

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 445

COURT

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2020 BCSC 445 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 445

Date: 20200325

Docket: 27393-60

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar

And Larry Ronald Amero

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Before: The Honourable Madam Justice Maisonville

Ruling Re O'Connor Application for the Production of

Third Party Records

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Place and Date of Hearing:

Vancouver, B.C.

March 25, 2020

Place and Date of Ruling:

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introduction

- [1] This ruling addresses an O'Connor application for the production of records in the investigative files of three third party police agencies: the Toronto Police Service (the "TPS"), the Surete de Quebec (the "SQ"), and the Niagara Regional Police Service (the "NRPS"). The Applicant, Dean Michael Wiwchar, submits that these materials are relevant to issues he intends to litigate in these proceedings.
- [2] The Crown opposes the application, characterizing it as "a fishing expedition based on pure speculation". The Crown maintains that the Applicant has failed to demonstrate a basis for it to believe that the records will be useful in advancing any of the arguments he seeks to make.

BACKGROUND

- [3] This application follows from an earlier application for the disclosure of a significant subset of these records on a Stinchcombe first party basis. In reasons indexed as 2019 BCSC 2224 (the "Ruling"), this Court concluded that the appropriate framework for the application was the third party O'Connor regime.
- [4] The relevant factual background is set out in the Ruling. In brief, the primary context for the present application is Application #17, in which the Applicant seeks to exclude the evidence from two BlackBerry devices seized upon his arrest in Toronto on June 21, 2012 for the murder of John Raposo. The Crown in the present case intends to tender that evidence against the Applicant for the murder of Sandip Duhre.
- [5] Notice of Application #17 sets out the factual background as follows:
1. On January 17, 2012, the Vancouver Police Department (the "VPD") commenced an investigation into the shooting death of Sandip Duhre ("Duhre") at the Sheraton Wall Center in Vancouver. The VPD theorized that the Applicant was the shooter.
 2. Six months later, on June 18, 2012, the Toronto Police Service (the "TPS") commenced an investigation into the shooting death of John Raposo ("Raposo") at a cafe on College Street in Toronto. The TPS theorized that the Applicant was the shooter.
 3. On June 21, 2012, the Applicant was arrested in Toronto by members of the TPS for the murder of Raposo. Det. Sgt. Browne of the TPS directed the arrest. The arrest was carried out by Cst. Hayes and Cst. Szewczyk of the TPS. At the time of the arrest, the Applicant was travelling in a taxi. The arrest was conducted without a warrant.
 4. The TPS had the taxi towed to a local detachment. Det. Purches of the TPS searched the taxi and seized:
 - 1) one black-colored "Blackberry Curve" device
 - 2) one white-colored "Blackberry Curve" device
 - 3) one "Blackberry Bold" device
 - 4) one Nokia phone
 5. On June 27, 2012, Det. Whittemore of the TPS was granted three separate warrants (the "2012 Warrants") to search the data contained on the three Blackberry devices.
 6. On December 18, 2012, Kimberly Warren, a civilian member of the RCMP's "Technical Investigation Services Technical Analysis Team" examined two of the three Blackberry devices at the RCMP lab in Ottawa; namely:
 - 1) the black-colored "Blackberry Curve" device
 - 2) the white-colored "Blackberry Curve" device

7. Warren disassembled the two Blackberry Curve devices and conducted a "partial read" of the devices' memory for a "password hash" and "PGP certificate" (the "Data Extractions"). The RCMP were unable to decrypt the information on these two devices. The techniques used in the Data Extractions are not known to the Applicant. The Crown claims privilege on the techniques used.
 8. The two Blackberry Curve devices were reassembled and returned to the exhibit room. It is not known where the data extracted from these two devices was stored. The defence is waiting for further disclosure related to the data extracted from the two Blackberry Curve devices.
 9. On January 24, 2013 Det. Menard of the TPS Tech Crimes Section examined the two Blackberry Curve devices. The SIM cards from the two devices were placed into a SIM card reader. Data was extracted from the SIM cards. The results of this extraction are not known to the Applicant. The defence is waiting for a response to a disclosure request with respect to the results of the extraction. Det. Menard also attempted to use a password ("LOLA") on the two devices but the attempt failed.
 10. On December 19, 2014, Sgt. Bernier of the RCMP extracted the "password hashes" from the Data Extractions from the two Blackberry Curve devices. Sgt. Bernier "resolved the password hashes" to the word "seawater".
 11. On March 9, 2015, Cst. Gillespie of the TPS Tech Crimes Section examined the two Blackberry Curve devices by entering the password "seawater" into the devices. Cst. Gillespie then manually photographed text messages, contacts, and memos on the two Blackberry Curve devices.
 12. At some unknown time, the data extracted from the two Blackberry Curve devices was provided to the VPD.
 13. The defence has made various disclosure requests with respect to the data extracted from the two Blackberry Curve devices; in particular, the extent to which the data was shared with other police agencies and how the data was used. The requests are outstanding.
 14. On July 18, 2014, Det. Whittemore was granted three more warrants to search the three Blackberry Curve devices seized from the taxi (the "2014 Warrants"). The 2014 Warrants authorized the police to search for the same items as those listed in the 2012 Warrants. The Crown will rely upon the 2014 Warrants as the lawful authority to retrieve the data from the two Blackberry Curve devices.
- [6] Against this factual background, the Applicant argues that the seizure of his BlackBerry devices was warrantless and presumptively unreasonable. He also challenges the validity of the cell phone warrants. His position is that the affiant, Det. Whittemore, failed to make full and frank disclosure in the information to obtain he swore on July 18, 2014 (the "ITO") by failing to identify all investigative sources and omitting relevant information. The Applicant will seek to cross-examine the affiant (though no application has yet been made) about the

degree to which he was provided with information about the Applicant from other investigations, as well as about the extent to which the affiant and other TPS investigators shared the data from the BlackBerry devices with other investigative agencies, and whether any controls were put in place to protect the Applicant's residual privacy interests. His position is that the degree of information sharing was unreasonable and contrary to s. 8 of the Charter.

