

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 34

COURT

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2021 BCSC 34 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2021 BCSC 34

Date: 20210108

Docket: 27393-32(a)

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 Application No. 32(a) - Application in respect of Excision, Amplification and Assessment from the

Information to Obtain

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Place and Dates of Hearing:

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introduction

- [1] Rabih Alkhalil, Dean Wiwchar, and Larry Amero face three charges on the indictment before the Court. Count 1 charges Mr. Alkhalil and Mr. Wiwchar with the first degree murder of Sandip Duhre; Count 2 charges Mr. Amero with conspiracy to commit the murder of Mr. Duhre; and Count 3 charges Mr. Alkhalil, Mr. Wiwchar and Mr. Amero with conspiracy to commit the murder of Suhkveer Dhak.
- [2] On August 8, 2012, police searched a residence located at Penthouse #6 - 555 Boulevard Rene Levesque Est in Montreal (the "Montreal Residence") pursuant to a warrant dated August 1, 2012 (the "Warrant"). The Warrant was issued on the strength of an ITO sworn by Sgt. Laurin of the Vancouver Police Department ("VPD").

- [3] The accused challenge various aspects of the warrant and its execution.

General Factual Background

- [4] On January 17, 2012 at 8:47 p.m., Sandip Duhre was shot at point-blank range in the head while dining at the Café One restaurant located in the Sheraton Wall Centre Hotel in downtown Vancouver. A lengthy VPD investigation ensued during which Mr. Alkhalil and Mr. Wiwchar became suspects.
- [5] Sgt. Laurin began preparing the information to obtain ("ITO") for the Warrant on July 11, 2012. In it, she affirmed that she had reasonable grounds to believe the murder and conspiracy to murder were committed against Mr. Duhre, and she set forth her belief that Mr. Wiwchar was the shooter and that Mr. Alkhalil and Alyas Rahimi were parties to the offence by assisting Mr. Wiwchar in locating Mr. Duhre and were part of a conspiracy to commit his murder along with others. The ITO was lengthy, comprising 295 paragraphs over 244 pages and spanning seven months of investigation.
- [6] Justice Clarke drew upon the ITO in setting out the facts surrounding the murder of Mr. Duhre in *R. v. Alkhalil*, [2017] O.J. No. 3367 (S. Ct. J.), a facial challenge to the Warrant in a separate proceeding in Ontario. As his ruling provides a convenient summary, I have taken the liberty of quoting extensively from it here:
- [6] On January 17, 2012, Sandip Duhre was shot to death while eating dinner in a restaurant at the Sheraton Wall Centre Hotel, in Vancouver, B.C.
- [7] Video surveillance ("CCTV") from the hotel and surrounding area showed two vehicles arriving nearby the hotel at approximately the same time, shortly before the murder, a red Toyota Avalon and a grey Mazda MDX. Each was driven by someone who has not been identified.
- [8] Dealing first with the Toyota, three men got out of that vehicle. They were first labelled by investigators as Persons of Interest ("POI") #1, #2, and #3. The affiant later identified those men, respectively, as (i) James Riach; (ii) the applicant, Rabih Alkhalil; and (iii) Alyas Rahimi. Riach went into a nearby store; Alkhalil and Rahimi entered the hotel.
- [9] Once inside the hotel, the applicant and Rahimi went to the front desk and asked the clerk if there was only one bar in the hotel. The clerk confirmed that there was only one bar and told the men that it looped around the corner, from where they were, to the restaurant.
- [10] After speaking to the clerk, the two men went to the bar area and first sat at a dirty booth. Shortly thereafter, they then moved to the bar. The bartender thought it "suspicious" that they moved from the booth at which they were originally seated to the bar, even though there were other clean tables available. The bartender also thought it odd that, atypical of most bar patrons, one of the men, later identified as the applicant, drank only bottled water. The bartender also noted that Alkhalil appeared to be glancing back toward the dining area, where Duhre was seated. The applicant also appeared to be texting someone on his cellular

telephone.

- [11] Turning to the Mazda, the affiant concluded that a co-accused on this trial, Dean Wiwchar, got out of that vehicle and entered the lobby of the north tower of the hotel at 8:07 p.m., exiting at 8:12 p.m. Approximately 12 minutes later, at 8:24 p.m., Wiwchar entered the south tower of the hotel, exiting approximately 20 seconds later.
- [12] Once seated at the bar, Alkhalil left twice before the shooting. At 8:28 p.m., he took his jacket and left for approximately six minutes. Later, at 8:41 p.m., both he and Riach left, each with jacket in hand. Alkhalil also had a cellular telephone in his hand at the time. The men returned to the bar, at 8:45 p.m., and stood near the barstools they had occupied several minutes before. Less than a minute later, CCTV shows Wiwchar walking toward the bar area. At the same time, Alkhalil and Rahimi are seen leaving the area for the third and final time. As the men passed each other near the entrance to the bar, CCTV shows Alkhalil glancing back at Wiwchar.
- [13] Wiwchar walked into the restaurant where Duhre was seated and shot him several times in the head. He then ran out of the hotel and back to the grey Mazda, whereupon, with Wiwchar aboard, the vehicle was immediately driven away.
- [14] After leaving the bar, immediately before the shooting, Alkhalil and Rahimi walked to the lobby area once again and spoke with the desk clerk. As they did so, gunshots rang out. The clerk said that, when the shots were fired, she looked at Alkhalil and said, "Oh my God". Alkhalil neither looked shocked nor appeared to have any reaction to the gunshots.
- [15] CCTV reveals that the clerk, Alkhalil, and Rahimi all ducked and ran from the hotel. Once outside, the clerk saw Alkhalil again, at which time he stated "There's a dead guy over there". When the clerk indicated that she did not know what to do, Alkhalil responded, "Don't worry, they're all gone." She did not know how Alkhalil could have known someone was dead because, like her, he had run in the opposite direction from the shooting, such that he would not have been in a position to know whether someone had actually been shot, much less killed. CCTV confirms that the applicant went in the same direction as the clerk.
- [7] The Warrant authorized a search of the Montreal Residence of Mr. Alkhalil for the following items as set out in Appendix B:
- a) Clothing, including:
 - i. A black waist length jacket with a yellow zipper pull on the upper left chest and a patch on the left shoulder;
 - ii. A grey sweater with a hood, a zipper and pockets;
 - iii. Blue jeans;
 - iv. Black boots;

