

CANADA / JUDGMENT

## R. v. Gill

2020 BCSC 1216

### COURT

Supreme Court of British Columbia

### DECIDED

17 August 2020

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2020 BCSC 1216 R. v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gill,

2020 BCSC 1216

Date: 20200817

Docket: X080640

Registry: New Westminster

Regina

v.

### Samandeep Singh Gill

Restriction on publication: A publication ban has been imposed restricting the publication, broadcasting or transmission in any way of the evidence taken, the information given, the representations made and the reasons, if any, given in respect of the application to set aside search warrants

These Reasons have been edited for publication purposes

Before: The Honourable Mr. Justice D.M. Masuhara

Ruling on Voir Dire:

Search Warrant ITO

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Place and Dates of Hearing:

New Westminster, B.C.

May 25-28, 2020

June 2, 2020

Written Submissions:

July 30, 2020

July 31, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 17, 2020

I. Introduction:

- [1] The nature of the application before me concerns a sub-facial challenge to the authorization of two search warrants, one for the applicant's residence at 12726 67B Avenue, Surrey (the "Residence") and one for a white 2000 Toyota 4Runner (the "4Runner"). The search warrants were executed on an ex parte basis by Judicial Justice Chellappan and Judicial Justice Hodge (the "Issuing Justices"), respectively, on May 14, 2011, on the basis of Informations to Obtain ("ITOs") sworn by Cpl. Andrew Brintnell ("Affiant"). The applicant, the accused Mr. Gill, seeks a finding that the search warrants resulting from the Affiant's ITOs are invalid.
- [2] The applicant submits that the ITOs contain false and misleading statements, speculative assertions, and conclusory statements which must be excised. The applicant submits that when the misleading and inaccurate portions of the ITOs are excised, the remaining information contained in the ITOs does not provide a basis on which the Issuing Justices could have found the reasonable and probable grounds required to issue the search warrants.
- [3] The Crown submits that the ITOs are presumptively valid and that the applicant has failed to discharge his burden of rebutting this presumption. The Crown submits that while the drafting of the ITOs was not perfect, the Affiant included all material information known to him at the time he swore the ITOs. Based on what the Affiant knew or ought to have known at the time, the Affiant did not, intentionally, or otherwise, mislead the Issuing Justices and ultimately acted in good faith. Any erroneous information contained in the ITOs is the result

of minor errors, made in good faith, and should be corrected on review through amplification.

- [4] The applicant's challenge to the validity of the search warrants is extremely important in the context of these proceedings. These search warrants led to the seizure of many items at the Residence and from the 4Runner. Mr. Gill stands charged with the second-degree murder of Mr. Manbir Kajla and the attempted murder of Ms. A.B., who is Mr. Kajla's wife. The alleged offence took place on April 27, 2011 in Surrey.
- [5] According to Ms. A.B.'s statements, Ms. A.B. and Mr. Kajla were driving somewhere near 128 Street and 72 Avenue. They had just been married earlier that day in order to validate their marriage in Canada. Mr. Kajla, the driver, tried to pass a white Toyota Four Runner (when referring to direct quotes from the ITOs and witness statements I will adopt the precise terms used to describe the suspect vehicle, in addition to the "4Runner"). The Toyota Four Runner hit their car. Mr. Kajla cut off the Toyota Four Runner and exited his vehicle to approach the driver's side of the Toyota Four Runner, while Ms. A.B. stayed in their car. Ms. A.B. heard several shots, exited her car and noticed the driver of the Toyota Four Runner was holding a handgun. The driver pointed the handgun at Ms. A.B. Ms. A.B., ducked, heard several shots, and then observed the Toyota Four Runner drive away. When Ms. A.B. provided her first official statement on April 27, 2011 (the same day as the offence), she described the shooter as an Indo-Canadian male of medium build with some facial hair on his chin, wearing dark coloured clothing. Ms. A.B. stated that she would recognize the shooter if she were to see him again.
- [6] The trial of this matter is scheduled to start in September 2020 (this is now questionable). This application follows an earlier application made before me by the applicant seeking leave to cross-examine the Affiant on the contents of the ITOs in aid of the applicant's sub-facial challenge to the search warrants. On May 4, 2020, I granted leave, and the cross-examination and re-examination of the Affiant proceeded on May 25 and May 26, 2020, respectively. The evidence adduced through this cross-examination has assisted me in reaching my conclusions on this application.
- [7] The examination of the Affiant was conducted during a period when court operations had been suspended due to the COVID-19 public health emergency. Protocols were put in place to permit an "in-court" hearing. The Affiant and counsel were physically present in the courtroom as was I.
- [8] The accused by consent of the parties and approved by the court attended by video conferencing. Subsequent to the close of the voir dire, I requested counsel's submissions regarding their consent in relation to s. 650 of the Criminal Code. Both parties submitted that the requirements of s. 650 were properly complied with and the court had jurisdiction to proceed in the way that it did. Defence counsel's submission included the following:

Mr. Gill attended by video from the Surrey Pre-Trial Centre (the "Institution"). To our understanding, the Institution at that time did not have procedures in place for in-court attendance. Since the official re-opening of the courts, the Institution has implemented a mandatory 14-day quarantine period for inmates returning from court. During the quarantine period, inmates are placed in segregation and kept in isolation 23 hours a day.

Mr. Gill has signed and filed a Counsel Designation Notice permitting his counsel to attend Court on his behalf. Counsel for Mr. Gill conveyed on the record in these proceedings, instructions from Mr. Gill to request that he attend by video, in our submission, the requirements under s. 650(2)(b) of the Criminal Code are satisfied by the filed Counsel Designation Notice, Mr. Gill's instructions, and counsel's submissions on the record.

## II. The Law

- [9] Challenges to the constitutionality of "warranted searches" are generally brought by way of a facial or sub-facial attack to the authorizing warrant. A facial challenge attacks the warrant on the basis that the record before the issuing justice was insufficient to make out the statutory preconditions required for authorization. The statutory preconditions required for the issuance of a search warrant are reasonable and probable grounds to believe that an offence has been committed and that evidence related to that offence will be found at the location to be searched.
- [10] The challenge to the constitutionality of the search warrants before me proceeds by way of a sub-facial challenge. A sub-facial challenge involves bringing forward information that was not put before the issuing justice, in order to attack the reliability of the ITOs' contents--both in terms of the nature of the information that was included by the Affiant, and the information the Affiant omitted. This is done by placing material before the reviewing judge, on a voir dire, that was not before the issuing justice but which the Affiant knew or ought to have known at the time the ITO was drafted: *R. v. Paryniuk*, 2017 ONCA 87 [Paryniuk] at para. 47. This often involves a cross-examination of the affiant of the ITO. In the current proceedings, cross-examination of the Affiant took place on May 25, 2020.
- [11] If it comes to light in the voir dire that there are erroneous statements or false claims in the ITO, that the affiant knew or ought to have known were inaccurate or would permit inaccurate inferences (as is tested against the affiant's reasonable belief at that time the ITO was sworn) these statements are excised from the ITO: *World Bank Group v. Wallace*, 2016 SCC 15 at para. 121 [World Bank]; *R. v. Morelli*, 2010 SCC 8 at para. 45 [Morelli]. However, where the voir dire (1) adduces additional information that, in light of the affiant's obligation to make full and frank disclosure, should have been included in the ITO based upon what the affiant reasonably knew or ought to have known at the time of the ITO, but which was not excluded out of a deliberate attempt to mislead, or (2) establishes other good faith drafting errors in the ITO, "evidence adduced at the voir dire should be used to fill the gaps in the original ITO": *Morelli* at paras. 59-60; *R. v. Araujo*, 2000 SCC 65 at para. 57 [Araujo]; *R. v. Van Diep*, 2015 BCCA 264 at para. 31. The principle that good faith drafting errors and

omissions should be corrected on review by amplification in part recognizes that "[t]he specificity and legal precision of drafting expected of pleadings at the trial stage is not the measure of quality required in a search warrant information": *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. S.C.).