- [7] Some of the other police investigations that feature in the Applicant's claims with respect to information sharing include Project Ink and Project Loquace.
- [8] Project Ink was a NRPS investigation into drug trafficking in 2011-2012 that led to the collection of evidence establishing two conspiracies to import cocaine into Canada. One of the conspiracies was to steal approximately 200 kg of cocaine from Mr. Raposo, who had allegedly been involved in cocaine importation and distribution with Nicola Nero, Rabih Alkhalil (the Applicant's co-accused), Martino Caputo and others. The Crown intends to rely on text messages obtained from a PGP device seized from Mr. Nero in the present proceedings. Mr. Alkhalil is currently awaiting trial on charges arising from Project Ink. The Applicant was not a target of the investigation and is not alleged to have any involvement in either conspiracy.
- [9] Project Loquace was an SQ drug investigation in Montreal into drug trafficking and importation. Ninety people were charged with various offences, including Mr. Alkhalil and the Applicant's other co-accused, Larry Amero. Mr. Alkhalil is currently on trial. A judicial stay of proceedings for delay was ordered in relation to Mr. Amero. The Applicant is not an accused in the Project Loquace prosecutions.
- [10] The Applicant was charged with the murder of Mr. Raposo along with Mr. Alkhalil and two others. They were convicted following a trial with jury on May 11, 2017 and sentenced to life in prison. The Applicant's conviction is under appeal.
- [11] The Crown opposes Application #17 on the basis, in part, that the Applicant did not challenge his arrest or the search of his devices and the admissibility of their contents at his trial for the murder of Mr. Raposo.
- [12] The Crown has disclosed all of the source materials referred to and relied upon by Det. Whittemore in the ITO to the Applicant.

GOVERNING LEGAL PRINCIPLES

- [13] The test for production of third party records is well-settled and was recently summarized in *R. v. Gubbins*, 2018 SCC 44 at paras. 25-28:

- [25] Third party disclosure is dealt with in O'Connor. To obtain disclosure of such records, an accused must make a court application. First, the burden is on the accused to show that the record is "likely relevant". Second, where the accused discharges this burden, the judge will examine the record to determine whether, and to what extent, it should be produced to the accused.
- [26] Information will be "likely relevant" where there is "a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify": O'Connor, at para. 22 (emphasis deleted). The "likely relevant" threshold has been described as significant, but not onerous: O'Connor, at para. 24; [R. v. McNeil, 2009 SCC 3] at para. 29. The reason that the relevance threshold is "significant" is to allow the courts to act as gatekeepers, preventing "speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming" requests for production: O'Connor, at para. 24, quoting R. v. Chaplin (1994), [1995] 1 S.C.R. 727 (S.C.C.), at para. 32.
- [27] Nevertheless, the burden on the accused is not onerous. "Likely relevance" is a lower threshold than "true relevance", and has a "wide and generous connotation" that "includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence": McNeil, at para. 44; see also O'Connor, at para. 21. Only after information has been shown to be likely relevant will the courts assess the actual relevance of the record sought. The courts then consider competing interests at the second stage of an O'Connor application: McNeil, at para. 39. It may be apparent "upon inspection by the court that the claim of likely relevance established at the first stage of the O'Connor application is simply not borne out": McNeil, at para. 40.
- [28] There are two reasons why the threshold in an O'Connor application is not onerous. First, the only issue at this stage is likely relevance. The application judge is not determining the admissibility of records, nor has the judge reached the point at which he or she considers competing interests: O'Connor, at para. 24. Second, the accused at this stage is in the difficult position of having to make submissions without knowing the contents of the records being sought: O'Connor, at para. 25. The likely relevance threshold is a first-step inquiry designed to prevent fishing expeditions, but nothing more.
- [14] The requirement that the Applicant establish a reasonable possibility that the records being sought are logically probative to an issue does not necessitate that he demonstrate the specific use to which the information might be put. Nevertheless, the mere assertion that the content of the records may be relevant is not sufficient to justify production. Rather, an applicant must point to some case specific evidence or information to justify that assertion: R. v. Sipes, 2011 BCSC 150 at para. 16, citing R. v. Batte (2000), 145 C.C.C. (3d) 449 (Ont. C.A.).
- [15] Some of the records that the Applicant seeks are governed by the likely relevance threshold discussed above. Most, however, are sought in furtherance of his Garofoli application (R. v. Garofoli, [1990] 2 S.C.R. 1421), and a narrower relevance threshold applies. As the Supreme Court held in World Bank Group v. Wallace, 2016 SCC 15 at para. 100, where third party

records are sought in relation to a Garofoli application, an applicant must show a reasonable likelihood that the records will be of probative value to the narrow issues in play on such an application.

- [16] As the Court reviewed in that decision, the Garofoli framework assesses the reasonableness of a search when wiretaps are used to intercept private communications. A search will be reasonable if the statutory preconditions for the authorization have been met. A Garofoli application does not determine whether the allegations underlying wiretap application are ultimately true, but, rather, whether the affiant had "a reasonable belief in the existence of the requisite statutory grounds" (*R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at para. 41).
- [17] As a general rule, there are two ways to challenge an authorization:
- (a) that the record before the authorizing judge was insufficient to make out the statutory preconditions; and
 - (b) that the record does not accurately reflect what the affiant knew or ought to have known and that, if it had, the authorization could not have issued.
- [18] In the latter of these circumstances, a subfacial challenge, what matters is what the affiant knew or ought to have known at the time the affidavit in support of the authorization was sworn. Thus, cross-examination that can do no more than showing that some of the information relied upon by the affiant was false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known it was false. While an affiant may not ignore signs that other officers may be misleading them or omitting material information, they do not have to conduct their own investigation if there is no indication that anything is amiss. The Court in *World Bank Group* then continued (at para. 124):

With these principles in mind, while we do not foreclose the possibility that the O'Connor process may be used to obtain records for purposes of a Garofoli application, the relevance threshold applicable to such an application is narrower than that on a typical O'Connor application. Specifically, where an accused asserts that third party documents are relevant to a Garofoli application, he or she must show a reasonable likelihood that the records sought will be of probative value to the issues on the application. The fact that the documents may show errors or omissions in the affidavit will not be sufficient to undermine the authorization. They must also support an inference that the affiant knew or ought to have known of the errors or omissions. If the documents sought for production are incapable of supporting such an inference, they will be irrelevant on a Garofoli application (*Pires*, at para. 41).