- v. Black-rimmed glasses; and
- vi. Wolf Pack-related items;
- b) [excised]
- c) Communications devices and related items, including PGP BlackBerry cellular phones, regular cellular phones, packaging for cellular phones, SIM cards, receipts for cellular phone purchase, and phone bills;
- d) Computers and electronic data storage devices, including Playstation or Xbox terminals which could be used to store photographs;
- e) Fake identification;
- f) Financial records, including scoresheets or evidence of payments to Wiwchar, Rahimi, Riach, Ley, Ibrahim or Morn, receipts or financial statements showing purchases in Vancouver between January 10-19, 2012, banking or credit card statements showing purchases of travel or accommodations, and safety deposit box information;
- g) Travel documents, including Alkhalil's passport, luggage tags or travel insurance documents;
- h) Any documents, paper or electronic, mentioning the names Sandip Duhre, Dean Wiwchar, Vicious, "V", Valentino, Philip Ley, "Chino", James Riach, "Loonie", Alyas Rahimi or a private investigator;
- i) Proof of residency for the Montreal Residence;
- j) Cash, money counting equipment or materials for bundling money; and
- k) Map books, Airmiles documents or hotel memberships.

Alkhalil Application re Sufficiency of the Montreal Search ITO

- [8] Mr. Alkhalil takes the position that the ITO, after appropriate excision and amplification, is insufficient to support the issuance of the Warrant. While accepting that there was sufficient information in the ITO to establish reasonable grounds to believe an offence had been committed (the murder of Mr. Duhre), he contends that after excision and amplification, there is insufficient reliable and credible information to establish that evidence of the murder of Mr. Duhre would be found at the Montreal Residence. Specifically, he submits that the ITO does not disclose reasonable grounds to believe that he was person of interest [POI] #2 or that POI #2 was involved in the shooting.
- [9] Mr. Alkhalil says that at best, the ITO establishes only that he may have been present at the Wall Centre on the evening of the shooting, an insufficient basis to search an apartment on the other side of the country some seven months after the offence in question was committed. Absent that foundation, he submits that the Warrant must be set aside and that the resulting warrantless search of the Montreal Residence was contrary to s. 8 of the Charter. The admissibility of the evidence seized during the search therefore falls to be

determined under s. 24(2).

[10] Mr. Amero endorses the submissions of Mr. Alkhalil.

[11] The Crown responds that Mr. Alkhalil's claims are not well-founded on their facts or at law. It says that he parses out individual pieces of evidence, fails to consider the totality of the evidence, and asks the Court to apply a trial evidentiary standard to the ITO, ignoring that it is an investigatory tool. The Crown maintains that the ITO sets out evidence on each of the required grounds and provides a balanced perspective without being overly complex.

Governing Legal Principles

[12] The test for review of the sufficiency of an ITO is narrow. As set out in *R. v. Araujo*, 2000 SCC 65 at para. 51:

The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for the wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli*, *supra*, at p. 1452:

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[Emphasis added.]

[13] Justice Ryan discussed the role of a reviewing judge in similar terms in *R. v. MacNeil*, 2013 BCCA 162 at para. 50:

[50] As the trial judge noted, the reviewing judge does not stand in the place of the justice who issued the authorization. The question is not whether the reviewing judge would have granted the order, but whether there was any basis on which the issuing justice could have done so: *Garofoli* at 188; *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 51. In other words, the reviewing judge should only set aside the authorization if satisfied, on the whole of the material presented, that there was no basis on which it could be sustained: *Garofoli* at 188.

[14] The reviewing court must consider the information in the ITO in its totality, taking a common sense, practical and non-technical approach. It is important that the information be examined as a whole and not on a piecemeal basis because each piece of evidence colours other pieces of evidence and a fuller picture emerges by considering all the evidence together: *R. v. Lam*, 2002 BCCA at para. 10. Moreover, the reviewing court must also bear in mind the power of the authorising judge to draw inferences and make reasonable deductions from the material set out in the ITO. In deciding whether the reasonable grounds standard has been met, a court is entitled to "put two and two together":

R. v. Charlton (1992), 15 BCAC 272 at para. 34.

- [15] An affiant is required to make full, fair, and frank disclosure of all material facts: Araujo at para. 46. When seeking an ex parte authorization, an affiant must not "pick and choose" among the relevant facts in order to achieve the desired outcome. Rather, he or she must present all material facts, favourable or not. Concision may be achieved by omitting irrelevant or insignificant details but not by material non-disclosure: R. v. Morelli, 2010 SCC 8 at para. 58.
- [16] The Ontario Court of Appeal described what constitutes full, fair and frank disclosure in R. v. Booth, 2019 ONCA 970, as well as how to correct an ITO where that has not occurred:
- [56] What, then, is the frame of material information that should be included to make full and frank disclosure? To answer that question, consider what is required to issue a "reasonable and probable grounds" search warrant. For such a search warrant to issue, the grounds for the warrant must be adjudged not only to be probable, but reasonable to rely upon. The ITO affidavit has to disclose what Dickson J. described in Hunter et al. v. Southam Inc. as a "credibly-based probability [that] replaces suspicion": [1984] 2 S.C.R. 145, at p. 167; see also R. v. Floyd, 2012 ONCJ 417, 263 C.R.R. (2d) 122, at para. 9. As a result, the frame of material information required to achieve full and frank disclosure includes all material information that: (a) could undercut the probability that the alleged offence has been committed; (b) could undercut the probability that there is evidence to be found at the place of the search; and (c) that challenges the reliability and credibility of the information the affiant officer relies upon to establish grounds for the warrant.
- [57] Where full and frank disclosure has not been made, a reviewing court will correct the warrant ITO to achieve full and frank disclosure, and then determine based on that corrected ITO whether the warrant could properly have issued if full and frank disclosure had been made. "What is involved is an analysis [of the corrected ITO] to determine whether there remains sufficient reliable information upon which the search authority could be grounded": R. v. Paryniuk, 2017 ONCA 87, 134 O.R. (3d) 321, at para. 45.
- [58] Sometimes erroneous information in an ITO will be corrected by simply removing it. Information that should not have been included in the warrant will always be "excised" in this way: Morelli, at para. 45.
- [59] Erroneous information that would have been appropriate for inclusion in the ITO if presented accurately will sometimes be corrected by "amplification" so that it can be considered during the sufficiency review. Amplification entails adding information that should have been disclosed in order to give an accurate picture or replacing mistakenly inaccurate information with accurate information. When material information that would hinder a finding of reasonable and probable grounds has been improperly omitted, the ITO must be amplified to include it. However, amplification relating to information that could advance the warrant application is permissible only if the error in not making full and frank disclosure is: (1) a "minor, technical error"; and (2) made in "good faith": Araujo, at para. 59;

Morelli, at para. 41.

