 of the *Charter*. The defendant submits that the evidence depicted in the video, as well as Officer Chase's interpretation of what he saw in the video, are integral to the sufficiency of the warrant. Without it, submits the defendant, there is little or nothing to connect Mr. Maric and Mr. Eckstein to the 38th floor or to characterize their attendance at 85 Queen's Wharf Rd. as suspicious. The defendant submits he was unknown to the police before April 29, 2016 notwithstanding an intensive investigation of others allegedly involved. Further, without evidence connecting Mr. Eckstein with drug dealing, the defendant's contact with Mr. Eckstein on April 29 becomes entirely innocuous. The defendant submits that without the video, the defence is effectively handicapped in challenging the officer's version of events.

[42] The defendant submits that the law relating to lost evidence was summarized and enumerated by the Nova Scotia Court of Appeal in *R. v. B (F.C.)* (2000), 142 C.C.C. (3d) 540 (NSCA) at pp. 547-548. The defendant submits that this approach was adopted by the Ontario Court of Appeal in *R. v. B (J.G.),* [2001] O.J. No. 107 (C.A.) at para. 4. The defendant submits that when a court finds that the evidence was relevant, that it should have been disclosed, and that the police were negligent in not preserving it, the onus shifts to the Crown to explain the loss. If the Crown cannot explain the loss, then the *Charter* breach has been established. The remaining issue is the appropriate remedy.

[43] The defendant submits that if the Court finds the police lost the evidence through inadvertence and not negligence then the defendant must show prejudice in order to establish a breach. See *R. v. B (J.G.)* at para. 8. The defendant submits whether Officer Ho lost this evidence through inadvertence, negligence, or wilfulness affects the burden in this application. If negligent or wilful, the Crown must explain the loss. If the Crown fails to do so, the breach is established. If the loss was inadvertent, the defendant must show prejudice. In this case submits the defendant, the loss of evidence was due to negligence. As such, it should be the Crown's burden to explain it. The evidence in this case is highly relevant and as such the degree of care required in its preservation was great. The police obviously knew the relevance of the elevator video

evidence since this is repeatedly referenced in the ITO. No explanation has been provided as to the circumstances surrounding the loss of the evidence. There is no indication the Crown or police made any efforts to locate and preserve the evidence.

[44] The defendant submits that the evidence was lost due to negligence and that the inaction of the police and the Crown supports that submission. As a result, the police failed to fulfil their obligation to preserve evidence. This failure has prevented the Crown from disclosing all relevant evidence, which has frustrated the defendant's ability to make full answer and defence and has breached the defendant's rights under the *Charter*.

[45] The defendant submits that although the courts have said that a stay may be an appropriate remedy for lost evidence, here the defendant is seeking the less drastic remedy of excision of the information from the ITO. The defendant submits that unconstitutionally obtained evidence must be excised. The defendant submits that the failure to preserve evidence directly breaches the defendant's s. 7 *Charter* rights because Mr. Maric and Mr. Eckstein's conduct are being used against the defendant.

[46] I am of the view that the defendant's s. 7 *Charter* rights were not violated in this case. The onus is on the defendant to establish a *Charter* breach. In my view, there was no evidence on the record before me that the failure of Officer Ho to preserve the elevator video was due to inadvertence, negligence or wilfulness. A failure to adequately investigate a case does not give rise to an independent *Charter* violation. See *R. v. Barnes*, 2009 ONCA 432 at para. 1. The Crown in this case has met its disclosure obligations. As Justice Charron said in *R. v. McNeil*, 2009 SCC 3 at para. 22, the *R v. Stinchcombe,* [1991] 3 S.C.R. 326 regime of disclosure extends only to material in the possession or control of the Crown. The law cannot impose an obligation on the Crown to disclose material which it does not have or cannot obtain. Where, as here, the Crown has met its disclosure obligations, to make out a s. 7 breach on the basis of evidence that is no longer available the defendant must establish actual prejudice to the right to make full answer and defence. See *Barnes* at para. 1.

[47] In my view, the defendant has not shown actual prejudice. Speculation cannot ground a finding of unfairness or prejudice. In this case, the suggestion that the elevator video Officer Ho observed showed anything other than what he testified to and recorded in his information report is entirely speculative. It is contrary to Officer Ho's uncontradicted testimony. There must be more than potential relevance to the lost evidence, and there must be an air of reality that the missing evidence would in fact, and in a material way, assist the defendant. It is a first step on a motion such as this to show that the lost evidence would more likely than not tend to rebut some evidence of the Crown's case or would more likely than not tend to assist the defendant. See *Ontario (Ministry of Labour) v. Lee Valley Tools Ltd.*, 2009 ONCA 387 at paras. 19-22. This the defendant has failed to do. The suggestion that the video contained anything other than what Officer Ho testified to is speculative. In any event, in my view there was no evidence on the

record before me that the failure of Officer Ho to preserve the elevator video was due to inadvertence, negligence or wilfulness. The only possible relevance of the video on a *Garofoli* hearing is if the court were to consider that Officer Chase knew or ought to have known that he could not rely on the information being provided to him by officer Ho. See *World Bank Group v. Wallace*, 2016 SCC 15 at para. 123. There was no evidentiary basis for such a suggestion on the record before me.