- [19] Accordingly, the test for third party production is consistent with that to cross-examine the affiant: a reasonable likelihood that cross-examination will elicit testimony of probative value to the issue for consideration by the reviewing judge. In other words, it must be reasonably likely that the records or cross-examination will be useful on the application.

- [20] The statutory preconditions for the issuance of a search warrant are set out in s. 487 of the Criminal Code, R.S.C. 1985, c. C-46, namely, that the issuing justice must be satisfied by information on oath that there are reasonable grounds to believe that an offence has been committed, and that the search of the place identified in the warrant will afford evidence of the evidence. Put into the context of this application, that a murder was committed, and that a search of the Applicant's devices would afford evidence of the murder.

MATERIALS SOUGHT BY THE APPLICANT

- [21] The notice of application seeks the production of 26 records from three police agencies. A number of these, however, are no longer in issue.
- [22] The Applicant stresses that a critical feature in assessing relevance here is that the Crown is seeking to use evidence from a separate investigation--the Raposo homicide--against him in these proceedings. Thus, while the TPS is notionally a third party, it is the investigative agency in regards the search and seizure of his devices. For this reason, he submits, materials from the Raposo investigative file are uniquely important to his case.
- [23] The Applicant says that each record he seeks has relevance to one or more of the following issues:
- a) Sufficiency of the July 18, 2014 ITO - This basis of relevance arises from the Applicant's subfacial challenge to the cell phone warrants. He submits with respect to a great many of the records that there is a reasonable likelihood they will be logically probative of (a) whether any statements in the ITO were misleading or inaccurate; (b) whether any information contained in the ITO was obtained in breach of his Charter rights; and (c) whether the affiant failed to disclose material facts. The records are logically probative of these issues because they are capable of supporting the inference that the affiant knew or ought to have known that there were misleading or inaccurate statements in the ITO or that he failed to disclose material facts.
 - b) Manner of search of the Applicant's devices - The records that the Applicant seeks with respect to this category largely pertain to initial police attempts to access the contents of his devices. While the focus of the Applicant's "manner of search" claim has, to date, been with respect to the sharing of information between police agencies, he now raises the manner by which the police obtained access to the password to his devices as another component. He argues that since the password was used to gain access to the devices under the cell phone warrants, the reasonableness of the method by which the police obtained it is relevant to the manner of the search.

- c) Grounds to arrest the Applicant - The Applicant submits that unless the Crown is able to demonstrate that the devices were seized pursuant to a lawful arrest, any references to them must be excised from the ITO, and the warrant will fail. Accordingly, records that pertain to his arrest are relevant to whether the TPS had reasonable grounds to believe that the Applicant was the person who killed Mr. Raposo and whether those grounds were objectively reasonable.
 - d) Search/seizure incident to arrest - The Applicant argues that "seizure" incident to arrest includes not only the physical seizure of the devices but also the attempts to access the information they contained. Attempts made long after the Applicant's arrest and prior to the issuance of the search warrants were not truly incidental to arrest and, consequently, were not authorized by law, contrary to s. 8 of the Charter.
 - e) Information sharing - The Applicant raises the extent of the sharing of his personal information amongst police agencies as an issue that engages his rights under s. 8 of the Charter.
- [24] To add specificity to these fairly generic assertions of relevance, the Applicant provided a chart at the hearing of this application that set out with greater particularity his claims of relevance with respect to each of the records. I will refer to some of these details as I go through each of the requested records below.

DISCUSSION

- [25] Although the Applicant presumably had disclosure of the materials he now seeks when he stood trial for the Raposo homicide, his counsel, who did not represent the Applicant at the Toronto trial, advise that they do not have access to the disclosure. They say that implied undertakings preclude them from obtaining the materials from the Applicant's Toronto counsel and using them in these proceedings.
- [26] What the Applicant does have, however, are all of the source materials for the ITO. This includes Det. Whittecombe's notes, which frequently have his source documents stapled right in. As well, the Crown went through the ITO with Det. Whittecombe and compiled a source binder of any documents that were not in his notes.
- [27] I turn now to consider each of the Applicant's third party requests, beginning with the materials in the possession of the TPS.

Item A - Handwritten Notes of Det. Sgt. Browne from August 22, 2012 to June 27, 2014

- [28] The Applicant submits that these materials are relevant to the sufficiency of the ITO, the manner of search of the devices, search and seizure incident to arrest, and information sharing. Specifically, he says that Det. Sgt. Browne was the lead investigator with respect to the Raposo homicide, and that he attended multiple meetings with the affiant. The Applicant

contends that since these notes were made prior to the issuance of the warrants, they contain information Det. Whittemore knew or ought to have known. Accordingly, they are "virtually certain" to contain relevant information, including details that may need to be added to the ITO through amplification, and notes relating to attempts to search the Applicant's devices prior to the issuance of the warrants (which would also be relevant to the issue of search/seizure incident to arrest).