- [60] Whether the omission satisfies the first of these two amplification prerequisites - the "minor technical error" requirement - depends on the significance and nature of the error.
- [61] Errors that have been corrected by amplification include: mistakenly attributing observations to the wrong observer (Araujo, at para. 61; R. v. Lewis, 2012 NBQB 312, 395 N.B.R. (2d) 201, at para. 24); mistaken dates and typographical errors (R. v. Crevier, 2015 ONCA 619, 330 C.C.C. (3d) 305, at para. 75; Lewis, at para. 15); and erroneous but unimportant errors in the description of the source of information (R. v. Plant, [1993] 3 S.C.R. 281, at pp. 298-299; R. v. Lall, 2019 ONCA 317, 432 C.R.R. (2d) 195, at para. 39; R. v. Van Diep, 2015 BCCA 264, 373 B.C.A.C. 230, at para. 5.)
- [62] In contrast, amplification was not available for errors that are too significant to qualify as "minor, technical" errors, including: the failure to identify properly the target unit in a plaza (R. v. Ting, 2016 ONCA 57, 333 C.C.C. (3d) 516, at para. 71); the failure to include information supporting the expertise of a police officer (Morelli, at para. 74); and the failure to provide evidence supporting the provenance and reliability of a document of disputed authenticity (R. v. Voong, 2013 BCCA 527, 304 C.C.C. (3d) 546, at para. 52.)
- [63] Where the erroneous information cannot be corrected because the error is not a "minor, technical" one, it is obvious that it must be excised in its entirety. This is because the uncorrected, erroneous information simply cannot be permitted to remain in the ITO, thereby providing an inaccurate boost to the case for reasonable and probable grounds.
- [64] The same is true where an officer has not acted in good faith when failing to make full and frank disclosure - the second amplification prerequisite. Given that amplification is confined to "good faith" error correction, it follows that by acting in bad faith, an affiant officer squanders the opportunity to have intentionally misleading information considered in its corrected form by the reviewing judge. The misleading information cannot remain.
- [65] In some cases, bad faith on the part of an affiant officer can have an even more profound effect. Where an affiant officer's failure to make full and frank disclosure is egregious enough to "[subvert] the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like", a court has the "residual discretion" to set aside the search warrant, even if there would have been reasonable and probable grounds, had there been full and frank presentation of the information: Paryniuk, at para. 69.
- [66] To emphasize, "amplification" is to be used to correct "minor, technical" errors caused by a good faith failure to make full and frank disclosure. It is not an opportunity during the search warrant review for the Crown to retroactively add information that it could have included in support of the warrant but failed to do so: Morelli, at para. 42. To permit this would turn the authorization process into a sham: Araujo, at para. 59.

Uncontested Excisions from the ITO

- [17] The Crown agrees to a substantial number of excisions, most arising out of a ruling earlier in these proceedings that the police infringed Mr. Alkhalil's rights under s. 8 of the Charter when they obtained his personal information from Avis Car Rental without prior authorization (2019 BCSC 1801, the "Avis Ruling"). These excisions are as follows:
45. The parties agree on the scope of excision arising from this Court's ruling on NOA #29. As a result of the unlawful seizures of the AVIS car rental information, the RBC Visa information and the Dial Number Recorder Warrant results, the following paragraphs must be excised from the ITO because the information therein was illegally obtained:
- a. Paragraph 15 "ALKHALIL's Royal Bank of Canada at the time of Duhre's murder"
 - b. Paragraph 25 "and was rented by ALKHALIL on May 27 for the time period until June 3, 2012"
 - c. Paragraph 29
 - d. Paragraph 31(a)(ii) "RBC Visa card in the name Robby ALKHALIL bearing number 4514044801272590"
 - e. Paragraph 33(i)
 - f. Paragraph 102(f) last italicized sentence
 - g. Paragraph 123(d)
 - h. Heading on page 124 "rented by ALKHALIL"
 - i. Paragraph 139(i) italicized portion
 - j. Paragraph 142
 - k. Paragraph 143
 - l. Paragraph 144
 - m. Paragraph 146
 - n. Paragraph 147
 - o. Paragraph 148
 - p. Paragraph 149
 - q. Paragraph 152
 - r. Paragraph 154 "following January 13, 2012"

- s. Paragraph 191 "between June 29, 2012 and July 22, 2012 there were 595 contacts (text messages or phone calls) between ALKHALIL's phone number 613-899-9966 and a phone number registered to Eagle Star Petroleum" and last italicized sentence
- t. Paragraph 255(c) italicized portion
- u. Paragraph 256(i)(i) last italicized sentence
- v. Paragraph 270(b) and (h)
- w. Paragraph 275(b) "RBC Visa card in the name Robby ALKHALIL bearing number 4514044801272590"
- x. Paragraph 276(b) "I believe that ALKHALIL he rented the 2012 Chevrolet Impala for WIWCHAR"
- y. Paragraph 276(c)(ii) "ALKHALIL was using a cellular phone communications between ALKHALIL and WIWCHAR"
- z. Paragraph 276(f) "ALKHALIL's RCB Visa was used to purchase and a rental vehicle for WIWCHAR on June 4, 2012".

aa. Paragraph 276(i) "rented by ALKHALIL for WIWCHAR"

bb. Appendix B (1)(b) "RBC Visa card in the name Robby ALKHALIL bearing number 4514044801272590"

[18] In addition, the Crown agrees to the excision of the following paragraphs for reasons unrelated to the Avis Ruling:

- a) Paragraph 119;
- b) Paragraph 120;
- c) Paragraph 247(d);
- d) Paragraph 249(d), italicized portion only;
- e) Paragraph 256(c), (d), (j) and (k)
- f) Exhibit #1; and
- g) Exhibit #2 paragraph 2(d).

