

CANADA / JUDGMENT

R. v. Abo Zead

2020 BCSC 1970

COURT

Supreme Court of British Columbia

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2020 BCSC 1970 R. v. Abo Zead

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Abo Zead,

2020 BCSC 1970

Date: 20201210

Docket: X082097

Registry: New Westminster

Between:

Regina

v.

Ayman Sobhy Abo-Bakr Abo Zead

Before: The Honourable Madam Justice Sharma

Oral Ruling on Voir Dire #2: Facial Challenge -

Warrants for Cell Phones

Counsel for the Crown:

M. Volvodic,

M. Lefebure

Counsel for the Accused:

M.A. Beckett

Place and Date of Hearing:

New Westminster, B.C.

November 27, 2020

Written Submissions Received:

December 3, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 10, 2020

[1] This is the written version of a ruling, an abbreviated version of which was delivered orally.

I. BACKGROUND

- [2] This matter was set for a voir dire for six days commencing November 27, 2020. The parties had agreed that the voir dire would proceed as follows. First, the court would hear and rule on a facial challenge to the information to obtain (the "ITO") supporting two warrants to search cell phones. After that, if necessary, the court would address the applicant's sub-facial challenge to the same ITO as well as to the ITO supporting the warrant to search the applicant's residence. That would begin with submissions on the defence application to cross-examine the affiant (the same officer swore both ITO's).
- [3] The warrants for the search of the cell phones and supporting ITO were made exhibits and defence counsel completed his submissions on the facial challenge on November 27, 2020. Crown counsel commenced but did not complete his submissions. That was scheduled to complete, along with defence's reply submission on November 30, 2020. Both counsel indicated they were confident all submissions would complete that morning.
- [4] On November 30, 2020, defence counsel informed the Court that the applicant, Ayman Sobhy Abo-Bakr Abo Zead, was ill; defence counsel believed the applicant would be unable to attend court because of the current restrictions on attendance implemented in response to the COVID-19 pandemic. The applicant was requested to get a COVID test and the matter was set over for December 1, 2020 for an update. On December 1, 2020, defence counsel affirmed that the applicant had gone for a COVID test and was still feeling ill.
- [5] It was obvious matters would need to be re-scheduled, but without a ruling on the facial challenge, it was difficult to know how much time was needed. In these unusual circumstances, I directed the parties to submit the remaining submissions in writing, which they did.

- [6] Another telephone conference was convened on December 3, 2020. As of then, the applicant had not yet received the result of his COVID test. Defence counsel did advise the Court that he believed the applicant remained ill and would be unable to pass the screening to attend court in person. The applicant does not have a computer and was therefore unable to attend court by video link.
- [7] Both Crown and defence agreed that it would be acceptable for me to deliver my ruling in the absence of the physical presence of the accused. Defence counsel would appear as the applicant agent pursuant counsel designation, but the applicant would also attend by telephone. It was also determined at that time, that the remainder of the voir dire would need to be re-scheduled but no dates were available before January 2021. The matter was set down for Monday, December 4, 2020 for delivery of the ruling and scheduling.
- [8] On December 4, 2020, defence counsel informed the Court that he was advised that the applicant had become more ill and was currently at the emergency room of a hospital. His instructions were not to appear as agent for the applicant by counsel designation in circumstances where the applicant could not attend by phone. In those circumstances the Crown agreed it was unwise for the ruling to be delivered orally. The matter was set over to December 10, 2020. The continuation of the voir dire was also set for January 11, 12 and 15, 2021.

II. THE APPLICATION

- [9] The applicant seeks an order quashing two search warrants granted on August 25, 2017. The warrants were authorized by a judicial justice of the peace, G. Hayes, on the basis of an ITO sworn by Detective Constable Jennifer White (the affiant) on or about the same date.
- [10] The applicant alleges that the ITO was insufficient, and did not provide reasonable grounds required to grant a search warrant under s. 487 of the Criminal Code, R.S.C. 1985, c. C-46. He brings a facial and sub-facial challenge to the ITO. This ruling only addresses the facial challenge.
- [11] As noted, the ITO supports two separate warrants, which authorized:
- a) a search of an Apple iPhone 7 seized incident to the arrest of a youth implicated in this matter identified as F.J. (the "iPhone Warrant"); and
 - b) a search of a black Samsung S7 phone, which is alleged to have been possessed by the applicant (the "Samsung Warrant").
- [12] The applicant is charged with five counts relating to conspiracy to traffic and trafficking in firearms and ammunitions contrary to ss. 99(1) and 465(1)(c) of the Criminal Code.
- [13] The offenses were alleged to have occurred in Surrey in July 2017. They arose following an undercover investigation conducted in the months leading up to July 2017.