- [12] Ultimately, essential features of a sub-facial challenge are "excision and amplification": Paryniuk at para. 46. The reviewing judge must decide whether, after excision and amplification, there remains sufficient credible and reliable evidence to permit the issuing justice to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place of the search: Morelli at para. 40; Paryniuk at para. 43; and Araujo at para. 58. In these proceedings, it is not contested that an offence has been committed. As such, the pertinent issue before me on review is whether, after I have reached a determination on the parts of the ITOs that should be excised or amplified, the remaining evidence could support the Issuing Justices' determination that there were reasonable and probable grounds to believe that evidence of Mr. Kajla's murder, and the attempted murder of Ms. A.B., would be found at Mr. Gill's Residence and in the 4Runner.
- [13] Reasonable and probable grounds to believe, in the context of a search warrant, is the point at which "credibly-based probability replaces suspicion": Morelli at para. 128; *R. v. Booth*, 2019 ONCA 970 [Booth] at para. 56. Importantly, the question is not whether the reviewing court would itself have issued the warrant in the place of the Issuing Justices, but rather, whether there remained evidence, after excision and amplification, on which the Issuing Justices could have found that the ITOs disclosed a "credibly-based probability [that] replaces suspicion]" and issued the search warrants: Morelli at paras. 40 and 128; *R. v. Sadikov*, 2014 ONCA 72 [Sadikov] at para. 84.
- [14] Consistent with the review process on a sub-facial challenge, I will first identify which information in the ITOs should be excised, and where information should be added to the record to "fill in the gaps": Morelli at para. 60.
- [15] Thus, to assist me in this sorting function, I find it useful to review the approach the Court in Morelli took to excision and amplification, and adopt the same approach to the contents of the Affiant's ITOs before me. The ITO before the Court in Morelli was the basis of a warrant to search an accused's computer to assist in the investigation of the offence of possession of child pornography.
- [16] In Morelli, the Court excised erroneous information in the ITO as well as misleading statements that on a plain reading would lead to a false interpretation of the facts. For example, in Morelli, the Court found it "necessary to excise several misleading passages in the ITO that suggested [that the computer technician] had actually viewed illegal pornography on the computer" when in fact the computer technician had only seen "suspiciously-labelled bookmarks": at para. 47.

- [17] Specifically, the ITO stated that the computer technician "observed 'Lolita Porn' on the screen," whereas in the voir dire it became clear that the computer technician only saw a bookmark labelled "Lolita Porn" on the screen: Morelli at para. 45. The Court held that because the "natural reading of the ITO is that pornographic images of children were actually seen on the computer [the statement was] an entirely false claim, and must therefore be excised from the ITO": Morelli at para. 48. I would add to this discussion that the piece of information that the technician had only seen a bookmark labelled "Lolita Porn," and had not in fact seen pornographic images of children on the computer, was information known to the affiant of the ITO at the time of drafting, based upon a detailed statement the affiant took from the technician. Thus, this is the type of statement that the affiant knew or ought to have known was false, inaccurate or misleading (i.e. in permitting inaccurate inferences) based upon what the affiant knew at the time he drafted the ITO: World Bank at para. 121.
- [18] In addition to excision, the Court in Morelli also engaged in amplification of the record to "fill in the gaps" left by the affiant's incomplete and selective account of the facts in the ITO. The Court turned to amplification where it found these omissions to be in contravention of the affiant's duty to make full and frank disclosure of all material information (based upon what was reasonably known to the affiant at the time of drafting), but where the affiant's omissions did not disclose an intent to trick the issuing justice: at paras. 59-60. For example, the Court found that while there was "no deliberate attempt to mislead the [affiant's] selective presentation of the facts [nonetheless] painted a less objective and more villainous picture than the picture that would have emerged had he disclosed all the material information available to him at the time": at para. 59. Thus, the Court found that these omissions "must be considered on a review of the sufficiency of the warrant application" to "fill in the gaps in the original ITO": at para. 60.
- [19] For example, the Court in Morelli found that there had been a selective and misleading account of the facts in the ITO in contravention of the affiant's duty to make full and frank disclosure, because:
1. the ITO described two bookmarks labelled "Lolita Porn" and "Lolita XXX," without including the fact that these bookmarks were amongst many to "regular adult material;"
  2. the ITO failed to mention that the only pornographic image the technician did actually view first hand was legal adult pornography, thus helping create a misleading impression that the accused was "particularly inclined towards child pornography;"
  3. the ITO emphasised the presence of a "web-cam pointing towards [children's] toys", and noted that "[t]he client was alone in the house with a three-year old child" while omitting the following information:
    - (a) the child was the accused's daughter,
    - (b) the accused's wife lived with him and the child,