- [29] As for the other bases of relevance, the Applicant says that Det. Sgt. Browne appears to have been the primary contact with Sgt. Bernier of the RCMP regarding the search of his devices so his notes are likely useful in that regard. Moreover, contained in the notes that the Applicant has already received are references to Det. Sgt. Browne either receiving or providing information to the VPD, and thus the broader period of notes are likely relevant to his claim regarding information sharing.
- [30] The murder of Mr. Raposo occurred on June 18, 2012 and the Applicant was arrested three days later on June 21. The Crown says that while, strictly speaking, only notes covering those days are relevant, the TPS provided the Crown with Det. Sgt. Browne's notes for the period leading up to the arrest plus two additional months. These notes, totalling over 200 pages, have been disclosed to the Applicant. The Crown argues that the Applicant now seeks an additional two years of notes in the hopes of finding errors and omissions without identifying what he expects to find that will advance his arguments.
- [31] As for the manner of the search, the Crown again says that the Applicant's request is nothing more than a fishing expedition, as there is no reason to believe that there was anything untoward in how Sgt. Bernier, whose will-say has been disclosed, searched the devices in 2014. In a related vein, the Crown says that the Applicant's claim that the records are likely relevant to attempts to search his devices prior to the issuance of the warrants in 2014 is premised on a theory with no basis in fact.
- [32] The Crown explains that according to disclosure in the Applicant's possession, in 2012 the TPS had warrants to search his devices but was unable to decode the password. After they received information that the Applicant's girlfriend had suggested the password might be "Lola", an analyst tried that password but it was incorrect and the devices were not accessed. In 2014, the RCMP lab believed they were in a position to access the devices and invited the TPS to resubmit them for analysis. Det. Whittemore updated his 2012 ITO and applied for and was granted a search warrant in July 2014 to search the devices. By now the RCMP had developed the Data eXtractor ("RDX"), and Sgt. Bernier was able to determine that the password for the two BlackBerrys was "Seawater".
- [33] In October 2014, Mr. Justice Bowden ruled in *R. v. Ley and Wiwchar*, 2014 BCSC 2108, that portions of surveillance video from the Edgewater Casino that captured the Applicant's private communications infringed s. 8 of the Charter. The Crown has conceded that any references to the contents of those communications should be excised from any ITOs that refer to them.

- [34] The Crown says that although it has confirmed multiple times that no information from the Edgewater Casino video was used to access the BlackBerrys and that access was not gained until 2014 through use of the RDX software, the Applicant continues to pursue a theory that police somehow used information from the Edgewater Casino footage to access the devices so that he can connect it to Bowden J.'s ruling in the hope of framing it as the fruit of a poisoned tree.
- [35] Finally, with respect to the Applicant's claim of relevance relating to information sharing, the Crown answers that there is nothing at all inappropriate with police agencies sharing investigative information of the sort the Applicant has identified here. It urges the Court to be wary of accepting the Applicant's request for the production of third party records in support of an application advancing a novel argument that has yet to be filed.
- [36] I am not persuaded of the likely relevance of Det. Sgt. Browne's notes.
- [37] With respect to the sufficiency of the ITO, although the Applicant is not required to demonstrate that the records he seeks will successfully discredit one or more of the statutory preconditions for the search warrants, more than a simple assertion that the records may contain relevant information is required to satisfy the threshold for production. The Applicant has not identified what he expects to find in the officer's notes that is reasonably likely to be of probative value to the issues relevant to the Garofoli application.
- [38] The facts of Garofoli itself offer an example of the type of circumstance that satisfies the threshold. An informant alleged that he had been approached by Garofoli in Hamilton with an offer to supply him with cocaine. Garofoli stated in an affidavit that he lived in Florida at the material time, and that the officer in charge of the case was aware of that. Information from the informant was critical to establishing the requisite reasonable grounds. The Court found the accused had shown a basis for cross-examination of the affiant, given the degree of reliance by the police on the informant. If he was discredited, then the factual basis for the authorization would be undermined. Further, if it was shown that the informant lied, that could raise the inference that the police knew or ought to have known that he lied.
- [39] Here, the Applicant has not presented any similar basis to support a reasonable likelihood that Det. Sgt. Browne's notes may reveal inconsistencies in the ITO upon which to advance an error or omission argument. While the burden at the first stage of an O'Connor application is not onerous, something beyond mere speculation is required.
- [40] As for the manner of search, the mere fact that Det. Sgt. Browne appears to have been the primary contact with Sgt. Bernier, without more, falls far short of establishing a reasonable likelihood that Det. Sgt. Browne's notes will be of any probative value to this issue.

- [41] I accept, for the purposes of this application, the Crown's explanation of the background regarding police attempts to access the contents of the Applicant's devices. Without something to even hint that Det. Sgt. Browne's notes might contain information relevant to the Applicant's apparent theory that the police accessed the contents of his devices earlier than they claim, I am not satisfied of their relevance to this issue either.
- [42] Finally, I will address the Applicant's claim as it relates to information sharing in some detail here, as the issue arises frequently in regards other requested materials.
- [43] The basis for the asserted relevance of records relating to information sharing is set out in the Applicant's Notices of Application #17 and #34.
- [44] At paragraph 22 of Notice of Application #17, the Applicant alleges:
22. Furthermore, the TPS were under a duty to conduct the search reasonably. The Applicant contends that the degree to which the affiant and other TPS investigators shared the data retrieved from the Applicant's Blackberry devices with other investigative agencies was not reasonable, and violated s. 8 of the Charter.
- [45] Application #34 is a disclosure application for analysts reports regarding data seized from the Applicant's devices and his communications; details regarding the sharing of his intercepted communications between police agencies; and, the policies of various police agencies with respect to inter-agency sharing of information. The Applicant sets out the legal basis for the application at paragraphs 38 and 39:
38. In addition, the Applicant intends to challenge the manner of these searches. The Applicant contends that he maintains a privacy interest in his communications. It is the Applicant's position that the various police agencies in possession of his private communications disseminated the information without putting controls in place to protect the Applicant's privacy interests, and without any continuing oversight over further dissemination. Furthermore, the information was shared without judicial authorization, either on the part of the agency that initially seized the information, or the agency with whom the information was shared.
39. The Applicant's position is that the intensely personal nature of the communications, as well as the sheer breadth of the information sharing, renders the manner of the various searches unreasonable, in violation of s. 8.
- [46] The Applicant has yet to file an application with respect to this alleged Charter infringement, as the materials he first seeks on Application #34 are in furtherance its preparation.