[19] The Crown also agrees to the amplification of the following paragraphs as proposed by Alkhalil:

- a) Paragraph 38(j) - To be amplified to include that in his statement to police Mr. Cuevas said "it wasn't instant when that happened to them leaving but probably 10 minutes";
- b) Paragraph 45(b) - To be amplified to correct "Nabil" ALKHALIL to "Navil" ALKHALIL;

- c) Paragraph 45(d) - To be amplified to correct "Nabil" Alkhalil and "Terry" Hisham Alkhalil and Larry Amero to "Nabeel" Khalil, Terry "Hashim Khalil" and "Hell's Angel Larry"; and
- d) Paragraph 99(a) - To be amplified to add "given the quality of photos" at the end of the sentence.

Discussion

[20] Mr. Alkhalil submits that certain information must be excised from the ITO because it is conclusory, misleading or erroneous. He further contends that amplification is necessary in a number of places to correct failure on the part of the affiant to make full, fair and frank disclosure.

Excision of Conclusory Statements

- [21] The first of Mr. Alkhalil's challenges to the ITO are with respect to what he says are "conclusory statements, based on pure speculation, and without any underlying facts to support them". The focus of his concerns is with respect to paragraph 66(d).
- [22] Under the heading "Video Surveillance", the affiant begins at paragraph 61 of the ITO to describe the surveillance video in and around the Wall Centre, including the locations of the cameras. She next chronicles her detailed observations from the video with corresponding time stamp. She then continues:
66. Based on my review of the video surveillance described in paragraph 65 and the witnesses' statements, combined with my beliefs regarding the identities of the individuals observed on the surveillance footage, I believe the following:
- a. ALKHALIL, RAHIMI, and RIACH arrived together in the Red Toyota Avalon at approximately the same time that the grey MAZDA MPV parks in a nearby lane;
 - b. ALKHALIL and RAHIMI turned and looked at RIACH [They appeared to me to be sharing some form of communication];
 - c. An unknown person was driving the Red Toyota Avalon as it pulled away after ALKHALIL, RAHIMI, and RIACH had exited;
 - d. ALKHALIL and RAHIMI were assisting the shooter in locating DUHRE. I base this belief, in part on the following:
 - i. ALKHALIL and RAHIMI attended the front desk and inquired if there was only one bar in the Wall Centre. [I believe this indicates that they had information that DUHRE would be at the bar];
 - ii. ALKHALIL and RAHIMI sat at a booth with dirty dishes and then moved to the bar, although other clean tables were available. [I believe that the bar had the best view of where DUHRE was seated];

- iii. The bartender, CUEVAS, stated that one of the males kept looking towards the back of the restaurant;
- iv. ALKHALIL was communicating with someone via texting on his phone;
- v. At 8:28 p.m., ALKHALIL left the bar taking his jacket off of his chair with him and returned 6 minutes later. [I believe this is too short of a time period to have a cigarette and that it would not be normal to take a jacket to the washroom.] Prior to this the shooter had entered and exited the Wall Centre twice and appeared to make a phone call at 8:24 p.m. [I believe that the shooter was having difficulty in locating DUHRE and that ALKHALIL may have gone to assist.]
- vi. ALKHALIL and RAHIMI left the bar and walked away from the Wall Centre at 8:41 p.m. with their jackets on and ALKHALIL had his cell phone in his hand. ALKHALIL and RAHIMI returned to the bar at 8:45 p.m. and stood there for approximately 50 seconds. The shooter followed the same route in to the Wall Centre and up to the restaurant. ALKHALIL and RAHIMI began to walk away just as the shooter walked with purpose into the bar toward the victim;
- vii. ALKHALIL glanced back at the shooter as he passed. [I believe based on my observations of the video surveillance that ALKHALIL and RAHIMI assisted WIWCHAR in locating DUHRE.]

(The affiant set out her personal opinions and beliefs in italics in square brackets.)

[23] Mr. Alkhalil submits that Sgt. Laurin's "belief" in subparagraph 66(d) that he and Rahimi were assisting the shooter in locating Mr. Duhre are based upon the following facts, each of which is supported by speculative conclusions and must be excised:

- a) In subparagraph (i), the affiant asserts, without any factual foundation, her belief that the fact that the two men asked the front desk clerk if there was only one bar indicates they had information that Duhre would be at the bar. This is not a reasonable inference and completely speculative.
- b) In subparagraph (ii), the affiant swears to her belief that the bar "had the best view of where Duhre was seated" but she includes no basis for this belief. There is no indication that the affiant attended at the scene, nor are there any statements from witnesses or employees to support the assertion.
- c) In subparagraph (v), the affiant swears that the person she believes to be Mr. Alkhalil left the bar with his jacket and returned six minutes later. She speculates that this is too short a time to go for a cigarette and, further, that the shooter may have been having difficulty locating Mr. Duhre and that Mr. Alkhalil may have gone to assist. However, the fact that the video surveillance shows the person believed to be Mr. Alkhalil exiting the lobby of the Wall Centre and returning five minutes later was not mentioned.
- d) In subparagraph (vii), the affiant asserts that the person she believes to be Mr. Alkhalil glanced back at the shooter as he passed and that this supported her belief that he and Mr. Rahimi assisted the shooter in locating the victim. This is an entirely speculative conclusion

to draw given that the fact that the shooter was unusually tall with long hair and wore a toque, black face mask and bright sports jacket was reason enough for a person to glance back at him. Mr. Alkhalil contends that this paragraph should be excised or amplified to include a description of the shooter.