[48] As well, the defendant has provided no authority for the proposition that the s. 7 jurisprudence regarding lost evidence extends to evidence that is in the hands of third parties, but not seized by the police. The concept of lost evidence relates to instances where the state loses or destroys relevant material in its possession. Even prior to *McNeil*, a number of courts rejected the state's duty to preserve evidence in situations where evidence had not been gathered by an investigative agency. See *R. v. Grant*, [2007] M.J. No. 251 (Q.B.) at para. 20. In my view, there has been no violation of the defendant's s. 7 *Charter* rights. No excision of this information is required from the ITO.

c) Observations of Officer Ho at 85 Queen's Wharf Rd.

[49] In addition to the above submissions, the defendant adopts the submissions of Mr. Maric regarding the observations of Officer Ho at 85 Queen's Wharf Rd. on April 29, 2016 and later on May 2, 2016 when he viewed the elevator video of April 29, 2016. The defendant submits that those observations were a violation of Mr. Maric's s. 8 *Charter* rights and therefore the references to those observations must be excised from the ITO for the general warrant of May 3, 2016 because it was unconstitutionally obtained evidence. For the reasons that I provided in my judgment in Mr. Maric's *Garofoli* application, I am of the view that Officer Ho's observations did not violate Mr. Maric's s. 8 *Charter* rights. Accordingly, they should not be excised from the ITO. In any event, for the reasons I develop more fully later in this judgment in regard to the search warrant of June 27, 2016, because the defendant did not have a reasonable expectation of privacy in the common areas of 85 Queen's Wharf Rd. he is not entitled to excision of Officer Ho's observations from the ITO, even if unconstitutionally obtained.

d) Multiple Entries

[50] The general warrant was obtained on May 3, 2016 to search five different properties including the defendant's condominium at 295 Adelaide St. W., Toronto, unit 304. The general warrant at paragraph 5 authorized the police to "at any time day or night to covertly enter" 295 Adelaide St. W. unit 304. Paragraph 9 specifies that the warrant was valid for 60 days. The defendant submits the warrant did not authorize the police to make more than one entry.

[51] The police entered the defendant's condominium on two occasions, on May 4, 2015 and May 5, 2015, pursuant to the general warrant. Therefore, submits the defendant, because the

general warrant only authorized one search, the search of May 5, 2016 was a warrantless search and a violation of the defendant's s. 8 *Charter* rights. The fruits of the May 5, 2016 search must therefore be excluded from the evidence at trial. The defendant submits that this case is in contrast to the general warrants considered by the Ontario Court of Appeal in *R. v. Ha*, 2009 ONCA 340 and the Supreme Court of Canada in *R. v. Telus Communications Co.*, 2013 SCC 16, where multiple entries were specifically authorized. The defendant submits that the Ontario Court of Appeal has recognized with respect to general warrants under s. 487.01(3) that in order to avoid the risks associated with anticipatory warrants, there is much to be said for insisting on preconditions that are explicit, clear and narrowly drawn. See *R. v. Brooks*, 2003 CanLII 57389 (Ont. C.A.).

[52] The defendant submits that although a general warrant may authorize multiple entries it must so specify. The ITO must also set out the grounds justifying multiple entries. These prerequisites were entirely absent in this case. As such, the warrant may only be construed as authorizing a single entry. The defendant submits that while Officer Chase may have requested multiple entries in paragraph 64(g) of the ITO, it was clear that the issuing justice did not grant such entries. The defendant also submits that the case of *R. v. Lucas*, 2014 ONCA 561 affirming the decision of Justice Nordheimer in *R v. Lucas*, [2009] O.J. No. 3415 has no application because the wording of the warrant is different from the warrant in this case.

[53] I do not accept the argument of the defendant regarding this issue. Based on the decision in *Lucas* from the Ontario Court of Appeal, the phrase "at any time" has been held to authorize multiple entries. While the wording in the warrant in this case is slightly different than was the case in *Lucas*, I am satisfied that the phrase "at any time, day or night" is sufficient to authorize the police to enter on multiple occasions. In *Lucas* the wording in the general warrant authorized peace officers to enter and search the relevant places "at any time during the period the order is in effect". In this case the wording in the general warrant provided at paragraph 5 that peace officers are authorized "at any time, day or night, to covertly enter the following places and vehicles". Later in the warrant at paragraph 9 it provided that the general warrant was valid for 60 days. Also, it is clear at paragraph 64(b) of the ITO that Officer Chase specifically sought permission to covertly enter each premise on multiple occasions pursuant to the terms of the warrant. In the circumstances, the wording of the general warrant in this case provided authorization to the police to make multiple entries into the named premises during the period of the general warrant. The decision in *Brooks* relied on by the defence regarding anticipatory warrants is distinguishable from the facts in this case. In *Brooks*, it is clear that at the time the warrant was issued in that case, reasonable grounds did not exist to search the premises.

[54] The phrase "at any time" has been held to authorize multiple entries. While the wording is different in our case than in *Lucas*, I am satisfied that the phrase "at any time" is sufficient to authorize the police to enter on multiple occasions.

e) Insufficient Grounds to Issue the Warrant

[55] The defendant submits that after excision and amplification there is no other information linking the defendant with any other individuals named in the ITO or with any drug activity in general. The defendant has no previous drug related convictions or charges. He was not known to this investigation prior to April 29, 2016. The defendant submits that the ITO contains no information that directly implicates Mr. Eckstein in drug activity, except for the information associating him with Mr. Maric on three occasions, one of which was three years prior to the present investigation. The defendant submits that there is even less in the ITO to implicate the defendant and less still to support a surreptitious entry and search of his apartment or storage unit. There is simply the exchange with Mr. Eckstein of a shopping bag for a package of paper towels on a single occasion. The defendant submits that there was no basis upon which the issuing justice could have been satisfied that there were reasonable grounds to believe that an offence had been or would be committed and that information concerning the offence would be obtained through the covert search of the defendant's condominium at unit 304, 295 Adelaide St. W. Toronto.