- [14] One of the targets of that investigation was an individual named Harjot Samra. Mr. Samra sold firearms and ammunition to undercover police officers. Through their investigation, police officers identified individuals from whom they believed Mr. Samra was sourcing the firearms and ammunition. Those individuals include a youth named F.J. The Crown alleges that the applicant supplied F.J. with some of the firearms and ammunitions which Mr. Samra then sold to undercover police on at least two occasions in July 2017.

A. The Warrants

- [15] In the iPhone Warrant, the named offenses are: (i) on or about July 25 and 27, 2017, F.J. did transfer firearms when he did not have the authority to do so contrary to s. 99(1)(a) of the Criminal Code; and (ii) did possess a firearm for the purpose of trafficking when not authorized to do so, contrary to s. 100(1)(a) of the Criminal Code. The iPhone Warrant specifically authorized recovery of: (i) records of correspondence and communications stored electronically within the phone, including phone calls, text messages and chat logs; (ii) contact lists; and (iii) multimedia recordings including photographs, videos and audio clips.
- [16] The named offenses in the Samsung Warrant were identical to those in the iPhone Warrant, with the exception that the date of the alleged offences was only July 25, 2017. The Samsung Warrant contained the identical list for recovery of items as the iPhone Warrant.

B. The ITO

- [17] The ITO lists 15 counts. Four of those relate to Mr. Samra and the allegation of his involvement in firearms. Two relate to the applicant's alleged involvement with weapons and possession of firearms and two other counts relate to the same activities with regard to F.J.
- [18] The affiant has been a member of the VPD since April 2007 and held the position as detective in the special investigation section since November 2011. She set out in detail her experience and knowledge in different investigations where she has had to analyse, categorize, and identify evidence from various sources of information.
- [19] She explains that Task Force Tourniquet was a proactive initiative by the VPD to suppress violence in Vancouver due to ongoing gang conflicts. Tourniquet aimed to target individuals committing violence in relation to gang conflict and to disrupt their activity. The ITO in this case was sworn in support of investigating and obtaining evidence of the 15 named offences, all related to Tourniquet.
- [20] Under Tourniquet's umbrella, different projects were established to investigate separate groups of individuals. Project Tariff was one of the investigations that stemmed from Task Force Tourniquet. Project Tariff was responsible for the investigation of the five individuals, including Mr. Samra.

- [21] More specific to the events at issue in this case, in April 2017, individuals advised the RCMP of being the victims of extortion at the hands of Mr. Samra and another person, both of whom were already being targeted by Task Force Tourniquet. Project Tariff utilized undercover operators to obtain evidence of the extortion and related offenses. It is in relation to that investigation that Mr. Samra sold eight firearms and various quantities of drugs to undercover operators.
- [22] The affiant then set out 34 scenarios that were completed by undercover officers. The most relevant are scenarios 31 and 33. Scenario 31 took place on July 24 and 25, 2017. On July 24, 2017, Mr. Samra offered an undercover officer two firearms for sale. The next day Mr. Samra arrived at a location with F.J. and two other males. Money was collected and firearms, as well as a black plastic bag containing a trigger lock and ammunition were left in a covert vehicle.
- [23] The affiant also described at least four other occasions of Mr. Samra selling firearms to undercover agents.
- [24] Scenario 33 involved, among other things, an undercover officer arranging through Mr. Samra to purchase firearms. The arrangement was for the firearms to be dropped in an undercover police vehicle. Surveillance confirmed F.J. being one of three people dropping of the firearms. Moments later, surveillance revealed F.J. and another person stole back the firearms from the undercover police vehicle.
- [25] In addition to those scenarios, the affiant reviewed a real-time intelligence centre bulletin issued on July 23, 2017 (the RTIC). This identified F.J. as being involved in the suspicious transaction at a building associated with the applicant. The suspicious transaction appeared to be the exchange of money for a large item wrapped in a towel, which was believed to be a long gun.
- [26] She notes that as a follow-up from the RTIC, police officers attended at the building associated with the applicant and obtained CCTV video from the building. Among the recordings seized was one where F.J. appears to cautiously peer out of a back door before leaving the building with the applicant behind him. She reviewed another officer's report describing the video. The video included F.J. and the applicant apparently concealing large items under their clothing. This activity seemed to impair their ability to walk properly from the building, as their strides appeared to be awkward.
- [27] The affiant also reviewed the video herself and stated she believed F.J. was one of the individuals captured in the CCTV footage, along with the applicant. She then stated her belief that the firearms transaction identified in scenario 31 took place at the applicant's residence. Paragraph 69.5.5 of the ITO is highly relevant. It states that "[u]pon reviewing video footage" from scenario 31 and the CCTV video, the officer who obtained the latter "observed that [F.J. and the applicant] left the [location where CCTV camera was] with concealed items within minutes of [F.J.] placing guns into the undercover drop vehicle in the company of [Mr. Samra] and another male".