- [47] In arguing that information sharing amongst law enforcement agencies is generally permitted at common law, the Crown cites *United States of America v. Wakeling*, 2014 SCC 72. There, the Supreme Court of Canada recognized that law enforcement authorities are entitled to share lawfully obtained fruits of a judicial authorization in the absence of further judicial review without infringing s. 8 of the Charter. Chief Justice McLachlin, concurring in the result, reasoned as follows (at paras. 92-93):
- [92] The warrant allows the police to obtain the information and to use it for purposes of law enforcement. The individual whose communications are lawfully intercepted under a valid warrant cannot complain that this unreasonably breaches his privacy. To put it metaphorically, a valid warrant sanitizes the state intrusion on privacy, as long as the execution of the warrant is reasonable and the information is used for purposes of law enforcement.
- [93] It has never been suggested that this principle is confined to the use of information in Canada. Provided information is shared for purposes of law enforcement, the individual cannot complain that the sharing violates his s. 8 right to privacy.
- [48] Although these comments were made with respect to Part VI intercepted communications, the principle applies equally to the sharing of evidence gathered pursuant to a search warrant under s. 487 of the Criminal Code.
- [49] The Applicant relies on *R. v. Ferguson*, 2018 BCSC 594, where Madam Justice DeWitt-Van Oosten (as she then was), after discussing *Wakeling*, recognized that the manner in which information sharing occurs between agencies can render a search unreasonable for the purposes of s. 8. She wrote at paras. 194-195 and 197-198:
- [194] As I read the majority ruling in *Wakeling*, investigative agencies are entitled to share evidence they lawfully seize in the absence of further authorization, without contravening s. 8 of the Charter. However, there may be cases in which the unique circumstances surround the decision to share, the sharing methodology employed by those with conduct of the search, or other features of the evidentiary matrix raise concerns about the sharing and its impact on the overall reasonableness of the search.
- [195] In these scenarios, the result is that the search may not have been "reasonably executed". Without a reasonable execution of the search, the *Wakeling* principle cannot save (or validate) access to the fruits of the search for the purpose of an unrelated investigation.
- [197] For instance, there may be governing statutory provisions (as in the case of wiretap intercepts), that prohibit or restrict disclosure of the obtained evidence except in defined circumstances, or a regime that legislatively mandates the imposition of protocols, caveats on use, or other forms of procedural or substantive safeguards before dissemination is permitted. The warrant itself might contain terms relevant to sharing the fruits of the search. Or, the investigators in charge of execution may be aware of circumstances, including the intended use of the evidence by the recipient agency, that risk abuse, an

unfair prosecution or trial, or will otherwise unreasonably interfere with the residual privacy interests held by the accused, however diminished.

- [198] The point is that whatever the circumstances consist of, restrictions on sharing the evidence, limitations on granting access to it by another agency, or other factors that appropriately inform the reasonableness of the manner in which the search was executed, must be considered, respected and given meaningful effect by police, or investigations run the risk of rendering the search in violation of s. 8.
- [50] Ferguson was such an example. The VPD applied for a warrant to search the accused's mobile devices in relation to a possession of stolen property and firearms investigation. The authorizing justice, unusually, issued reasons accompanying the warrant that placed parameters on the search, explicitly limiting it to the offences identified in the warrant and not any others the accused was suspected of being involved in on the basis that there was an insufficient grounding for the latter. The VPD nevertheless enabled other agencies, primarily the Combined Forces Special Enforcement Unit ("CFSEU"), to seize and search the data for purposes unrelated to the VPD's investigation.
- [51] The accused challenged the manner in which the warrant had been executed, arguing that the way in which the data had been obtained from the devices, including the sharing of the results with other investigative agencies, rendered the search unreasonable for the purposes of s. 8 of the Charter.
- [52] Justice DeWitt-Van Oosten found the defence argument compelling, particularly in light of the highly intrusive nature of a cell phone search and the heightened need for police, within this context, to exercise diligence in how they extract and search for evidence. She concluded that by enabling the CFSEU's active involvement in the extraction of data from the mobile devices, to the extent that it did, including uncontrolled access to, or sharing of, the extractions as the search unfolded, the VPD facilitated precisely the kind of search of the contents of the devices by a second police agency that the authorizing justice said was not justified. In the result, DeWitt-Van Oosten J. found that the manner in which the search was executed rendered it unreasonable within the meaning of s. 8 of the Charter.
- [53] I would observe that the facts of Ferguson were quite particular, and that nothing in DeWitt-Van Oosten J.'s reasons departs from the general proposition that law enforcement agencies are entitled to share validly obtained investigative information with other agencies for purposes of law enforcement. The references the Applicant cites in support of the relevance of Det. Sgt. Browne's notes do not relate to information extracted from his devices but to more general investigative information. Given how the Applicant has framed his concerns in Notices of Application #17 and #34, I am not persuaded that the Applicant has established the likely relevance of Det. Sgt. Browne's notes to his information sharing claim.
- [54] Accordingly, the production of Det. Sgt. Browne's notes is not warranted.

Item B - Email sent to Det. Dungey of the VPD by a TPS Member outlining the ongoing TPS investigation into the Raposo murder and requesting that they share information from the Duhre investigative file

[55] This item relates to meeting notes of a June 25, 2012 meeting in Toronto attended by both TPS and VPD officers. Det. Whittemore attended the meeting, and the meeting notes were attached to his handwritten notes.

[56] The meeting notes read, in part, as follows:

A general overview with respect to the Toronto murder of John RAPOSO was discussed.

Previous emails have been sent to Det. Paul DUNGEY [of the VPD] that have outlined details of the ongoing TPS investigation. An overview was provided of this by DS KULMATYCKI.

Vancouver Homicide asked to assist expeditiously with the following:

- Information on PGP devices from the Part VI writer to assist Det. WHITTEMORE in his warrant preparation
- DNA of their decedent to assist in DNA (Ontario CFS) comparison re WIWCHAR clothing and gloves seized
- The "Construction" clothing (helmet and vest) seized in Vancouver - provide photos and further details to assist in Toronto video surveillance of murderer pre-shooting
- All similar fact evidence in the Vancouver murder that may assist in Toronto investigation
- Reference was made in Vancouver "Intercepts" to WIWCHAR talking about a blonde wig - seeking call and transcript
- Surreptitious entry was made to WIWCHAR address in Vancouver - wipes were viewed. Any notes or photos to be provided re: Hotel in Toronto seizure of wipes suspected to be used to clean firearms or destroy DNA
- Rental agreement for IMPALA vehicle used by WIWCHAR on May 28, 2012 (VPD are seeking Production Order)

Agreed that cooperation between the two agencies will continue. TPS should in the future, attend to Vancouver for file review to assist in the RAPOSO investigation.