[56] For the reasons I have just explained, except for some amplifications in the ITO I have referenced, I do not see merit in the defendant's submissions regarding the requested excisions in the ITO. I must therefore go on to consider whether, on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there remains a sufficient basis upon which the warrant could be issued. See *Nguyen* at para. 57.

[57] Regarding the general warrant, the affiant relies on information from confidential informant CHS[2] #6. In this case the information provided by CHS #6 provided important components of the ITO sworn to obtain the general warrant. See *R. v. Wiley*, (1994), 84 C.C.C. (3d) 161 (S.C.C.) at p. 170. As noted earlier when, as in this case, the information to support a warrant comes from a confidential informant, the totality of the circumstances inquiry focuses on three questions as set out previously: Does the material before the reviewing judge demonstrate that the confidential informant's information was compelling? Does the material demonstrate that the confidential informant was credible? And, does the material demonstrate that the confidential informant's information was corroborated by a reliable, independent source? See *Debot* at para. 53; *Shivarattan*, at para. 27.

[58] In beginning the analysis regarding the sufficiency of the ITO, it may be useful to consider separately each of the three questions and the evidence pertaining to them before addressing the totality of the circumstances.

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[2] Confidential Human Source

(i) Was the Confidential Informant's Information Compelling?

[59] The judicial summary of the redacted Appendix X6 of the ITO for the general warrant of May 3, 2016 in regard to CHS #6 at Exhibit YY(2) indicates that CHS #6 provided the following information: (1) in relation to certain information, the affiant has expressly stated the source of CHS #6's knowledge (e.g. firsthand observation) (2) CHS #6 has firsthand knowledge of Shahin's drug dealing (3) in 2016, CHS #6 identified Abdul Shahin as a male who partners with Marko Maric (4) CHS #6 advised that Shahin and Maric sell cocaine (5) further details concerning Shahin's and Maric's drug dealing (6) Shahin lives on Proudfoot Lane (7) Shahin sells cocaine and marijuana (8) Shahin lived with his parents on Philbrook (9) Shahin uses mobile telephone number 519-702-3855 (10) Shahin and Maric use stash houses to keep their drugs. At paragraph 53 of the ITO it is indicated that CHS #6 advised that a male by the name of Marko Maric is a large scale cocaine supplier in London and is capable of selling in the kilogram level. The unredacted version of paragraph 47 of the ITO which now appears at Exhibit KK(3a) was summarized indicating that CHS #6 advised that Marco Maric obtains his cocaine in Toronto where he spends considerable time. On balance and considered as a whole, I am satisfied that the material in the ITO demonstrates that the information from CHS #6 was compelling.

(ii) Was the Confidential Informant Credible?

[60] As set out in the judicial summary of the redacted Appendix X6 at Exhibit YY(2), CHS #6 is carded and/or registered as an informant with the police service handling him/her. This provides some degree of comfort with respect to his/her credibility in the sense that he/she was not an anonymous informant. See *R. v. Choi,* 2013 ONSC 291 at paragraph 34. As set out in the judicial summary, CHS #6 has provided information to his/her police handler in the past, which has led to several seizures of controlled substances. The seizures are summarized. On the occasions that the source has provided information to the police it has been corroborated and found to be reliable. The source of CHS #6's knowledge is stated. The judicial summary indicates that CHS #6 is immersed in the drug culture, which is relevant to his/her character. Whether or not CHS #6 has a criminal record and the nature of any conviction is disclosed. Additionally, CHS #6's motivation for providing information to the police is provided including whether consideration or compensation was sought or arranged. On balance and considered as a whole, I am satisfied that the material in the ITO demonstrates that CHS #6 was credible.

(iii) Was the Information Corroborated?

[61] It is clear that to constitute corroboration of a source's allegation of criminal conduct, it is not necessary that what is offered relate specifically to the criminality of the allegation. See *R. v. Lewis,* (1998) 38 O.R. (3d) 540 (C.A.) at paragraph 22. At the same time, it is important to keep in mind that the confirmation of innocuous, general information is only of limited value in this analysis. Such information could be easily gathered by anyone familiar with the target of the

investigation and provides no confirmation that the target has been engaged in the criminal activities alleged. See *R. v. Zammit*, (1993), 81 C.C.C. (3d) 112 (Ont. C.A.) at paras. 117 and 121. The question is whether it strengthens a belief in the credibility or reliability of the confidential informant. Whether it does is to be determined on a consideration of the totality of the circumstances.