- [28] She also outlined some previous production orders and warrants obtained in the course of Project Tariff, as well as the information gleaned from those. Included in that list was her applying for and being granted the following in relation to Mr. Samra's phone: a production order for subscriber information, transmission data records, and tracking warrants.
- [29] The affiant also deposed that on July 27, 2017 she applied for and was granted a warrant to search F.J.'s residence. On August 9, 2017 she applied for and was granted a warrant to search the applicant's residence.
- [30] The applicant was arrested on August 17, 2017 and a black Samsung phone was seized incident to his arrest. F.J. was arrested on July 27, 2017 and an iPhone 7 was seized upon his arrest. It is specifically noted that during his arrest, F.J. "pulled out his cell phone and tried to make or answer a phone call" (para. 65.3).
- [31] In paragraph 109, the affiant deposed she had reasonable grounds to believe that searching the iPhone "will afford evidence" with respect to the named offences. At paragraph 112, she deposed that she was requesting the warrant for the following evidence:
- a) communications on the phones to provide evidence to "support or refute" her belief that F.J. and the applicant were involved in supplying firearms to Mr. Samra;
 - b) communications on the phones to identify additional suppliers and evidence as to where F.J. acquired the firearms on July 25, and 27 2017;
 - c) information to reveal who F.J. was on the phone with during the observed phone call on July 27, 2017;
 - d) a comparison of data from Mr. Samra's phone, which indicated communication with fictitious names, to phone numbers listed in the contacts on the seized phone to assist in revealing the true identities of gun suppliers; and
 - e) photographs of firearms based on two beliefs: (i) that F.J. was involved in supplying firearms to Mr. Samra; and (ii) that "being involved in firearm trafficking would require [F.J.] to take and receive photographs of firearms to exchange with suppliers and buyers rather than transport in person in the first instance" (para. 112.4).
- [32] The affiant's evidence with respect to the Samsung phone was very similar. At paragraph 111, she stated she had reasonable grounds to believe that searching the Samsung phone would afford evidence with regard to the named offences. At paragraph 115, she deposed that she was requesting the warrant for the following evidence to "support or refute" her belief that the applicant was also involved in supplying firearms to Mr. Samra, as well as to identify additional suppliers and evidence regarding where the applicant acquired the firearms on July 25, 2017.

[33] As with the iPhone Warrant, the affiant also sought photographs of firearms from the phone based on her belief that being "involved in the supplying of firearms to [Mr.] Samra, [the applicant] would be required to show photographs of products [firearms] he had available" and the applicant would send the photographs to potential buyers rather than transport the firearms (para. 115.3).

III. LEGAL PRINCIPLES

[34] The sole issue addressed in this ruling is whether the ITO facially contained information sufficient to provide the reasonable grounds required to grant the two search warrants. Section 487 of the Criminal Code states in part that a justice, "who is satisfied by information on oath that there are reasonable grounds to believe that there is in a building, receptacle or place" items or information fitting one of the four listed categories may issue a warrant authorizing a peace officer to search that building, receptacle or place.

[35] The four categories set out at s. 487(1) are as follows:

- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
 - (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
 - (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
- (c.1) any offence-related property

[36] The Crown relies on paragraph (b) above, namely that there were reasonable grounds that the search of the phones would "afford evidence with respect to the commission of an offense" that had been committed.

[37] In *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452, the Supreme Court of Canada sets out the test to be applied. The Court confirmed that a reviewing judge does not substitute his or her view for that of the authorizing judge. Rather, so long as the reviewing judge concludes on the basis of the record, as amplified on the review, that the authorizing judge could have granted the authorization, the warrant should be upheld.

[38] In *R. v. Araujo*, 2000 SCC 65, the Court explained why the reviewing court must look at the whole of the ITO (para. 54):

An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge.

[39] The Supreme Court of Canada has commented on the meaning of the phrase in paragraph (b) above, "will afford evidence with respect to the commission of an offense", in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 at para 15. The phrase is interpreted broadly. The Court notes that "the natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of a warrant." In other words, the phrase in s. 487(1)(b) refers to any material that might shed light on the circumstances of the event that constitutes the offence.

[40] In *R. v. Liu*, 2014 BCCA 166, the Court of Appeal summarizes the approach judges should take when addressing a facial challenge to the validity of an ITO (at para. 39):

I would summarize the main points from this jurisprudence in the following way:

- The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant.
- The trial judge should examine the information in its totality, not on a piece meal basis, in a 'practical, non-technical, and common sense basis'.
- The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.
- The appropriate standard is one of reasonable probability rather than proof beyond a reasonable doubt or prima facie case. The phrase reasonable belief also approximates the requisite standard.
- Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".