[57] The Applicant submits that the emails are relevant in relation to his claim regarding information sharing, which the meeting notes clearly demonstrate was occurring in a significant way from the earliest stages of the Raposo investigation. He further submits that the reference to information on PGP devices likely pertains to information the VPD improperly obtained from the Edgewater Casino surveillance footage, and that there is also mention of the Applicant's intercepted communications.

- [58] The Crown answers that there is no suggestion that the emails to Det. Dungey were about the Duhre investigation at all; rather, the meeting notes suggest the emails were sent from the TPS, outlining information about the Raposo investigation. Moreover, says the Crown, there is no reason to believe that any of the evidence was obtained illegally, and therefore there is no basis upon which to ground a s. 8 breach.
- [59] With respect to the reference to "information on PGP devices from the Part VI writer", the Crown advised that it contacted Det. Wu, the Part VI writer, about this request. Det. Wu informed the Crown that she was not familiar with Det. Whittemore and that she did not share information about PGP devices or the investigation with him. She checked her emails and confirmed that she had had no communication with Det. Whittemore (apart from a 2016 email to her from an Ontario Crown counsel inquiring about certain exhibits, to which Det. Whittemore had been cc'ed).
- [60] I am not persuaded that the Applicant has demonstrated a basis to believe the emails sent to Det. Dungey regarding the TPS investigation or the request of the VPD to share investigative information with the TPS are likely relevant to his information sharing claim. The police are entitled to share information absent specific restrictions that do not appear to be engaged here.

Item C - Details of what information was Shared by Det. Wu of the VPD with Det. Whittemore of the TPS regarding the Duhre homicide investigation

- [61] The Applicant argues that this request is relevant to the sufficiency of the ITO, as well as to his claim regarding information sharing. He says that there are various references in the ITO to the Duhre investigation, and he believes that Det. Wu provided the information to Det. Whittemore. This is information the affiant knew or ought to have known, and there may be references to information that was not disclosed to the authorizing justice but ought to have been, such as the fact there was an alternate suspect.
- [62] I am satisfied that Det. Wu's response to the Crown referred to above addresses the request for Item C.

Item E - The date of the video from the Edgewater Casino reviewed by Det. Whittemore and Identified as contained on Disc 1 at p. 186 of his handwritten notes

- [63] The Crown submits that in response to information provided by the VPD that the Applicant's girlfriend suggested that his password could be "Lola", Det. Whittemore attempted to confirm this by viewing the Edgewater Casino video. The relevant portions of his notes read:

Review Edgewater Casino of Wiwchar using his PGP - Disk #1 18:11:50. Wiwchar at a machine - pulls cash out of pocket - 1 \$5 bill has some writing on it - 18:52:01. Password - watched several times - does seem to be short # - uses R thumb & L thumb - quite possibly enters LOLA

- [64] The Crown says that the detail the Applicant requests is contained in the note. The date is June 8, 2012 and the time is 18:52:01.

[65] I am satisfied this addresses the Applicant's request.

Item F - Details of all attempts to access the information on the Applicant's devices and all correspondence between TPS officers regarding efforts to access the devices

[66] The Applicant argues that the fact that the TPS attempted to gain access to his devices on a number of occasions without a warrant is information that should have been before the authorizing justice, and that Det. Whittemore's failure to include it in the ITO is a breach of his duty to disclose. He further maintains that there were likely other attempts to gain access to the devices. He contends that these warrantless attempts constitute presumptive breaches of s. 8 relating to the manner of the seizure of his devices and form a pattern of Charter infringing conduct.

[67] The Crown responds that the method used by the RCMP to identify the password to the Applicant's devices is protected police technique and subject to legal privilege, information it has communicated to the Applicant. It has also confirmed there was no information used in the process of accessing the Applicant's devices from the Edgewater Casino video footage.

[68] In my view, the Crown's claim of privilege is the answer to this request.

Item G - All technical reports of Det. Menard relating to any attempts to search the Applicant's devices

[69] The Applicant submits that this material is relevant to the sufficiency of the ITO, the manner of search of his devices, and search/seizure incident to arrest. He says that although the Crown has advised that no such reports exist, he has correspondence from October 2019 to the effect that inquiries were being made to determine whether that was the case.

[70] The Crown responds that it has made McNeil inquiries and advised the Applicant that there are no reports or notes for Det. Menard, who was never able to access any of the Applicant's devices. Sgt. Bernier was the only officer who was able to resolve the password for the devices, and his report/will say has been disclosed. What the Applicant is asking for simply does not exist.

[71] On the basis of the submissions of the Crown, I accept that the reports the Applicant seeks do not exist.

Item H - Emails between the TPS and BlackBerry regarding obtaining access to the Applicant's devices

Item I - Details regarding the TPS "tech" attempting to "get a PIN" for the Applicant's devices, and the results of those attempts

Item J - Documents received by Det. Menard regarding how PGP devices are encrypted

- [72] According to the Applicant, these sets of materials are relevant to the sufficiency of the ITO since the fact that there was an exchange of information between BlackBerry and the TPS regarding the manner of encryption of the Applicant's devices and warrantless attempts to obtain a PIN is information that should have been disclosed to the authorizing justice. They are also relevant to the manner of search of the devices, as warrantless attempts to gain access are presumptive breaches of s. 8 that form a pattern of Charter infringing conduct. Finally, the Applicant says the materials are relevant to search/seizure incident on a similar basis.
- [73] With respect to these items, the Crown submits that the Applicant is simply fishing for something to support his theory that the police determined the password to his devices through means other than the RDX software, a theory for which there is no support. While it is clear that the TPS once tried to access the devices with the password "Lola", the password was incorrect. The Crown says there is no reason to believe there were other attempts that would constitute a s. 8 breach.
- [74] In the absence of any basis to suggest there were additional undisclosed attempts to access the contents of the Applicant's devices, I agree with the Crown that the Applicant has not established a reasonable likelihood that the materials will be of probative value to the issues he has identified.