- (c) the room with the web-cam appeared to double as the child's playroom,
- (d) there were no signs of abuse, and
- (e) the web-cam was plugged into a VCR not hooked up to the computer.

[20] Having identified the above omissions in the voir dire process, and concluding that these omissions (1) painted a less objective and more villainous picture than the picture that would have emerged had the affiant disclosed all the material information available to him at the time, and (2) were not made in a deliberate attempt to mislead the authorizing justice, the Court amplified the review of the ITO with the addition of the omitted information: at paras. 59-60. Similarly, as outlined below, I find there are several areas in the ITOs before me which, based upon the information adduced within this voir dire, disclose an incomplete and selective account of the facts in contravention of the Affiant's duty to make full and frank disclosure, but which ultimately do not disclose a deliberate attempt to mislead.

### III. Statements in the ITOs that should be Excised and Amplified

[21] Adopting the approach taken by the Court in Morelli, I will turn to the contents of the Affiant's ITOs before me and determine which statements should be excised from the record on review, and where the ITOs should instead be amplified by information adduced by counsel during the present voir dire. At the outset, consistent with the trial judge in Morelli, having had the opportunity to witness the cross-examination of the Affiant in this voir dire, and the submissions of counsel, I find that there was no deliberate attempt to mislead the Issuing Justices on the part of the Affiant: Morelli at para. 59.

[22] In assessing where the ITOs should be excised and amplified I will move through each of the ITOs "fundamental flaws," as submitted by defence counsel:

1. The Affiant's summary of the photopack interview of Ms. A.B.;
2. The Affiant's treatment of the photopack interview of Mr. Harry Sandhu;
3. Assertions that the applicant was involved in criminal activity;
4. The information included from "Informer I" and the "hidden" 4Runner;
5. The misleading structure of the ITO.

[23] Defence counsel submits that the above fundamental flaws in the ITOs work together to paint a very different picture than that presented to the Issuing Justices. These fundamental flaws had the effect of misleading the Issuing Justices to believe that the evidence was stronger than it really was and thus, these areas of the ITOs should be excised. Defence counsel submits that the ITOs do not contain any other evidence capable of supporting reasonable and probable grounds to believe that evidence of the offence would be found at the Residence or in the 4Runner. In other words, defence counsel submits that once these misleading portions of the ITOs are excised, there remains no reliable evidence in the ITOs

upon which the Issuing Justices could have issued the search warrants: Morelli at paras. 40 and 128.

- [24] The Crown submits that the Affiant acted in good faith based upon the information that was available to him at the time he swore the ITOs. Further, the ITOs must be considered as a whole and not reduced to a piecemeal assessment of the veracity of each and every statement. The Crown submits that while the drafting of the ITOs was not perfect, they were nonetheless fair based on the information the Affiant reasonably ought to have known at the time of drafting. Any erroneous information contained in the ITOs is the result of minor errors and omissions, made in good faith, and should be corrected on review through amplification.