[41] In *R. v. Jir*, 2010 BCCA 497 at paras. 27, the Court of Appeal confirmed that the reasonable grounds standard is less than the civil standard of proof on a balance of probabilities.

[42] As to the precision of language required, in *R. v. Belanic*, 2019 BCSC 1411 Justice Riley stated:

[11] With regard to quality of drafting, I am guided by *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. S.C.), wherein Hill J. stated that: "[t]he specificity and legal precision of drafting expected of pleadings at the trial stage is not the measure of quality required in a search

warrant information". To the same effect are the remarks of Gibbs J.A. in *R. v. Melenchuk* (1993), 24 B.C.A.C. 97 at para. 15, explaining that it would be "impractical to expect of an officer swearing an information in these circumstances the precise prose of an Oxford grammarian, the detailed disclosures of a confessional and the legal knowledge of a Rhodes scholar." To paraphrase the remarks of Campbell J. in *R. v. Boussoulas*, 2014 ONSC 5542 at para. 12, while "reasonable latitude" should be accorded to the drafter of an ITO, considering the precision of the language, such latitude can never be extended so far as to relieve the affiant of his or her duty to act with "integrity and reasonable diligence", mindful of the duty to make full and frank disclosure in an ex parte proceeding.

- [43] Courts have stated that an ITO must not include merely conclusive statements, but must contain factual grounds supporting those conclusions. Therefore, an ITO may be deficient if an affiant states their belief that the search will afford evidence, but does not include the underlying facts for that belief. Such a situation prevents the issuing justice from making an objective assessment of the affiant's belief: *R v. Morelli*, 2010 SCC 8 at paras. 40, 73.
- [44] However, a judge is entitled to draw inference from facts set out in the ITO, but those inferences must be reasonable and must also be based on facts contained within the ITO itself. The Ontario Court of Appeal put it this way in *R. v. Nero*, 2016 ONCA 160:
- [71] Like the authorizing justice, the reviewing judge 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 or order could have issued: *Morelli*, at para. 40; *Sadikov*, at para. 88.
- [45] The Crown relies on *R. v. Ferguson*, 2018 BCSC 490. The named offenses in *Ferguson* were possession of stolen property and possession of a loaded, restricted firearm. The warrant sought to search and recover information from six mobile devices relating to the accused and two alleged associates. One of the six cellphones was found on the accused incident to the arrest and another was found in a vehicle in which the accused was a passenger. The other four were seized from a hotel room registered in the name of the accused.
- [46] The ITO, the relevant portions of which are summarized at paras. 29-36, did not disclose any observations of the accused or his associates using cell phones. Indeed, the paragraphs in the ITO that conveyed the affiant's belief that a forensic examination of data from the phones would assist in the investigations did "not provide any details or specifics on how, or in what way, the seizing officers thought 'forensic examination and recovery' would assist" (at para. 34).
- [47] In support of the ITO, the Crown in that case stated that it was a "notorious fact that people today - especially young people - communicate extensively with mobile devices" and that they "take photos and videos using mobile devices" (at para. 60). The Crown noted that this material, if found on a device, could provide direct evidence of offences. The Crown went on

to argue "that in light of this common sense reality, the authorizing justice was entitled to put 'two and two together'" from the facts set out in the ITO and make reasonable inferences that were not specifically articulated by the affiant (at para. 61). These inferences included that the three men had been staying together for months, and so were associated with one another, and that they were in joint possession of the firearms.

- [48] Justice DeWitt-Van Oosten agreed with the Crown and found that the ITO set out sufficient facts for the authorizing justice to make a number of necessary conclusions, which are listed at para. 74. Specifically, the court concluded that the relationship between the three men, particularly that they travelled to Vancouver together and had been staying together, was a reasonable basis upon which the authorizing justice could infer that they would have communicated during that time frame with mobile devices found in their possession (para. 75). The warrant was upheld.
- [49] As part of her reasoning, DeWitt-Van Oosten J. relied on the following observation that the police are not obliged to establish with certainty that the requested search will produce direct evidence of the offence in question:
- [67] Moreover, as explained in *CanadianOxy Chemicals Ltd. v. Canada*, I am to remain cognizant of the fact that s. 487(1) of the Criminal Code does not require of police that they show the search will produce direct evidence of the offences named in the warrant.
- [68] Rather, s. 487(1) has been broadly construed and authorizes police to "locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability" for the named offences: *CanadianOxy Chemicals Ltd. v. Canada* at para. 22 .
- [50] The defence relies on *R. v. Emery*, 2019 BCSC 1710 at para. 36, which quotes from an earlier ruling in *Ferguson*: 2018 BCSC 378 at paras 65-70. That ruling addressed the accused's facial challenge to an ITO that supported a warrant authorizing the search of a motel room in Vancouver. The accused had previously succeeded in establishing a breach of his s. 10(b) rights (*R. v. Ferguson*, 2018 BCSC 242). Thus, large parts of the *Ferguson* ruling cited in *Emery* address excisions from the ITO because of the s. 10(b) breaches. In discussing the applicable approach, DeWitt-Van Oosten J. surveys a number of cases, which highlight principles that the applicant asserts are helpful to the analysis in this case:
- In *Restaurant Le Clémenceau v. Drouin* (Judge), [1987] 1 S.C.R. 706, the court quashed a warrant to search business premises in connection with alleged taxation offences because the ITO did not set out a factual basis to support the stated grounds. The affiant merely cited an investigation he had undertaken as support for his reasonable belief that an offence had occurred, but did not disclose the nature of that investigation or specify any facts. The Supreme Court found the statements in the ITO merely stated conclusions drawn from the information gathered by investigators which did not give any real sense of the underlying facts that led to the conclusions.