[62] In this case, there is some corroboration of the confidential informant's information. The police subsequently confirmed, at least in part, the accuracy of some of the information provided by the confidential informant. For example: (1) According to MTO records, Mr. Shahin resided at 1629 Philbrook Drive, London. (2) On September 3, 2015, members of the London Police Service executed search warrants in relation to 600 Proudfoot Lane, unit 403, London and 1629 Philbrook Drive, London. Officers placed Mr. Shahin under arrest after he was observed leaving 600 Proudfoot Lane. Mr. Shahin was found to be in possession of a quantity of currency. Officers searched Proudfoot Lane and located approximately 125 grams of cocaine and 40 grams of marijuana. Officers searched Philbrook Drive and located an electronic money counter and (3) On September 14, 2015 Mr. Shahin attended London Police Headquarters and provided his cellular telephone number of 519-702-3855 in compliance with his recognizance. In my view the police discovery of the accuracy of at least some of the information provided by the confidential informant adds some credibility and reliability to the information provided to the police by CHS #6. On balance and considered as a whole, I am satisfied that the material in the ITO demonstrates that some of the information from CHS #6 was corroborated by the police.

[63] Because information relied upon in the ITO emanated from a confidential informant, I must carefully consider whether the information was compelling, whether the confidential informant was credible and whether the information the confidential informant provided was corroborated by a reliable, independent source. As noted in *Debot* at para. 53, these are not separate tests. Weaknesses with respect to one may be compensated by strengths in relation to the others. In this case the material before me in the ITO demonstrates that the confidential informant's information was compelling, the confidential informant was credible and the confidential informant's information was to some extent corroborated by the police. After considering the totality of the circumstances set forth in the ITO I am satisfied that the information provided by CHS #6 was relevant and reliable and was properly taken into account by the issuing justice in determining whether the general warrant of May 3, 2016 should issue. See *Wiley*, at p. 171.

[64] As well there is the information from confidential informant CHS #1. The judicial summary of the redacted Appendix X1 of the ITO for the general warrant of May 3, 2016 in regard to CHS #1 at Exhibit YY(2) indicates that on April 14, 2016 CHS #1 was shown an MTO photo of Marko Maric. CHS #1 positively identified the male in the photo as the Serbian male from London known to him/her as Marco, who purchases large quantities of controlled substances from Kevin Er's organization. CHS #1 advised of further details regarding Marco and

Kevin Er. I have already indicated earlier when dealing with CHS #1 regarding the first wiretap authorization relating to Mr. Maric that after considering the *Debot* factors, in the totality of the circumstances, the information provided by CHS #1 was relevant and reliable. In regard to the ITO in support of the general warrant of May 3, 2016, the material before me in the ITO also demonstrates that CHS #1's information was compelling and that CHS #1 was credible. While there was no direct corroboration of the information provided by CHS #1 regarding Marco there was a basis for the issuing justice to evaluate the credibility and reliability of CHS #1. After considering the *Debot* factors and the totality of the circumstances set forth in the ITO, I am satisfied that the information provided by CHS #1 was relevant and reliable and was properly taken into account by the issuing justice in determining whether the general warrant of May 3, 2016 should issue. See *Wiley* at p. 107. In addition, the information of CHS #6 and CHS #1 mutually corroborates each other. See *R v. Abdirahim*, 2013 ONSC 7420 at para. 62. Although I have reviewed all the information provided by the confidential informants CHS #2, 3, 4, 5, and 7, given my findings in regard to CHS #1 and CHS #6, in my view it is unnecessary for me to determine whether the information provided by CHS #2, 3, 4, 5 and 7 corroborates the information of CHS #1 or CHS #6 or strengthens a belief in the reliability or credibility of CHS #1 or CHS #6. Nor have I relied on the information from those confidential informants for that or any other purpose. I will note, however, that nothing in the information provided by CHS #2, 3, 4, 5 and 7 undermines or contradicts the information provided by CHS #1 or CHS #6.

[65] In addition to the information provided by CHS #6 and CHS #1 there was also other relevant evidence set out in the ITO. Mr. Eckstein was connected to Mr. Maric through a prior arrest as referenced in the London police occurrence report of 2013. He was also connected to Mr. Maric through surveillance conducted on April 29, 2016. On that date both Mr. Maric and Mr. Eckstein engaged in suspicious behavior on the elevator at 85 Queen's Wharf Road. In Officer Chase's experience as a drug investigator, this behavior was consistent with a counter-surveillance technique. Officer Chase had experienced drug traffickers attending the location of their stash houses to get off on a different floor and use the stairs to reach their intended destination. See *R. v. Saciragic*, 2017 ONCA 91 at para. 17 and *R. v. Juan*, 2007 BCCA 351 at para. 19.

[66] There was also the evidence of the surveillance by Officer Hildebrand, who on April 29, 2016 at 245 Adelaide St. W. observed the defendant give a large weighted shopping bag to Mr. Eckstein and while both the defendant and Mr. Eckstein were at the rear of Mr. Eckstein's vehicle, Mr. Eckstein placed the shopping bag in the trunk of his vehicle under the floor mat where the spare tire would be stored. Officer Chase, based on his experience as a drug investigator, viewed this activity as consistent with a drug transaction in all the circumstances. See *Saciragic* at para. 17.

[67] The general warrant in this case is presumptively valid. The onus is on the defendant to establish that the information relied upon to obtain the general warrant did not provide a basis

upon which the issuing justice could have concluded that there were reasonable grounds for its issuance. In my view, the defendant has not met his onus on this application.