### A. The A.B. Photopack

- [25] The ITOs include a summary of a photographic lineup ("photopack") participated in by Ms. A.B. (the deceased's wife) on May 12, 2011. The ITOs state that the photographic lineup package contained a colour photograph of Mr. Gill and nine colour photographs of males who looked similar to Mr. Gill. Defence counsel submits that the ITOs contain several misleading statements and omissions with respect to the summary of, and conclusions drawn from, Ms. A.B.'s photopack.
- [26] Specifically, defence counsel submits that while it is stated several times throughout the ITOs that Ms. A.B. positively identified Mr. Gill as the person who shot her husband, Ms. A.B. in fact made only a qualified selection--making statements to the effect that while she thought Mr. Gill was the person that she saw, she would need to see the picture from a different angle. Defence counsel drew my attention to statements in the ITOs which stated that Ms. A.B. positively identified Mr. Gill: (ITOs at paras. 15, 47-50; ITO #1 at paras. 61(c)(v), 62(c)(ii), 63(e)(vii), 65; and ITO #2, at paras. 65(g)(v), 66(j)(ii), 61(b)). Defence counsel submits that the Affiant's repeated assertions in the ITOs that Ms. A.B. made a positive identification of Mr. Gill are false and misleading statements.
- [27] Defence counsel also submits that the Affiant made several other omissions by attributing direct quotes to Ms. A.B. during the photopack that were neither accurate nor complete and failed to include information about Ms. A.B.'s body language and pauses during the selection process. Defence counsel submits that the cumulative effect of these misstatements and material omissions operated to create a misleading picture of what occurred in the photopack and falls short of full, fair, and frank disclosure of the material facts. In aid of this review, I have provided a comparison of the impugned quotes attributed to Ms. A.B. in the ITOs and text from the photopack transcript side-by-side, as well as some additional information from the video recording of the photopack as provided by counsel:

#### Incomplete Quotes

#### Description in ITOs

## Transcript

First round of viewing 10 images - Ms. A.B. went through each picture and said "no" to each photograph except for one:

[At the outset of the photopack process, Ms. A.B. is told to sign and date the back of a photograph if she makes a positive identification from the photograph. She is also told to initial all other photographs viewed.]

"I saw him from an angle this person is head on. His features are more like this person. I can't really say" [49(c)]

Ms. A.B.: I saw him from an angle, so, and this wasn't head on, it was, it was an angle. But his features are similar to this, this person. Um I can't really say with this one.

Second round of viewing - Ms. A.B. paused on the same photograph that she had paused on during the first viewing:

"I need to see a side angle but this is the one" [49(f)]

Ms. A.B.: He didn't have hair like that. I'd need to see this guy from a, a, a little bit of a side angle, but this one.

Constable: Okay, and what is it, why is it that you recognize him?

"It is these eyes. This is definitely the shape of his face. And his features are like that guy's features. I would say that this is the person." [49(g)]

Ms. A.B.: It was these eyes, it's his eyes, this was the type of nose, like I mean the nose, like

[video of photopack: Ms. A.B. covers part of Mr. Gill's face on the photo and then is told not to do that]

this is the shape of his face, this is definitely the shape of the face and his features are like that guy's features, I would say that it's this person, it's just I'd need to see him from that angle.

Constable: Okay, and what else did you notice from the angle?

Ms. A.B.: He had, this, this was the shape of his face, this is, that's the shape of the face um, he didn't really have anything that, some people have features like very distinctive nose or lips and his is, like they're, they're normal, it's the eyes. 'Cause when I saw the person I saw his eyes and these are the type of eyes he had.

Constable: Okay, tell me a little bit more, what stood out about his eyes?

### **A.B. commented on the facial hair being the same [49(i)]**

Ms. A.B.: They were like this or they reminded me of somebody else's eyes and they were like, like that um even the facial hair, I notice like he didn't have like a goatee from here but he had facial hair here.