Item K - Transcripts of eyewitnesses in the Raposo homicide

- [75] The ITO contained references to eyewitness accounts of the Raposo shooting. However, relying on an excerpt from Det. Whittemore's notes that refers to an interview of an individual in relation to the incident that is not included in the ITO, the Applicant says that not all witness interviews were included in the ITO. He submits this is an example of the affiant's failure to make full and frank disclosure relevant to the grounds for the issuance of the warrant, and that there will inevitably be others. Further, if the summaries of the witness interviews are misleading or false as compared to the transcripts, this would be information the affiant knew or ought to have known. Any information in the transcripts that ought to have been included in the ITO is also relevant to amplification.
- [76] The Applicant submits that the transcripts are also clearly relevant to a second issue, which is the subjective grounds for his arrest and the objective reasonableness of those grounds.

[77] The Crown says that for the purposes of preparing the ITO, Det. Whittemore reviewed summaries of the witness statements, not transcripts. Those summaries have been provided to the Applicant. Although he hopes to find inaccuracies, there is no reason to believe that any exist, especially since some of the eyewitnesses testified at his trial for the Raposo murder, and any meaningful inaccuracies in the summaries would therefore be apparent by now.

[78] I am not satisfied that the Applicant has demonstrated that there is any reason to believe that production of the transcripts will reveal discrepancies with the summaries that would undermine the statutory preconditions for the warrants. Random fact-checking is not the purpose of the production of third party records.

[79] As for the second basis, grounds for arrest, I accept the Crown's submission that it is apparent from Det. Sgt. Browne's notes that he was briefed on what the witnesses had said and that he ordered that summaries be prepared. The shooting occurred on June 18 and the Applicant was arrested on June 21. There were no transcripts of witness statements at the time of the arrest. They are not likely relevant.

Item N - Details of how the police established a link between a \$50 bill in the Applicant's safety deposit box and a money laundering investigation in Montreal

[80] Paragraph 221 of the ITO provides:

On the 15th day of January, 2013 D/S BROWNE advised me that a fifty (50.00) dollar bill that was seized from WIWCHAR's safety deposit box in Vancouver was linked to a Montreal Police Department investigation involving laundering money.

[81] The Applicant argues that without Det. Sgt. Browne's notes, he has no information about this purported link. The officer's notes are therefore likely relevant to determining whether any pertinent details were left out of the ITO or whether the information it contains is misleading.

[82] The Crown responds that the supporting documentation has already been provided to the Applicant as first party Stinchcombe disclosure in the form of three task action reports and underlying documents. As the Crown further explains in its written submissions (at para. 79):

When Wiwchar's safety deposit box was searched on April 5, 2012, it contained \$140,000 in cash, 484 x \$100 bills and 1832 x \$50 bills. The serial numbers of these 2,316 bills were run through the RCMP Currency Serial Number Tracing database ("CRATS"). One of the \$50 bills came back with a "hit" connecting it to a money laundering investigation in Montreal that had concluded in 2007 (five years earlier). We are advised by the VPD that there are no further documents in their possession on this subject beyond what has already been disclosed and we have no reason to doubt the veracity of that statement.

[83] I consider the Crown's explanation sufficient to address this request.

Item P - All Project Loquace Materials reviewed by Det. Whittemore including any documents containing the "AKAs" of various PGP usernames

Item Q - All Project Ink materials reviewed by Det. Whittemore including any documents containing the "AKAs" of various PGP usernames

Item R - All materials reviewed by Det. Whittemore relating to the "AKAs" of various PGP usernames

[84] These items relate, in part, to a text message included at para. 238(ccc) of the ITO:

From: TheDreamCatcher

To: RunNHide

Subject : Re

Sent: Jun 18, 2012 4:40 PM

Lol I had the whole construction uniform on mullet helmet dust mask orange side road shirt and rocker shades lol I sat down and ordered a corona

[85] The text was sent a short time after the shooting of Mr. Raposo, and it is the Crown's theory that the Applicant is Dream Catcher. The Applicant contends that the text was obtained in violation of s. 8 of the Charter, and he seeks its excision.

[86] The Applicant says that Det. Whittemore indicated in the ITO that he was "also known as" and "believed to be" Dreamcatcher. These references, he says, were either intentionally misleading or Det. Whittemore knowingly omitted to include any reference to the investigative source of the information. Either way, the information he seeks is relevant.

[87] The Applicant further submits that additional information regarding Project Loquace was included in the ITO, culminating in the impugned text, including information purporting to link the Applicant, Mr. Alkhalil and Mr. Lavoie, a Project Loquace target. The clear inference is that the Raposo murder was related to a drug deal gone bad. The Applicant argues that the information is therefore relevant to grounds and the sufficiency of the ITO. He further says that the materials requested would also be relevant to information sharing, as the impugned text was provided to Det. Whittemore by the SQ.

[88] The Applicant contends in relation to Item Q that he has standing to challenge the search of the phone seized from Mr. Nero during Project Ink. To the extent that any of his private communications were shared with Det. Whittemore, this could constitute a breach of s. 8 depending on what was shared, how it was shared and for what purpose.

[89] Item R is essentially a catch-all request. The Applicant's concern is the source of the information that he is Dream Catcher, and if it is neither the SQ nor the NRPS, then he seeks to know what other agency provided that information.

- [90] The Crown responds that no source documentation has been provided to support Det. Whittemore's assertions with respect to Dream Catcher being "believed to be" the Applicant for the simple reason that there is no such source document. Based on the timing and content of the impugned text, Dream Catcher was clearly the shooter; since the Applicant was arrested for the shooting, it can be inferred he was Dream Catcher. The Crown says it is for this reason that Det. Whittemore was cautious in using the language "believed to be" in identifying the Applicant as Dream Catcher in the ITO, whereas he was less circumspect in connecting other individuals to particular nick names.
- [91] As for the other bases of relevance, the Crown submits that the information regarding the Project Loquace and Ink investigations was included in the ITO as full, frank and fair disclosure. The investigations provide background information regarding the motive for the co-accused who ordered the Raposo hit. The Applicant was hired to by Mr. Alkhalil to carry out the hit but he did not have any involvement in the drug conspiracies. Accordingly, information from those third party investigations is not material to the issuance of the warrant. Moreover, the fact that Det. Whittemore reviewed material from other investigative files does not make it "source material" for the purpose of the ITO; it only becomes that if he relied on it. The Crown says that it has already disclosed all source materials.
- [92] With respect to Item P, the Crown submits that the Project Loquace content is found at para. 238 of the ITO. It refers to Det. Whittemore attending a meeting with members of the SQ. The information set out in the ITO is in essentially the same order as the notes he took of the meeting. It is therefore obvious that is the source of the information in the ITO.
- [93] Similarly, with respect to Item Q, the Crown says that the portion of the ITO that refers to Project Ink begins at paragraph 120. The ITO indicates that information was gathered at a meeting on June 20, 2012 between members of the TPS and the NRPS. Det. Sgt. Kulmatyck was the note taker, and it is apparent from his briefing notes that Det. Whittemore relied on them for the summary, as the ITO summary traces the notes virtually word for word. They were also inserted into Det. Whittemore's notes.
- [94] Accordingly, there is no indication that anything other than the notes were relied on by the affiant.
- [95] For the reasons put forth by the Crown, I am not satisfied that the Applicant has established the likely relevance of any of these materials to the issues he has raised.