- [24] The Crown responds that the affiant was clear in the opening sentence of paragraph 66 that her beliefs were based on the information she had reviewed. It says there was sufficient information in the ITO for the authorizing justice, who was entitled to put two and two together, to have come to the same conclusions.
- [25] With respect to paragraph 66(d)(i), the evidence is that they did attend the front desk and make that inquiry. The inference that they had information that Mr. Duhre would be at the bar was an available one to draw. As for paragraph 66(d)(ii), it is apparent from the video stills where the bar is in relation to the restaurant. Taken with the fact that Mr. Cuevas, the bartender, said one of them kept looking back at the restaurant, an obvious inference is that he was looking to see what was going on there. At 8:28 p.m., Mr. Alkhalil exited towards the Burrard Street exit. Although the surveillance video did not capture what he then did, given that the shooter had entered and exited the Wall Centre twice and appeared to be on his phone at around 8:25, it is certainly an available inference that Mr. Alkhalil met with or communicated with the shooter to assist in finding Mr. Duhre. Finally, with respect to Mr. Alkhalil glancing at the shooter, when that is considered in the context of the totality of the information regarding the timing of the arrival of the two vehicles and the movements and activities of the various individuals of interest in and around the hotel, it is an available inference that Mr. Alkhalil was communicating with the shooter to see what he was about to do.
- [26] The affiant was explicit that her beliefs were based on her review of the surveillance video and witness statements. She included video stills in the ITO and summaries of the witness statements, thereby providing a factual foundation for the issuing justice to make his own assessment of the reasonableness of the affiant's beliefs.
- [27] As for Mr. Alkhalil's position that paragraph 66(d)(vii) should be amplified to include a description of the shooter, I would observe that the ITO already contains several descriptions of the shooter, including at paragraphs 37(r), 40(b), 41(b) and 43(f). It is therefore not necessary to amplify paragraph 66(d)(vii) as suggested.

Excision of Misleading or Erroneous Statements

- [28] Mr. Alkhalil submits that the following paragraphs in the ITO must be excised because they are misleading, erroneous or both:

Paragraph 66(d)(iv)

- [29] Mr. Alkhalil says that it is misleading and/or erroneous for the affiant to assert her belief in paragraph 66(d)(iv) that the person believed to be Alkhalil was communicating with someone via text on his cell phone since it is not possible to determine from the video what the individual was doing with his phone. He says that the suggestion he was communicating with someone with his cell phone was a guess rather than a reasonable inference.
- [30] I do not agree. Given the purpose of a cell phone, that is an entirely reasonable inference to draw.

Paragraphs 101(b) and 271(f)

- [31] Mr. Alkhalil submits that the affiant refers to him being a member of the Wolfpack criminal organization at paragraphs 101(b) and 271(f) but fails to indicate that that she bases her assertion on an unsourced, undated and uncorroborated document purportedly authored by the Combined Forces Special Enforcement Unit ("CFSEU").
- [32] Paragraph 101, under the heading "Background of Rabi Alkhalil" reads, in part, as follows:
101. I have reviewed a summary written by Constable Terry Murphy of CFSEU-BC and obtained in part the following information:
- a. CFSEU-BC is currently investigating the ongoing gang violence in the Lower Mainland with a focus on the ongoing conspiracy to murder involving members of a group referred to as the Wolfpack;
 - b. Members of the Wolfpack include Larry AMERO ("AMERO"), RIACH, Hisham ALKHALIL, Rabi ALKHALIL and others;
 - c. The investigation centres on identifying those responsible for ordering, facilitating and carrying out what are believed to be retaliatory attacks against the DHAK/DUHRE group and their associates;
 - d. The investigation has shown that RIACH and his associates communicate using Blackberry devices with encrypted email. Some, if not all, of the devices are obtained from a Vancouver company named Esoteric Communications at 2140 East Hastings Street.
- [33] Paragraph 271(f) provides:
- f. WIWCHAR returned from Mexico with a "Wolfpack" bracelet which I believe is indicative of an association to that criminal organization (see paragraph 136.c). CFSEU advises that ALKHALIL is a member of that organization. HYSLOP's disclosures to the undercover officer indicated that WIWCHAR worked independently but is friends with "the Wolfpack" and Cowboys;

- [34] While those are the references Mr. Alkhalil cites, the ITO contains other references to the Wolfpack including: paragraphs 241(f) and (g), where Mr. Wiwchar's girlfriend, Juanita Hyslop, mentions Mr. Wiwchar's involvement with the Wolfpack to an undercover officer; and paragraph 259, where there is reference to Lindsey Black having been one of the victims when Wolfpack member Jonathan Bacon was killed in Kelowna. Paragraph 271(f) reproduced above also refers to Mr. Wiwchar having returned from Mexico with a Wolfpack bracelet.
- [35] I do not accept Mr. Alkhalil's submission. Paragraph 101 reproduces the majority of the content of the source document from the CFSEU. In my view, the affiant was entitled to rely on intelligence from the CFSEU, which was investigating Wolfpack members, as some evidence of Mr. Alkhalil's membership in the group.

Paragraphs 103 and 105

[36] Paragraphs 103 to 105 of the ITO read:

103. I have read the evidence of Detective 2401 Trevor GOW ("Detective 2401 Gow") and learned in part the following:
- a. Detective GOW submitted a request to Passport Canada to confirm that ALKHALIL had a fraudulent passport under the name Phillip BETTENCOURT FURTADO. On May 23, 2012, Detective 2401 Gow received email confirmation from Passport Canada that the passport issued in the name of Phillip BETTENCOURT FURTADO was a fraudulent passport for Rabi ALKHALIL. Detective 2401 Gow also received a copy of the fraudulent passport application and the passport photographs.
104. I have reviewed the fraudulent passport application and associated passport photograph for Phillip BETTENCOURT FURTADO and observed the following:
- a. According to the stamp on the back of the passport photograph, the photograph was taken on January 6, 2012 [eleven days prior to the shooting of DUHRE] and was taken at Walmart Portrait Studio located at 2210 Bank Street, Ottawa, Ontario;
 - b. The male in the photograph closely resembles the male described as POI #2 in the video surveillance from the Wall Centre both in facial features and hairstyle. The passport was not issued until May 10, 2012.
105. Figure 22 shows a comparison of the fraudulent passport photo of ALKHALIL taken January 6, 2012 [left] with a photo of POI #2 from the Wall Centre video taken January 17, 2012 [right]. I believe that ALKHALIL is POI #3 based on the similarities between these two photographs, the belief of Constable Crapigna, and ALKHALIL's associations with other individuals linked to the murder of DUHRE. ALKHALIL is a suspect as a party to the offence in the murder of DUHRE.