· In *Re Criminal Code*, [1997] O.J. No. 4393, the Ontario Divisional Court at para. 10 stated that "mere opinion and conclusion and inference do not in and of themselves afford a sufficient basis for the issuance of [warrants]" if they are entirely unsupported by reported facts.

· In *R. v. Sunner*, 2017 BCSC 2445 at para. 31, Justice Riley stated that it is trite law that in an ITO an affiant "cannot simply recite conclusory statements that are material to the application without setting out any factual underpinning allowing the issuing justice to evaluate the factual basis for the conclusion."

IV. ANALYSIS

[51] In general, the applicant's position is that the ITO is deficient because the information does not rise above mere suspicion and relies heavily on generalizations, conclusory statements, and opinions to fill in important gaps in the evidence. As explained below, I have concluded otherwise. I find the ITO is sufficient to support the warrants because viewed in its entirety, it outlines reasonable grounds based on facts and inferences to support the named offences.

[52] The applicant's challenge to the ITO can be organized into four categories.

A. Use of the Phones

[53] The applicant acknowledges the ITO could be seen as outlining reasonable grounds to believe the applicant and F.J. were involved in suspicious activity linked to the physical supply of firearms to Mr. Samra. However, he submits the ITO does not disclose a single investigatory observation suggesting the applicant used his phone in connection with any alleged suspicious activity. On that basis, he submits the ITO is deficient.

[54] Specifically, the applicant points out the following statements of facts contained in the ITO do not include observations that F.J. or the applicant used a cellphone:

- a) the description of undercover scenario 31 at which F.J. was present (para. 55);
- b) the summary of information from a real time intelligence bulletin (RTIC) identifying F.J. being involved in suspicious transaction at a building associated with the applicant (paras. 57 and 57.1);
- c) the description of an undercover purchase of drugs and firearms (beginning at para. 62), which included observations of:
 - i. F.J. leaving a vehicle in which Mr. Samra was a passenger (paras. 62.7.3 and 62.7.4);
 - ii. Mr. Samra approaching another vehicle while F.J. removes two boxes from the first vehicle and putting them into a second car (paras. 62.7.8 and 62.7.9), with those boxes being the same size as those used in another scenario where a firearm was purchased (para. 62.7.8);
 - iii. F.J. and Mr. Samra returning to the first vehicle and driving away (para. 62.7.10); and

- d) the description of CCTV footage seized from the applicant's building in which F.J. appears to cautiously peer out of a back door before leaving with the applicant, with both of them appearing to conceal items under their clothing and walk awkwardly away (paras. 69.5.3 and 69.5.4).
- [55] The Crown submits the absence of observations of the applicant using a cellphone is not fatal to the Samsung Warrant, pointing out that no such observation grounded the warrants upheld in Ferguson. It was sufficient that there were enough facts establishing an association among the individuals sufficient to infer they may have been involved in a joint criminal enterprise. Combined with the ubiquitous use of cellphones, the court was satisfied a reasonable basis existed for searching the phones.
- [56] The Crown points out the ITO does contain observations of F.J. using his cellphone. Once during undercover operations in scenario 33. Specifically, surveillance video captured images of F.J. being on his phone on two occasions contemporaneous with his stealing back the firearms. Also, as noted above, he attempted to use his phone to make or answer a call during his arrest.
- [57] The applicant submits that at best, the preceding observations amount only to a suspicion, rather than a reasonable inference, that F.J. made calls connected with the alleged firearms trafficking. He asserts little can be assumed about the purpose, topic, or recipient of the calls observed.
- [58] I disagree. The law does not require an inference to be the only explanation of events observed for it to be reasonable; nor is it necessary to rule out innocent explanations of observations. Given the observations that F.J. contemporaneously used his phone as the guns (which he had been involved in putting in the covert vehicle) were stolen back, it would, with respect, defy common sense not to conclude such an inference was reasonable.
- [59] The CCTV video referenced in the ITO contained images of F.J. associating with the applicant in suspicious circumstances. Specifically, the applicant was seen in F.J.'s company on the very day and very close in time to F.J.'s known involvement with an undercover gun purchase and, notably, the two were concealing items under their clothing. And on another occasion, the applicant was identified in the RTIC as being involved in suspicious activity with F.J. at the building associated with him.
- [60] Equally relevant, the applicant's fingerprint was found on a plastic bag and a trigger lock, which were involved in a known undercover gun transaction that surveillance confirmed directly involved F.J.
- [61] Added to the preceding is Mr. Samra's mentioning to an undercover officer that his "buddy" in Surrey could supply firearms. Reading scenarios 31 and 33, it is reasonable to assume his buddy is someone other than F.J. The Crown alleges the buddy is the applicant.