Item S - The handwritten notes of Det. McCullough and Det. Cst. Roberts of the TPS

[96] Paragraphs 240-241 of the ITO provide:

240. On the 10th day of May, 2013, I was advised by Detective Constables Kristal McCULLOUGH #8849 and Angela ROBERTS #9383. McCullough and ROBERTS attended numerous hotels in the downtown Toronto area. One location was the BEST WESTERN HOTEL located at 111 Carlton Street.

241. Information received, supported by the hotel's check in documents positively identified this hotel as having been rented by Michael FRIESON (Dean WIWCHAR) from the 13th June, 2012 until the 16th June, 2012. When 'FRIESON' checked into the hotel he provided the address of 1503-Madison Ave., B.C. Burnaby V5C 6C1.

[97] The Applicant argues that the circumstances surrounding these inquiries are relevant, such as the source of the officers' information. It is likely that the source is included in their notes, and ought to have been known to the affiant and disclosed to the authorizing justice. The Applicant will seek excision of this information on this basis. Further, the officers' notes are likely to contain facts regarding the search; any information obtained in violation of the Charter, as well as any misleading information, will need to be excised. Additional information will have to be added on amplification.

[98] The Crown points to Det. Whittemore's notes for May 6, 2013 in which he wrote, "detailed McCullough & Roberts to check area around the Eatons Centre for Alkhalil, Caputo, Wiwchar, Frieson and Ryan". Accordingly, the Crown submits, there is no source that directed them to the Best Western Hotel; rather, Det. Whittemore had them engage in "old-fashioned legwork" and they lucked out at the Best Western. There is there no reason to believe that there is an unnamed source that Det. Whittemore failed to disclose.

[99] Given the context the Crown has provided, I am not persuaded there is a reasonable possibility that the officers' notes will be of probative value.

Item T - Agency agreement for Hugo LeBlanc

Item U - Source debrief reports relating to Hugo LeBlanc

Item V - A copy of Hugo LeBlanc's one party consent

[100] These materials are in the possession of the SQ.

[101] As the Applicant explains, Hugo LeBlanc was a confidential informer who assisted the police in Project Loquace until he waived his informer privilege and became a police agent. In mid-April 2013, Det. Whittemore met with SQ officers in Montreal to discuss intelligence received from Mr. LeBlanc with respect to Project Loquace and other topics. A summary of the information Det. Whittemore received as it related to the Raposo murder was set out over three and a half pages in the ITO. Included is a photograph of the impugned text message from "Dream Catcher" to "RunNHide". The message was photographed from Mr. LeBlanc's phone by his handler.

[102] The Applicant says that the materials he seeks are relevant to the sufficiency of the ITO since the fact that the agent was paid for the information he provided is clearly relevant to his reliability and, therefore, to the grounds for the issuance of the warrant. It is material information that the affiant ought to have known and presented to the issuing justice, though he did not.

- [103] The records are also relevant to a separate Charter challenge with respect to an allegation that the SQ breached the Applicant's s. 8 rights when they intercepted his communications as a consequence of an agreement between Mr. LeBlanc and his handlers to transfer PGP messages to them upon receipt. Mr. Alkhalil successfully argued for the exclusion of some of these messages at his trial. The court in Quebec found that because Mr. LeBlanc was an agent, the police required a warrant under Part VI to intercept the communications.
- [104] The Applicant submits that the materials he seeks with respect to Mr. LeBlanc were all disclosed to Mr. Alkhalil in the Loquace prosecution, and there is, accordingly, a reasonable likelihood they will be logically probative of the issues to be raised in his Charter challenge, and, ultimately, to the issue of excision of the text message from the ITO. They will all factor into factual matrix of that Charter application.
- [105] The Applicant further contends that the materials are also relevant to information sharing. Since the SQ intercepted his private communications unlawfully, the sharing of those communications with the TPs constitutes a separate s. 8 breach.
- [106] The Crown says there is no reason to believe that Mr. LeBlanc knows who the Applicant or Dreamcatcher are. He simply showed the message on his phone to his handler. Thus, his reliability not in issue. The Crown further responds that the Applicant has not yet filed a notice of application in respect of this Charter challenge seeking excision of the impugned text from the ITO. Importantly, assuming that he does, none of the materials he is seeking will assist him in the application.
- [107] I also am unable to see how Mr. LeBlanc's agency agreement, one party consent and source debrief reports will assist the Applicant in either his proposed Charter challenge or his claims regarding information sharing. Whatever arguments he proposes to make will not be facilitated or enhanced by any of these materials. They are not likely to be of probative value.

Item Y - An index of Project Ink materials reviewed by Det. Whittemore, and the source of the information at p. 3 of the ITO regarding known nicknames and at para. 238(aa) regarding known PGP names

Item Z - All documents relating to the research and identification of nicknames of PGP users on the PGP device seized from Nick Nero

- [108] These items were addressed earlier in the context of Items P to R.

CONCLUSION

- [109] The Applicant has not demonstrated that any of the materials he seeks are likely relevant to issues he intends to litigate in these proceedings.
- [110] The application is dismissed.

"Maisonville J."

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