- [37] Mr. Alkhalil submits with respect to paragraph 103 that there is no factual foundation for the assertion that he submitted the passport application. He similarly contends that there is no basis for the claim in paragraph 105 that the photograph submitted with the passport application was in fact of him. Both propositions, he says, are based on a single line in a task report that refers to an email from Passport Canada to the effect that "the passport issued in the name of Phillip Bettencourt Furtado is a fraudulent passport for Rabih Alkhalil".
- [38] As above, it is my view that the affiant was entitled to rely on information from Passport Canada as a basis for those propositions, and it was neither misleading nor erroneous for her make them.

Amplification to Correct Failure to Make Full, Fair and Frank Disclosure

- [39] Mr. Alkhalil submits that the affiant improperly omitted the following information, which, through amplification, should be included in the ITO.

Paragraph 39

- [40] Paragraph 39 of the ITO relates information from the statement of Karla Bazua, who was working behind the bar at the Wall Centre on the evening in question. Mr. Alkhalil submits that that affiant failed to include the significant fact that after the shooting, Ms. Bazua was shown a video and asked whether the two men at the bar had anything to do with the incident. She responded that she did not think so. Mr. Alkhalil says that this information was included in a prior ITO sworn by Det. Cst. Wu, and that the present ITO should be amplified to include it.
- [41] The Crown, in response, says that that aspect of Ms. Bazua's statement is speculative and not based on any factual foundation when considered with the reference in paragraph 39(f) that Ms. Bazua did not know whether Mr. Alkhalil and Mr. Rahimi had left the bar prior to the shooting. The Crown further submits that Ms. Bazua did not have the two men in her continuous observation, given her further statements that she had walked passed Mr. Duhre's table during the evening (39(j)) and that she had fled to the women's washroom for safety after hearing shots (39(h)).
- [42] I agree with the Crown that what is in essence a purely personal opinion or view on the part of Ms. Bazua does not need to be included in the ITO.

Paragraph 42(p)

- [43] Paragraph 42 of the ITO sets out information from an audio recorded interview of Charlene Pineda, a front desk clerk at the Wall Centre. The affiant states that Mr. Alkhalil was at the desk when Ms. Pineda heard the gunshots. Ms. Pineda looked at Mr. Alkhalil and said, "Oh my god" and noted that Alkhalil didn't look shocked or seem to have a reaction" (42(p)).

[44] Mr. Alkhalil submits that the affiant failed to disclose that in the surveillance video of the hotel lobby, the male believed to be him can be seen, at the moment of the shooting, to immediately react by ducking and running away. By failing to include this information, he contends, the affiant risked misleading the authorizing justice. The ITO should therefore be amplified accordingly.

[45] The Crown answers that the affiant included that information in paragraph 65 of the ITO. In setting out her observations from the surveillance video, the affiant noted that at 8:46:17:

The patrons of the bar reacted by looking towards the back of the restaurant and leaving the area. ALKHALIL, RAHIMI and the front desk clerk [at the front desk] ducked and ran away from the front desk area.

[46] While it is accurate to say that the information Mr. Alkhalil seeks to have amplified is included elsewhere in the ITO, I would observe that the affiant included her observations from the surveillance video in relation to other information relayed by Mr. Pineda right in paragraph 42 itself. Accordingly, it is appropriate to amplify paragraph 42(p) as sought by Mr. Alkhalil.

Paragraph 42(q)

[47] Paragraphs 42(q)-(s) provide:

- q. PINEDA ran to the back office, through a door where the elevators were, behind the gift shop and out the doors to the right of the revolving door;
- r. PINEDA then saw ALKHALIL again outside and he said, "There's a dead guy over there";
- s. PINEDA said to ALKHALIL that she didn't know what to do and he replied, "Don't worry, they're gone";

[48] Mr. Alkhalil submits that paragraph 42(q) should be amplified to include reference to what Ms. Pineda said in her typed police statement, which was that she remained in the office for "a few minutes" and heard screaming outside before she went out and spoke to POI #2. It should also mention that the video showed that a large number of other people from inside the hotel ran in the same direction as POI #2 and Ms. Pineda when the shots were fired. Mr. Alkhalil says that the ITO as drafted leaves the impression that Ms. Pineda ran outside immediately, thus leading to the inference that the only way POI #2 could have known what happened was that he had been involved.

[49] I agree that paragraph 42(q) should be amplified as proposed by Mr. Alkhalil to take into account the fact that Ms. Pineda was in her office for a few minutes and heard screaming outside before she went out.

Paragraphs 98-100

- [50] Mr. Alkhalil contends that the affiant, under the heading "Identification of Alkhalil and Rahimi", set out an incomplete and misleading summary of the information the police received with respect to the identities of POI #2 and POI #3. Specifically, he argues that:
- a) At paragraph 100, the affiant noted that Det. Crapigna of the Ottawa Police Service believed that POI #2 was Alkhalil. She did not disclose that Randy Baker identified POI #2 as resembling Francisco Caldera or that Sgt. Tupper of the RCMP POI #2 as resembling Aly Khan Mawni.
 - b) Further with respect to Det. Crapigna, the affiant failed to include the fact that he had initially indicated that POI #3 closely resembled Alyas Rahimi but that "the other persons of interest are not jumping out at me". It was not until three days later that Det. Crapigna advised that after reviewing the bulletin again he believed that POI #2 was very likely Mr. Alkhalil. He added, "I have dealt with Rabi [sic] on numerous occasions and is very well known to me as I am to him. The face and body make-up of POI #2 closely resembles that of Al-Khalil."
- [51] Mr. Alkhalil submits that the omission of these facts artificially strengthened the identification of POI #2 as himself, and that they must therefore be added to correct the affiant's misleading presentation of the facts.
- [52] With respect to paragraph 100, the affiant indicated in paragraph 98 that in response to the fan out bulletin, "more than 8 possible individuals were named, with varying degrees of certainty, who could possibly be POI #2 or POI #3." I agree with the Crown that it is not necessary that the affiant refer to everyone who did not identify Mr. Alkhalil in the ITO. Accordingly, no amplification is necessary.
- [53] As for the references to the identification by Det. Crapigna, it is my view that the affiant was certainly entitled to accept the opinion of a police officer who had dealt with Mr. Alkhalil in the past that he was POI #2. Nevertheless, given the importance of identification in this case, paragraph 100 ought to be amplified to include the information in Det. Crapigna's email correspondence at tab 13 of the Applicant's Book of Materials.