- [62] In my view, viewed all together, the preceding provides credibly-based and reasonable grounds to support both warrants, notwithstanding the absence of observations recorded in the ITO of the applicant using his phone.
- [63] The applicant supports his position that there is an insufficient link established in the ITO between the named offences and the applicant's cell phone by relying on Sunner. In that case, Riley J. similarly found that the ITO did not disclose a credibly-based probability that evidence relating to alleged drug trafficking would be found at the accused's residence. In support of the warrant sought for the accused's residence, the ITO relied on three instances where the accused got into a vehicle with a known drug dealer at or near his residence, drove off, and later sold drugs to an undercover operator. Justice Riley was not satisfied there was any "pattern of behaviour or movement of the suspects or vehicles to support a credibly-based probability" that the residence was being used to store drugs (at para. 41).
- [64] The applicant says just as the three instances of stopping at the accused's residence was an insufficient factual foundation for granting a warrant to search his residence, so too is the one or two instances of F.J. using his cellphone insufficient for grounding a warrant to search both the applicant's and F.J.'s phones.
- [65] I do not agree. First, the observation of F.J. talking on the phone is not the only basis upon which the warrant was granted. Second, the inference requested in Sunner requires a far greater logical leap than that required in this case. Entering a vehicle and travelling to a known drug transaction on three occasions does not--without more--lead to the reasonable inference that drugs would be found at the accused's residence. The drugs could just as likely be stored at the other individual's residence, or even at a completely different location (such as a "stash" house).
- [66] Engaging in known gun transactions, on the other hand, does lead to the reasonable inference that those involved communicated about the transactions with their cellphones. Communication is necessary to carry out any transaction, and at least some of this communication can reasonably be presumed to have been carried out via cellphone, whether that be in the form of a phone call, text, email, or other digital communication tool. Given that guns are inherently dangerous, highly regulated, and attract attention and suspicion upon sight, it is reasonable to assume those trafficking them avoid frequently transporting them. Unlike drugs, they are difficult to conceal. Logic dictates that communication is a central element of gun transactions.
- [67] For all those reasons, I do not find the facts analogous to those considered by Riley J. in Sunner.

B. Contacts and Identification Information

- [68] At paras. 112.3 and 115.2 of the ITO, the affiant expressed a belief that comparing information between Mr. Samra's phone (which contained fictitious names) and the Samsung phone and iPhone will aid in identifying the true names of firearms suppliers. The undercover officer understood that Mr. Samra called the two men he accompanied during the gun drop, as well as "his buddy" who arranged the deal (para. 62.13); it is Mr. Samra's phone data that revealed communication with "Jason Lowing" at a particular phone number.
- [69] The applicant submits the ITO is deficient in this regard because it does not link the information retrieved from Mr. Samra's phone during the incident of the firearms being stolen back with the applicant. He submits this is akin to a "fishing expedition"; the applicant asserts that instead investigators ought to use existing resources first to confirm the data.
- [70] I disagree. First, the applicant's statement of the test is too high; police are not required to demonstrate with certainty that evidence will be found. The ITO needs to establish reasonable grounds, rising above mere suspicion. Second, the possible existence of other routes to obtain information sought in a warrant does not necessarily detract from the validity of the warrant and supporting ITO. The issue is whether the facts in the ITO illustrate a credibly-based belief.
- [71] Keeping in mind that standard, I do find it is common sense, reasonable and logical to draw a link between known fictitious names on Mr. Samra's phone and the contacts on F.J.'s and the applicant's phone, especially given the interactions and information described in scenario 33.
- [72] Remembering that facts should not be viewed in an isolated manner, the following supports the link drawn in the ITO between Mr. Samra's phone records and F.J.'s and the applicant's phones. As noted above, one can infer that in addition to F.J. at least one other person (Mr. Samra's "buddy") supplied firearms involved in the undercover gun purchases. The undercover officer in the company of Mr. Samra, upon learning of the theft, told Mr. Samra to "get on the phone and have them put the guns back" (para. 62.11). That officer "understood [Mr. Samra] to be calling the males he accompanied during the deal as well as his buddy who arranged the deal" (para. 62.13). Added to those facts is the combination of the close timing of the observations in the CCTV, and the gun drop-off in scenario 33 (described in para. 69.5.5). Together, I am satisfied there is credibly based and reasonable grounds to connect F.J. and the applicant to that undercover gun transaction.
- [73] The applicant says there is a parallel between Liu and the facts in this case. In Liu, the ITO was held to be insufficient to support a warrant to search the residence of the two accused. The Crown argued--and the trial judge found--that the fact that the two accused were known to be drug dealers, combined with their travel patterns revealed during surveillance, supported an inference that drugs would be found at their residence. The Court of Appeal did not agree.