[video of photopack: I find that Ms. A.B.'s body language at this point in time indicates that Ms. A.B. is communicating that while the picture she is looking at has a goatee, and she doesn't remember the person in the incident having a goatee, other parts of the facial hair in the picture are the same]

A.B. signed the back of the photograph and put the date and time down indicating that the photograph was that of the suspect in her husband's murder [49(j)]

Constable: Okay, would you like to sign and date the back of that for me please?

[The constable then finishes going through the rest of the photopack].

- [28] As can be seen by the side-by-side comparison of the quotes included in the ITOs and the photopack transcript, some of the statements made by, and actions of, Ms. A.B. that qualify and cut against a clear, positive identification of Mr. Gill as the shooter, are not included. For example, while the ITOs state that Ms. A.B. commented on the facial hair being the same, the Affiant failed to contextualize this comment with the fact that Ms. A.B. was only indicating that part of the facial hair was the same, whereas other parts were not. Further, while quotation marks are used around several of the statements in the ITOs, some of these quotations have words missing, or are cut-off where Ms. A.B. continues her thought. These truncations become important where additional qualifiers are excluded such as where the ITOs quote Ms. A.B. as stating "I would say that it's this person" and does not include the completion of her sentence: "it's just I'd need to see him from that angle."
- [29] While the Crown is correct to point out that the ITOs do include this qualification as part of a separate quote attributed to Ms. A.B., ("I need to see a side angle but this is the one": 49(f)), by attributing another quote to Ms. A.B. that does not include this qualifying language, the ITOs nonetheless create the misleading impression that Ms. A.B. did vocalize an unequivocal positive identification at some point during the photopack without any qualifying language. On cross-examination, the Affiant agreed that the passages in quotations were intended to convey to the Issuing Justices that the Affiant was providing the exact words from the photopack presentation, and that on watching the photopack video again he agreed they were inaccurate. While the Affiant reviewed the audio and video recording of the photopack several times in preparing his ITOs, he did not have the benefit of a written transcript of the photopack presentation.
- [30] Additionally, while the ITOs state that Ms. A.B. signed the back of Mr. Gill's photograph indicating that she had made a positive identification of the suspect, Ms. A.B. signed the back of the photograph in response to the interviewing constable asking Ms. A.B. to sign and date the back of the photograph. Importantly, I note that the interviewing constable opened the photopack process by communicating to Ms. A.B. that if she made a positive identification she would need to sign and date the back of the photograph, whereas she would be asked to initial the back of photographs that were not a positive identification. However, given the importance of such an identification, I do find it problematic that the interviewing constable did not repeat the significance of signing and dating the back of the

photograph before asking Ms. A.B. to do so, particularly in light of her qualified comments that while "I would say that it's this person, it's just I'd need to see him from that angle." This is additional context which would have been of assistance to the Issuing Justices.