[68] In my view, in all the circumstances, on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there was a basis upon which the issuing justice could have been satisfied that there were reasonable grounds to believe that the offence of possession of cocaine for the purpose of trafficking had been or would be committed and that information concerning the offence would be obtained through the covert search of 295 Adelaide St. W., unit 304. The combined force of the circumstantial evidence provided a sufficient basis upon which the issuing justice could be satisfied the general warrant should issue. The general warrant of May 3, 2016 in regard to 295 Adelaide St. W., unit 304 was valid.

[69] Accordingly, I find that there has been no breach of the defendant's s. 8 *Charter* rights in the search of 295 Adelaide St. W., unit 304 on May 4, 2016 or May 5, 2016 pursuant to the general warrant of May 3, 2016.

B. SEARCH WARRANT OF JUNE 27, 2016

(a) Excisions from the ITO in Support of the Search Warrant

[70] The defendant submits that the information that he sought to be excised from the ITO for the general warrant of May 3, 2016 also needs to be excised from the ITO for the search warrant of June 27, 2016 for the same reasons. For the reasons I have already given, except for the amplification of certain aspects of the ITO in the general warrant, I do not believe there should be any further corrections in the search warrant ITO for information that is repeated from the general warrant.

[71] The defendant seeks further excision of information that appears in the search warrant that was not in the general warrant. Specifically, the observations made by the police when the police executed the general warrant on May 4 and May 5, 2016 that are referenced at paragraphs 30(e) and 30(f) of the search warrant ITO.

[72] For the reasons I explained, I am of the view that the general warrant of May 3, 2016 was lawful. Also, for the reasons I explained I am of the view that multiple entries were authorized by the general warrant of May 3, 2016. Therefore, the searches of May 4, 2016 and May 5, 2016, were lawful and information from those searches should not be excised from the search warrant ITO of June 27, 2016.

[73] The defendant also seeks the following further excisions from the ITO in support of the search warrant.

(i) Search of 85 Queen's Wharf Rd., Unit 3802

[74] The defendant submits that because of the concession by the Crown in Mr. Maric's *Garofoli* application that the search of May 10, 2016 at 85 Queen's Wharf Rd., unit 3802 was unlawful, the information obtained from that search was unconstitutionally obtained and must be excised from the search warrant ITO for the search of 295 Adelaide St. W., unit 304 as well. The defendant submits that it is irrelevant to the analysis that the defendant himself had no reasonable expectation of privacy in the unit and his own s. 8 *Charter* rights were not engaged. The defendant relies on *R. v. Guindon*, 2015 ONSC 4317 and *R. v. Marakah*, 2017 SCC 59 as authority for this proposition.

[75] I do not agree with the defendant's position on this point. I acknowledge that there are cases from the Ontario Superior Court of Justice that have differing views on this issue. However, I am of the view that the controlling case on this matter is the Ontario Court of Appeal decision in *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (C.A.) at paras. 33-42. See also *R. v. Ritchie*, 2016 ONSC 1092 at para. 53, overturned on other grounds at *R. v. Ritchie*, 2018 ONCA 918; *R. v. Dieckmann*, 2013 ONSC 747 at para. 31 and *R. v. Vickerson*, 2018 BCCA 39 at para. 48. A defendant must demonstrate a violation of his or her own *Charter* rights in order to obtain a remedy under the *Charter*. A defendant is only entitled to excision from an ITO of evidence unconstitutionally obtained in violation of his or her own personal rights. If a defendant's own s. 8 *Charter* rights were not engaged in that he or she did not have a reasonable expectation of privacy, the defendant is not entitled to excision from the ITO of evidence obtained pursuant to the search. There is no remedy for the violation of someone else's reasonable expectation of privacy.

[76] I do not view *Marakah* as standing for the proposition that an accused is entitled to the exclusion of evidence based on the breach of a third party's s. 8 *Charter* rights. Rather, the issue in *Marakah* was whether the sender of a text message had a reasonable expectation of privacy in the text message as stored in the recipient's mobile phone. In my view *R. v. Mahmood*, 2011 ONCA 693 does not assist the defendant because the trial judge in that case, unlike the situation in this case, found that all of the appellants had a reasonable expectation of privacy in the cell phone data obtained in the tower dump. See *Mahmood* at para. 75.

(ii) Misrepresentations Regarding Firearms

[77] The defendant submits that the reference in paragraph 30(e) and (f) of the June 27, 2016 search warrant ITO regarding various firearms found in the defendant's condominium unit when the general warrant was executed on May 4 and 5, 2016 should be excised. The defendant

submits that nowhere is it stated that Mr. Brounsuzian's possession and storage of those firearms were both safe and legal. The defendant submits that the issuing justice must have thought that there was some connection with the subject matter of the search and would reasonably have thought that the firearms were somehow incriminating. The defendant submits that the affiant failed in his duty to be full, frank and fair. There ought not to have been any mention of firearms and the affiant should have stated that the possession of the firearms by the defendant was completely legal.

[78] In my view this is an appropriate case to amplify the ITO. This was a minor, technical drafting error made in good faith. Officer Chase testified at the time he wrote the ITO, he did not know whether or not these firearms were lawfully possessed. He included them in the ITO because they were located during the execution of the general warrant on May 4 and 5, 2016. He did not attempt to paint a nefarious picture. He simply included in the ITO the items that were located in the residence. This is supported by reference to the trigger locks and the fact they were stored properly. In my view this was an error made in good faith and it is appropriate to amplify the record to indicate that the firearms were lawfully possessed.