- [74] The warrant was for two locations: the residence of the two accused and another location where the accused was involved in suspicious activity. The police had installed tracking devices in the vehicles and conducted surveillance. Despite that, the court noted there were only four occasions when they were observed returning directly from the suspicious location to their residence. Moreover, there was a gap in the evidence regarding the two accused's starting point before allegedly delivering drugs to the other location. This was particularly significant given the police's use of tracking devices. As a result, the warrant was set aside.
- [75] The applicant submits on the facts before me there is a similar gap between the alleged offences and the "place" being searched--i.e., the cellphones. He also points out that as in Liu, the police had other data whose connection to the sought after evidence was unexplained: in this case, police had information from a transmission data warrant for Mr. Samra's phone.
- [76] For the reasons expressed above, I do not agree there is such a gap in the evidence. I find the totality of evidence suggesting the applicant and F.J. used their cellphones to communicate with Mr. Samra and others regarding firearms trafficking more than outweighs the lack of explanation in the ITO. For that reason, I am not persuaded that the facts in Liu are comparable enough to the facts in this case to dictate the same result.

C. Wording of ITO

- [77] The applicant also submits the affiant expressed uncertainty about her belief that the phones would contain evidence relevant to the offences because of wording in paras. 112.1 and 115.1. In both, she stated a belief that F.J. and the applicant were involved in supplying firearms to Mr. Samra and that a review of correspondence from the phones "will support or refute this belief".
- [78] I do not agree with defence's interpretation of those paragraphs. The affiant is not expressing a lack of confidence, but rather stating the obvious--the information in the phone may or may not contain what she believes it does. The standard is not whether she is certain the evidence will be in the location sought in the warrant; rather, it is whether the information demonstrates a credibly-based, reasonable belief. I find that it does.
- [79] Moreover, I do not find focussing on one phrase is consistent with viewing the ITO as a whole. As noted in Liu at para. 39, the court must approach reviewing the ITO on a "practical, non-technical, and common-sense basis". Likewise, as stated in Belanic at para. 11, the court must give some latitude to affiants and not scrutinize the wording in an ITO at the level of an "Oxford grammarian".

D. Photographs and Other Media

- [80] The applicant submits paras. 112.4 and 115.3 of the ITO are unsupported opinions that undermine the issued warrants. In those paragraphs, the affiant deposed that she believed being involved in firearm trafficking would require F.J. and the applicant to exchange photographs of firearms with suppliers and buyers.
- [81] The applicant points out there is no statement of fact in the ITO that such behaviour is common to firearm-traffickers; nor is there any statement suggesting F.J. had sent pictures to Mr. Samra. The applicant further argues that nothing in the affiant's description of her experience or background supports the conclusion. For those reasons, the applicant argues those paragraphs contain impermissible reasoning analogous to what the court rejected in Morelli.
- [82] The Crown, on the other hand, submits the affiant has done nothing more than articulate a common-sense inference. Accordingly, her alleged lack of expertise on the issue is not relevant.
- [83] I agree. I do not read the impugned paragraphs as suggesting knowledge exclusive to those in law enforcement. Instead, the affiant expresses a belief that represents a practical assumption based on the prevalence of phones equipped with cameras. I see no material difference between her statements and the common-sense information accepted in Ferguson that people "communicate extensively" using cell phones, including using phones to take photographs.
- [84] Furthermore, to the extent the applicant focussed on the word "require", Crown submits that is not necessarily a conclusory statement meant to express certainty. I agree, relying again on Liu at para 39 and Belanic at para. 11.
- [85] Finally, Morelli is distinguishable. The case involved a warrant to search the accused's home computer relating to charges of possessing child pornography. The court found the ITO supporting the warrant deficient for many reasons.
- [86] For one thing, the affiant relied on generalizations about the behaviour of certain "types of offenders" to hoard images of child pornography without facts to link that behaviour to the accused. The absence of that link in the ITO is the faulty reasoning the applicant asserts exists in the ITO before me, making Morelli applicable. The applicant argues there is nothing in the ITO to support the supposition that those involved in firearms trafficking are "required" to exchange photographs before deals are completed.
- [87] However, that was only one aspect of why the ITO was found to have been insufficient in Morelli. Specifically, the majority concluded the ITO, "was carelessly drafted, materially misleading, and factually incomplete" (at para. 4). While some reasonable inferences could be drawn from facts in the ITO to the charge of accessing child pornography, the ITO was requested to support the offence of possessing child pornography. The majority's reasoning discussed technical aspects of the information in the ITO that it held were insufficient to