Assessment of ITO After Excision and Amplification

- [54] Mr. Alkhalil submits that the analysis of the ITO following excision and amplification reduces to two questions. The first is whether the ITO discloses reasonable and probable grounds to believe that POI #2 is Mr. Alkhalil. If it does not, then the authorization must fail. If the Court concludes that it does, then are there reasonable and probable grounds to believe that Mr. Alkhalil was involved in the commission of the offence such that evidence of the offence would be found in his residence.

- [55] Although I have concluded that most of the excisions and amplifications sought by Mr. Alkhalil on this application are not warranted, I have permitted certain amplifications. Moreover, substantial excisions were necessitated by the Avis Ruling. Nevertheless, there remains, in my view, sufficient evidence in the modified ITO to support the issuance of the warrant.
- [56] First, I am satisfied that the ITO discloses reasonable grounds to believe that POI #2 is Mr. Alkhalil. Det. Crapigna, who had had dealings with Mr. Alkhalil, identified him from still photographs taken from the surveillance video at the Wall Centre. He also identified Mr. Rahimi, which identification was confirmed through the presence of Mr. Rahimi's DNA on a toothpick seized from the bar at the Wall Centre where he had been seated. On the basis of a 2007 police stop of a vehicle in Ottawa, it is known that Mr. Alkhalil associated with Mr. Rahimi. The affiant compared a photograph of Mr. Alkhalil submitted to Passport Canada to images from the surveillance video and concluded he was POI #2 based on similarities in hairstyle and facial features. Further, Mr. Duhre's finance claimed to have received information that Mr. Alkhalil's brothers, Nabil and Hisham, along with Larry Amero, were responsible for the murder. Investigators obtained information that Mr. Alkhalil and Mr. Amero shared a residence in Montreal.
- [57] I am similarly satisfied that the ITO discloses reasonable grounds to believe that Mr. Alkhalil was involved in the commission of the offence based on the movements of the vehicles, the individuals arriving and departing in them, including Mr. Alkhalil, and their actions in the Wall Centre.
- [58] In brief, just before 8 p.m., a red Toyota Avalon parked in front of the Burrard Hotel and three men exited. Two of them, POI #2 and POI #3, walked northbound on Burrard Street, POI #2 looking at his phone. A grey Mazda MPV parked nearby at the same time. POI #2 and POI #3 entered the Wall Centre hotel and asked the front desk clerk, Ms. Pineda, if there was only one bar in the hotel. They walked to the bar area and initially sat at a booth with dirty dishes although clean tables were available before moving to sit at the bar at 8:04 p.m. where POI #2 drank only water. One of the men, believed to be POI #2, kept leaning back and looking towards the dining area where Mr. Duhre was seated. POI #2 also appeared to be texting someone on his phone.
- [59] The shooter got out of the grey Mazda MPV shortly after 8:10 p.m. and entered and exited the Wall Centre twice. The second time he exited at 8:25 p.m. he appeared to be on his phone. POI #2 left the bar with his jacket at 8:29 p.m. and returned six minutes later with his jacket on. At 8:42 p.m., POI #2 and POI #3 walked away from the bar area into the lobby and exited through the front doors. POI #2 appeared to have a phone in his hands. The two men returned at 8:45 p.m. and went to where they had previously been sitting in the bar. They crossed paths with the shooter at 8:46 p.m. and continued to the lobby where they spoke with the front desk clerk at 8:47 p.m. At that moment gunshots were heard, and POI #2 did not appear shocked or seem to have a reaction, though he did subsequently run away from the shooting.

- [60] The shooter had entered the lobby again at 8:46 p.m., and at 8:47 p.m., he walked to the back of the restaurant area where Mr. Duhre was and 14 seconds later ran out of the restaurant and the hotel. He got into the passenger side of the Mazda MPV and it drove away.
- [61] POI #2 remained on scene after the shooting and told the front desk clerk "There's a dead guy over there" and "Don't worry, they're gone".
- [62] Investigation by the VPD indicated that POI #2 was associated to persons known to have been associated with the Mazda MPV and the red Avalon.
- [63] The foregoing is some evidence to support the conclusion that Mr. Alkhalil was involved in the commission of the murder of Mr. Duhre.
- [64] Finally, I am satisfied that the ITO discloses a reasonable basis to believe that evidence of the offence would be located at the Montreal Residence as set out in paragraph 276 of the ITO notwithstanding the passage of almost eight months. With respect to communications devices in particular, the affiant based this belief in part on the fact that she personally had two old cell phones that she had kept in case she needed to find an old contact or dates of importance.
- [65] Accordingly, I conclude that notwithstanding the excisions and amplifications to the ITO, there remains sufficient credible evidence in the modified ITO for the Warrant to have issued.
- [66] Mr. Alkhalil's application is dismissed.

Amero Application re Sufficiency of the Montreal Search ITO

- [67] Mr. Amero challenges the Warrant on a different basis, arguing that the ITO did not provide reasonable grounds to search the Montreal Residence for all cell phones and electronic devices, as opposed to only those belonging to Mr. Alkhalil.
- [68] During the search of the Montreal Residence, police seized 21 cell phones, iPads and an iPod from various rooms in the suite. Six BlackBerrys, an iPhone, and an iPod were seized from Mr. Amero's bedroom.
- [69] Mr. Amero refers to paragraph 276 of the ITO where the affiant explains why she believes that the items sought will afford evidence of the conspiracy to murder and subsequent murder of Mr. Duhre. With respect to electronic devices, she states:
276. I believe the items sought in paragraph 272 will afford evidence of the Conspiracy to Commit Murder and subsequent Murder of DUHRE as follows:
- c. I believe that communications devices and related items belonging to ALKHALIL will afford evidence regarding the conspiracy to commit the murder of DUHRE and the murder of DUHRE have reasonable grounds to believe such devices will be located within Penthouse 6 of 555 Boulevard Rene-Levesque Est, Montreal, Quebec as follows:

- d. I believe that ALKHALIL's computers and other data storage devices will afford evidence in form of photographs, which may corroborate the relationships between ALKHALIL, RAHIMI, WIWCHAR and RIACH.