(iii) Certain Redactions in the ITO

[79] As acknowledged in Exhibit HHH (2), there was a drafting error by the affiant regarding corroborating confidential informant information that was redacted at paragraph 30(b)(i) of the ITO. The Crown does not rely on this redaction. As well, in the summary of the redacted portion at paragraph 9(l) of the ITO there is a reference in square brackets to corroborative information from "CHS #1" that is not the CHS #1 otherwise referred to in the ITO. The Crown does not rely on this redacted information either.

(b) Insufficient Grounds to Issue the Search Warrant

[80] Regarding the search warrant ITO of June 27, 2016, the affiant relies on the information from CHS #1. It is stated in Exhibit KK(5) that confidential informant CHS #1 was referenced in the previous ITOs of Officers Tait and Chase as CHS #6. I have already provided an assessment of the reliability of the information provided by CHS #6 earlier in these reasons in support of the general warrant of May 3, 2016. I indicated at that time that after considering the *Debot* factors, in the totality of the circumstances, the information provided by CHS #6 was relevant and reliable and properly taken into account by the issuing justice in determining whether the general warrant of May 3, 2016 should issue. With respect to this search warrant ITO, as set out in the judicial summary of the redacted Appendix X1 at Exhibit YY(5), among other things, CHS #1 identifies Abdul Shahin as a male who partners with Marko Maric. CHS #1 advised that Shahin and Maric sell cocaine and Shahin and Maric use stash houses to keep their drugs. The material before me in the ITO of June 27, 2016 demonstrates that the information of CHS #1 (formerly CHS #6) was compelling and that CHS #1 was credible. Also, the police discovery of the accuracy of at least some of the information provided by CHS #1 demonstrates that the

information from CHS #1 was corroborated by the police. In the totality of the circumstances set forth in the ITO for the search warrant, I am satisfied that the information provided by CHS #1 (formerly CHS #6) was relevant and reliable and was properly taken into account by the issuing justice in determining whether the search warrant of June 27, 2016 should issue. See *Wiley*, at p. 171.

[81] Although I have reviewed the information provided by CHS #2 (formerly CHS #7), given my findings in regard to CHS #1 (formerly CHS #6), in my view it is unnecessary for me to determine whether the information provided by CHS #2 corroborates the information of CHS #1 or strengthens a belief in the reliability or credibility of CHS #1. Nor have I relied upon the information from CHS #2 for that or any other purpose. I will note, however, that nothing in the information provided by CHS #2 undermines or contradicts the information provided by CHS #1.

[82] In addition to the evidence that was contained in the general warrant there was additional evidence at paragraph 30(f)(iv) of the ITO regarding the search of 295 Adelaide St. W., unit 304 on May 5, 2016 and at paragraph 39 (c)(ix) regarding the search of 85 Queen's Wharf Rd., unit 3802 on May 10, 2018. The search on May 5, 2016 of the defendant's apartment revealed $130,000 cash in a gun safe, $120,000 of which was inside a grey Nike shoebox in a reusable "Metro" shopping bag. Five days later, on May 10, 2016 in the search of Mr. Maric's apartment at 85 Queen's Wharf Rd., unit 3802, the police found the same reusable "Metro" shopping bag and shoe box. The bag and box were both empty.

[83] The search warrant in this case is presumptively valid. The onus is on the defendant to establish that the information relied upon to obtain the search warrant did not provide a basis upon which the issuing justice could have concluded that there were reasonable grounds for its issuance. In my view, the defendant has not met his onus on this application regarding the search warrant.

[84] Officer Chase sought the search warrant pursuant to s. 11 of the *Controlled Drugs and Substances Act*. In my view, in all the circumstances, on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there was a basis upon which the issuing justice could have been satisfied that there were reasonable grounds to believe that 295 Adelaide St. W., unit 304 contained, among other things, any thing that would afford evidence in respect of an offence under the *Controlled Drugs and Substances Act.* The combined force of the circumstantial evidence provided a sufficient basis upon which the issuing justice could be satisfied the search warrant should issue. The search warrant was valid.

[85] Accordingly, I find that there has been no breach of the defendant's s. 8 *Charter* rights in the search of 295 Adelaide St. W., unit 304 on June 28, 2016 pursuant to the search warrant of June 27, 2016.

SHOULD THE EVIDENCE BE EXCLUDED UNDER S. 24(2) OF THE *CHARTER*?

[86] As I indicated in my oral reasons of November 20, 2018, even if I was wrong and there was a violation of the defendant's s. 8 *Charter* rights, in all the circumstances, I was not satisfied that the evidence obtained from the searches of 295 Adelaide St. W., unit 304 on May 4 and May 5, 2016 pursuant to the general warrant of May 3, 2016 or the search of June 28, 2016 pursuant to the search warrant of June 27, 2016 should be excluded under s. 24(2) of the *Charter*. As counsel addressed s. 24(2) of the *Charter* in their submissions and I indicated that even if a s. 8 *Charter* breach occurred, I would not have excluded the evidence under s. 24(2), I will give my reasons regarding the s. 24(2) issue.

[87] The proper considerations under s. 24(2) of the *Charter* were established in *R. v. Grant*, 2009 SCC 32 at paras. 71-82. In determining whether evidence should be excluded under s. 24(2), the court considers (i) the seriousness of the *Charter*-infringing state conduct, (ii) the impact of the breach on the defendant's *Charter*-protected interests, and (iii) society's interest in an adjudication of the case on the merits. This requires the court to assess and balance the effect of admitting the evidence in light of these three factors. The party seeking to exclude the evidence bears the burden of proving its exclusion is required. See *R. v. Fearon*, 2014 SCC 77 at para. 89.