establish a credibly based inference of possession of images of child pornography on the computer. I do not find any analogous gap exists in the ITO before me.

- [88] Surveillance directly implicates F.J. in undercover purchases of firearms. CCTV video captures images of F.J. and the applicant together possibly concealing objects under their clothing, moments before one of those undercover gun transactions. Mr. Samra told the undercover officer that someone other than F.J. (a "buddy" from Surrey) could supply firearms, and another officer believed Mr. Samra called that buddy immediately after the guns were stolen back in scenario 33.
- [89] In my view, it is reasonable to infer that the applicant may be Mr. Samra's "buddy". In light of this and the nature of the offence, the Crown submits one can reasonably infer that the applicant and F.J. would send and receive photographs and other media in the course of trafficking firearms. I am satisfied that the facts stated in the ITO are sufficient to support this inference.
- [90] The applicant also relies on *R. v. Ricciardi*, 2017 ONSC 2788. The accused in that case was charged with 22 offences including attempted sexual assault with a weapon, robbery, attempted kidnapping, and carrying a concealed weapon. In addition to three violent assaults, he was alleged to have posted fictitious job ads online in order to attract potential victims for sexual offences. The police obtained a number of warrants to search the accused's residence, laptop, and cellphone.
- [91] With regard to the cellphone, the court held the ITO did not establish reasonable grounds to warrant searching it. Indeed, the ITO did not disclose any specific reason to suggest the cellphone might contain evidence relevant to the offences. Rather, it only offered very general statements about the nature of cellphones and the information they can contain. The court commented that this was a "far cry from credibly-based probability that the items sought will be at the location searched" because the affiant simply "hoped" that the warrant "could" lead to finding information on the phone (at para. 117). The warrant to search the laptop was found to be invalid for similar reasons.
- [92] The applicant argues the affiant's beliefs about the use of photographs also represents unfounded opinions. In my view, *Ricciardi* is distinguishable. On reviewing the whole of the ITO in this case, the facts included and the wording rises above mere suspicion. Moreover, with the possible exception of the offences relating to the fictitious job ads, communicating with accomplices is not an inherent element of the offences in *Ricciardi*, as it is in the offences at issue in this case.

- [93] Specifically, as Crown submitted, trafficking in firearms and ammunition involves the movement of inherently dangerous and expensive items. It is therefore only logical that F.J. and the applicant would neither insist on nor agree to an "in person" viewing, as that would require transporting firearms to a location before a sale was confirmed and increase their risk of being caught. In that sense, the Crown submits it would be artificial to exclude photographs and other media from the search of a phone.
- [94] As noted, police need not "show the search will produce direct evidence of the offences named in the warrant" because "s. 487(1) has been broadly construed and authorizes police to 'locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability'" (Ferguson, paras. 67-68, citing CanadianOxy at para. 22). As such, I do not find that paras. 112.4 and 115.3 of the ITO represent unsupported opinions or conclusory statements.
- [95] The Crown further submits that even if the affiant had not explicitly expressed a belief that the applicant and F.J. would send and receive photographs, it is a logical inference that could be drawn, therefore open to this Court to consider. In Ferguson, the court held the failure to articulate an inference is not fatal (at para. 106). In that case, the ITO similarly did not explicitly mention possible multimedia. Justice DeWitt-Van Oosten concluded the issuing justice could have drawn that inference and specifically referred to the likelihood firearms were obtained from others as a basis for this conclusion (at para. 86). I find Crown's position is sound.
- [96] For all those reasons, I am not persuaded by the applicant's position that the grounds for searching the phones for multimedia information, including photographs, was based on mere conclusions and opinions.

V. CONCLUSION

- [97] Viewing the ITO in its entirety, I find that it meets the applicable standard. I conclude the information contained in it is sufficient such that the issuing judge could have issued the warrants. For that reason, the facial challenge to the ITO for the iPhone Warrant and the Samsung Warrant is dismissed.

"Sharma J."

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