[Emphasis added.]

[70] As set out earlier, the Warrant authorized seizure of the following:

- c. Communications devices and related items, including PGP Blackberry cellular phones, regular cellular phones, packaging for cellular phones, SIM cards, receipts for cellular phone purchases, and phone bills;
- d. Computers and electronic data storage devices, including Playstation or Xbox terminals which could be used to store photographs;

[71] Mr. Amero submits that the Justice of the Peace was limited to authorizing a search for the items in paragraph 276 for which reasonable grounds existed. Instead, by authorizing a search for all electronic devices, he exceeded his jurisdiction by giving the police carte blanche to seize items also belonging to Mr. Amero without reasonable grounds to believe he was involved in the offences under investigation or that his electronic devices would afford any evidence. Accordingly, paragraphs "c" and "d" of the Warrant relating to communications devices and computer/electronic storage devices must be quashed as currently written and the words "belonging to Mr. Alkhalil" must be read in.

[72] Mr. Amero says that paragraph 273 of the ITO indicates that there were two bedrooms in the premises to be searched. He says it was also apparent from the ITO that he was living at the Montreal Residence and that he possessed communication devices (paragraph 278(b) of the ITO seeks to justify a dynamic entry into the residence in part by reference to the concern that Mr. Alkhalil and Mr. Amero not have time to delete electronically stored information or wipe cellular phones). In these circumstances, Mr. Amero submits that while it might have been reasonable for police to seize devices from common areas of the residence and certainly from Mr. Alkhalil's room, there was no reason for the police to believe that Mr. Alkhalil's devices would be located in his (Mr. Amero's) bedroom or night stand.

[73] The Crown responds that the Justice of the Peace had the requisite grounds to grant a warrant for the search of the entire Montreal Residence and to authorize the seizure of the items in paragraphs "c" and "d" of the Warrant. Security needs generally, and the particular circumstances of this case, required that the devices be quickly seized, secured and analyzed. The Crown submits that given the unique and portable nature of cell phones and electronic devices and their need to be secured before being searched to determine the identity of the users, the police acted in compliance with the Warrant in seizing all 22 electronic items.

Discussion

[74] The ITO in this case presented a clear basis for concern that communications and electronic devices might be wiped of data and any potential evidence destroyed. Paragraphs 183 and 185 of the ITO refer to the fact that when police attempted to analyze Mr. Duhre's cell phones, they discovered there was little information of value since the phones appeared to have been wiped. Paragraph 231 mentions an incident in July 2012 when Mr. Wiwchar, while in custody, asked someone over the phone to "wipe all my Berries". At paragraph 276(c)(iv), the affiant sets out her security concerns with respect to cellphones:

I believe that encrypted Blackberry cellular phones were used by DUHRE, WIWCHAR and LEY and that WIWCHAR was communicating with "PRINCESSCUT" regarding plans to commit crime which dated back to October 2011. Limited but potentially useful information, including phone numbers and email addresses, was able to be retrieved from DUHRE's encrypted Blackberries despite them being remotely "wiped". I therefore believe that evidence will be obtained from any encrypted Blackberry found in the dwelling house of ALKHALIL, particularly if the device is unlocked at the time enabling police to access contact lists and communications history) or disabled by police to prevent it from being "wiped".

[75] Finally, at paragraph 278(b), the affiant set forth the basis for a dynamic entry with simultaneous announcement of purpose:

- b. A dynamic entry by the Emergency Response Team with simultaneous announcement of purpose ("Montreal police. We have a search warrant) is planned. There is grave safety risk to the police officers conducting this dynamic entry in that ALKHALIL and AMERO are suspected of a firearms related murder and are believed to have access to firearms. WIWCHAR's texts to "PRINCESSCUT" suggest he was planning to use an apparent "cop car" to intercept a target. The occupants of Penthouse #6 at the time of entry may therefore doubt that it is really the police despite a clear announcement by the Montreal police of their presence and purpose. Additionally, I believe that any delay between announcement and entry would allow ALKHALIL and AMERO time to destroy evidence, in particular to delete electronically stored information or "wipe" cellular phones, and would increase the risk to the safety of the entry officers. The Montreal police will be in charge of the tactical implementation of locating and arresting person and/or securing a safe search environment.

[Emphasis added.]

[76] Additional to the demonstrated imperative of immediately securing any devices to prevent them from being wiped was the fact that ownership of such devices can only be ascertained once they are analyzed. Police executing a warrant are not able to immediately identify the owner or person associated to a cell phone or electronic device. This can only be done once the data on the device is extracted and analyzed. Accordingly, I find that it was reasonable for the Warrant to extend to all items listed in paragraphs "c" and "d" and not be restricted to those belonging to Mr. Alkhalil. Given that it was appropriate for the Warrant to authorize

the seizure of all devices in the Montreal Residence, in any event, it follows that the issue of whether it was reasonable for the police to believe that Mr. Alkhlail's phones would be found in Mr. Amero's bedroom is irrelevant.

- [77] Two further aspects of Mr. Amero's submission warrant brief comment. The first relates to the affiant's reference in the opening line of paragraph 276 to "the items sought in paragraph 272". This is clearly in error and the correct reference should be to paragraph 275. I do not understand Mr. Amero to dispute that amplification to correct this obvious typographical error is appropriate.
- [78] Second, Mr. Amero made submissions to the effect that should the Court conclude, following the excisions from the ITO, that the Warrant was not valid with respect to Mr. Alkhalil, the Warrant should similarly be held to be invalid as it relates to him. Given my conclusion above that the ITO as modified supported the issuance of the Warrant, it is not necessary to address this submission.

conclusion

- [79] The application is dismissed.

"Maisonville J."

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