[88] Regarding the first *Grant* factor, the defendant submits that the existence of numerous misleading statements in the two ITOs, and the carelessness with which the general warrant appears to have been drafted puts the police conduct towards the most serious end of the spectrum. The defendant submits that this weighs heavily in favour of exclusion of the evidence. The defendant submits that in this case there are a number of statements in the ITOs that are either confusing or give a misleading impression that the grounds are stronger that in fact they are. The defendant submits that the police conduct was at least negligent, if not wilful. Negligence in the obtaining of a warrant cannot be equated with good faith.

[89] In terms of the second *Grant* factor, the defendant submits that the police entered the defendant's home and searched it without reasonable grounds. The defendant submits that the impact on his constitutionally protected interests was severe.

[90] In terms of the third *Grant* factor, the defendant submits that where the first two factors weigh heavily in favour of exclusion, the third inquiry will seldom if ever, tip the balance in favour of admissibility. The defendant submits that the searches were unauthorized and the

breaches were not mitigated by exigent circumstances or by the existence of reasonable grounds. That the evidence is essential to the Crown's case does not mandate its inclusion. The defendant says this is particularly so where, as here, the charges are serious and the stakes for the defendant are high. The defendant submits the evidence should be excluded.

(a) The Seriousness of the *Charter* – Infringing State Conduct

[91] Dealing with the first factor, the seriousness of the *Charter*-infringing state conduct, this factor focuses on the actions of the police. The court's task in considering the seriousness of *Charter*-infringing state conduct is to situate that conduct on a scale of culpability. See *R. v. Paterson*, 2017 SCC 15 at para. 43. The court must consider whether admitting the evidence would send the message to the public that courts condone deviations from the rule of law by failing to dissociate themselves from the fruits of unlawful conduct. Accordingly, the more severe or deliberate the state misconduct is leading to the *Charter* violation, the greater the need for courts to disassociate themselves from that misconduct by excluding the evidence. Minor or inadvertent violations of the *Charter* fall at one end of the spectrum of conduct, while wilful or reckless disregard of *Charter* rights falls at the other end. Good faith will also reduce the need for the court to disassociate itself from the police conduct. However, neither negligence nor wilful blindness by the police can properly be characterized as good faith. Deliberate, wilful, or flagrant disregard of *Charter* rights may require exclusion of the evidence. Even a significant departure from the standard of conduct expected of police officers will lean this aspect of the inquiry in favour of exclusion of the evidence. Further, if the *Charter*-infringing police misconduct was part of a pattern of abuse, such conduct would support the exclusion of the evidence. See *Grant*, at paras. 72-75; *R. v. Taylor*, 2014 SCC 50 at para. 39.

[92] In terms of the first *Grant* factor, as I indicated when dealing with the s. 24(2) analysis regarding Mr. Maric and the ITO in support of the general warrant of May 3, 2016, while Officer Chase made some mistakes in the ITO for the general warrant of May 3, 2016, which is not to be condoned, I would not view the conduct of Officer Chase as negligent. Nor do I find that Officer Chase intended to mislead the issuing justice. In my view, Officer Chase was acting in good faith. Officer Chase was attempting to concisely summarize a very large investigation and in the course of that process he made some mistakes. As the Ontario Court of Appeal noted in *Nguyen* at para. 58, few applications are perfect. I also am of the view that Officer Chase was acting in good faith in the preparation of the ITO for the search warrant. As well, in this case the police sought a general warrant and a search warrant for the searches of 295 Adelaide St. W., unit 304. As the Ontario Court of Appeal noted in *R v. Rocha*, 2012 ONCA 707 at para. 28, applying for and obtaining a warrant from an independent judicial officer is the antithesis of willful disregard of Charter rights. In my view, if there was a violation of the defendant's s. 8 Charter rights, the gravity of the *Charter*-infringing state conduct was at the lower end of the spectrum. This first *Grant* factor favours admission of the evidence.

(b) The Impact of the *Charter* Breach on the Defendant's *Charter*-Protected Interests

[93] As to the impact of any *Charter* violation on the defendant's *Charter*-protected interests, the second factor of the governing legal test under s. 24(2) of the *Charter*, the court must assess the extent to which a breach undermines the *Charter*-protected interests of the defendant. The impact of the *Charter* violation may range from "fleeting and technical to profoundly intrusive." Of course, the more serious the impact on those protected interests, the greater the risk that admitting the evidence may signal to the public that *Charter* rights are of little value to citizens. The courts are expected to examine the interests engaged by the infringed *Charter* right and consider the degree to which the violation impacted those interests. The more serious the state incursion on these protected interests, the greater the risk that the admission of the evidence would bring the administration of justice into disrepute. See *Grant* at paras. 76-78.

[94] As to the second *Grant* factor, the *Charter* interest in question here was the privacy of the home which attracts a high expectation of privacy compared to other places. A search of a private residence, without reasonable grounds, indicates that the violation was serious from the perspective of the defendant's *Charter* interests. See *Grant* at paras. 78, 113 and 137. If there was a breach of the defendant's s. 8 *Charter* rights, this second *Grant* factor favours exclusion of the evidence.

(c) Society's Interest in the Adjudication of the Case on the Merits

[95] Under the third factor in *Grant*, the court must determine whether the truth-seeking function of the trial is better served by admission of the evidence, or by its exclusion. The court must consider the impact of the admission of the evidence as well as the impact of failing to admit the evidence. The reliability of the evidence is, of course, an important factor in this step of the analysis. If the *Charter* violation has undermined the reliability of the evidence, this will support its exclusion. However, the exclusion of reliable evidence undermines the accuracy and fairness of the trial from the perspective of the public and may tend to bring the administration of justice into disrepute. The importance of the evidence to the Crown's case is also a factor to be considered under this aspect of the inquiry. The exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively terminates the prosecution. See *Grant*, at paras. 79-84.

[96] The third factor acknowledges that the public has a keen interest in seeing cases adjudicated on their merits. With regard to this factor, the court looks to the truth-seeking function of the criminal trial and the impact of admitting or excluding the impugned evidence on the trial. A breach that undermines the reliability of evidence will point toward exclusion because the admission of unreliable evidence cannot enhance truth seeking. On the other hand, excluding reliable evidence that is key to the prosecution's case is a relevant consideration militating against exclusion. See *R. v. Spencer*, 2014 SCC 43 at para. 80; *Taylor* at para. 38.

[97] In the search of May 4, 2016 of 295 Adelaide St. W., unit 304 pursuant to the general warrant the police located, among other things, a handwritten note that appeared to be a debt list and also in a closet was a large gun safe and a money counter. In the search of May 5, 2016 of 295 Adelaide St. W., unit 304 pursuant to the general warrant the police located, among other things, a gun safe in which were located three rifles all secured with trigger locks, a pistol wrapped in a cloth sack secured with a trigger lock, and inside the door of the safe were shelves holding several pistol magazines and a reusable "Metro" shopping bag containing a grey shoe box. Inside the shoe box were ten bundles of cash. It was estimated that the ten bundles totalled $100,000. Also in the "Metro" bag was a white plastic shopping bag with four more bundles of cash. It was estimated that the four bundles totalled $20,000. On the top shelf of the gun safe was a brown leather bag containing a bundle of money estimated at being $10,000. In the search of June 28, 2016 of 295 Adelaide St. W., unit 304 pursuant to the search warrant of June 27, 2016, the police located cocaine. The observations of the police of the real evidence in the searches of May 4 and May 5, 2016 were reliable evidence. The cocaine found in the search of June 28, 2016 was reliable real evidence. All of this evidence was important to the Crown's case. Society has a strong interest in a trial on the merits where reliable evidence is obtained by the police in respect of serious offences. This third *Grant* factor favours admission of the evidence.

(d) Overall Balancing

[98] The trial judge must consider each of the *Grant* factors and determine whether, having regard to all the circumstances, the admission of the evidence obtained as a result of the *Charter* breach would bring the administration of justice into disrepute. There is no overarching rule that governs how to balance these three factors in ultimately determining the admissibility of the evidence under s. 24(2) of the *Charter*. The three factors are designed to encapsulate considerations of all of the circumstances of the case. Mathematical precision is obviously not possible, but consideration of these factors provides a helpful and flexible type of decision tree. See *Grant* at paras. 85-86.

[99] Balancing the three factors considered under *Grant*, I am of the view that, in all of the circumstances, the admission at trial of the evidence obtained from the searches of 295 Adelaide St. W., unit 304 on May 4, 2016 and May 5, 2016 pursuant to the general warrant of May 3, 2016 and the search of June 28, 2016 pursuant to the search warrant of June 27, 2016 would not bring the administration of justice into disrepute.

CONCLUSION

[100] I am of the view the general warrant of May 3, 2016 and the search warrant of June 27, 2016 in regard to 295 Adelaide St. W., unit 304 were valid. Accordingly, there was no violation of the defendant's s. 8 *Charter* rights in the searches of 295 Adelaide St. W., unit 304 on May 4 and May 5, 2016 pursuant to the general warrant of May 3, 2016 or in the search of 295 Adelaide St. W., unit 304 on June 28, 2016 pursuant to the search warrant of June 27, 2016. However,

even if I am wrong and there was a violation on the defendant's s. 8 *Charter* rights as a result of any of the aforementioned searches, I am of the view that in all the circumstances, the admission at trial of the evidence obtained from the searches would not bring the administration of justice into disrepute.

[101] The defendant's application under s. 24(2) of the *Charter* to exclude the evidence obtained from the search of 295 Adelaide St. W., unit 304 on May 4 and May 5, 2016 pursuant to the general

warrant of May 3, 2016 and the search of 295 Adelaide St. W., unit 304 on June 28, 2016 pursuant to the search warrant of June 27, 2016 is dismissed.

M. F. Brown J.

Released: August 30, 2019

CITATION: R. v. Brounsuzian, 2019 ONSC 4481
COURT FILE NO.: CR-18-0518
DATE: 20190830

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

MARCO MARIC, GIOVANNI RAIMONDI, ETHAN ECKSTEIN, ABDUL SHAHIN, VARTEVAR ED BROUNSUZIAN and TANG HIEN QUANH

Defendants

REASONS FOR JUDGMENT

PRE-TRIAL *CHARTER* APPLICATION OF VARTEVAR ED BROUNSUZIAN

M. F. BROWN J.

Released: August 30, 2019