- [31] On the basis of the omissions identified above, defence counsel argues that the statements in the ITOs indicating that Ms. A.B. made a positive identification of Mr. Gill as the shooter, are inaccurate and materially misleading. Thus, these statements should be excised. Additionally, defence counsel submits that as a result of the errors in the quotes attributed to Ms. A.B., and the omissions in the overall description of the photopack, the ITOs make the identification seem stronger than it was and disclose a picking and choosing on the part of the Affiant. On this basis, defence counsel submits that essentially all passages referencing the photopack should be excised.
- [32] At this stage, I will refer back to the approach taken in Morelli. In Morelli, the Court (1) excised erroneous information in the ITO, as well as misleading statements that on a plain reading would lead to a false conclusion of the facts, and (2) amplified omissions in the ITO which were in contravention of the affiant's duty to make full and frank disclosure of all material information based upon the affiant's reasonable belief at the time, or represented good faith drafting errors, but which were not a deliberate attempt to mislead: at paras. 47-48, 59-60.
- [33] As noted above, I have found that the Affiant did not intend to mislead the Issuing Justices. However, there are nonetheless omissions made with respect to the quotations attributed to Ms. A.B. in the ITOs that the Affiant "knew or should have known and included in the ITOs in order to make full, fair and frank disclosure," and thus this "evidence may be added when determining whether the warrant was lawfully issued": R. v. Sipes, 2009 BCSC 612 at para. 41. On this basis, I would not excise all references to Ms. A.B.'s photopack. Instead, I find it appropriate, and consistent with precedent in the circumstances, to amplify the record on review by importing the full quotations, including Ms. A.B.'s qualifying statements where omitted.
- [34] In adding the key direct quotations on review, I would excise the statement in the ITOs which unequivocally provides that Ms. A.B. "placed her signature and the date on the rear of this photograph in acknowledgment that she selected this photograph as the suspect." As surveyed, and as has emerged in this voir dire, it is unclear whether Ms. A.B. was signing and dating the back of the photograph as a final, positive identification of Mr. Gill as the suspect--knowing that she had been instructed at the beginning of the process that such a signature and date would signify her positive selection--or whether she had forgotten this earlier instruction and was simply responding to the interviewing constable's statements in that moment asking "would you like to sign and date the back of that for me please?" In the latter scenario, the conclusion that emerges from the interaction is that Ms. A.B. made a qualified identification of Mr. Gill as the suspect, noting that she "would say that it's this person, it's just I'd need to see him from that angle."

- [35] While it was reasonable for the Affiant to interpret the exchange as a positive identification, I find that the full exchange should have been provided to the Issuing Justices in order for them to draw their own conclusions. Thus, the standalone conclusion that Ms. A.B. signed the back of the photograph in acknowledgement of an unequivocal positive identification is a misleading statement and should be excised.
- [36] On this basis, where the ITOs state in the synopsis and conclusion sections that Ms. A.B. made a positive identification of Mr. Gill as the person who shot her husband, on review I would correct these statements to read that Ms. A.B. made a qualified identification of Mr. Gill out of a selection of ten similar photographs (i.e. "I would say that it's this person, it's just I'd need to see him from that angle"). However, I would also contextualize the conclusion that a qualified identification was made with the information that (1) Ms. A.B. signed the back of Mr. Gill's photo; (2) immediately prior to signing Ms. A.B. was asked to sign the back of the photo by the interviewing constable; and (3) at the outset of the photopack process Ms. A.B. was informed that adding her signature to the back of a photo would indicate a positive identification. This is a balanced representation of Ms. A.B.'s photopack and informs my decision as to whether the Issuing Justices could have found that the ITOs disclosed a "credibly-based probability [that] replaces suspicion": Morelli at paras. 40, 128; and Sadikov at para. 84.

## **B. The Affiant's treatment of the photopack interview of Harry Sandhu**

- [37] Defence counsel asks this Court to excise statements in the ITOs relating to a photopack presentation conducted with an individual named Harry Sandhu. Mr. Sandhu was involved in a driving incident in Richmond, British Columbia on April 27, 2011--the same day as the subject offence for which Mr. Gill stands accused. The incident occurred with an East Indian male in his late teens or early twenties, driving a Toyota Four Runner. The Affiant relied on the evidence of Mr. Sandhu in several places in the ITOs (at paras. 27, 52-53; and ITO #1 63(e) (vi)). Defence counsel states that the incident involving Mr. Sandhu in Richmond cannot be attributed to Mr. Gill, and that including information about this incident was misleading. In fact, defence counsel submits that, in multiple areas of his photopack interview, Mr. Sandhu appeared to exclude Mr. Gill as being the driver of the 4Runner, and these exclusionary statements were not included in the ITO.
- [38] On April 29, 2011, Constable Darren Naldrett interviewed Mr. Sandhu about the April 27 incident. In the ITOs, the Affiant states that he reviewed a report completed by Constable Naldrett detailing this statement. The ITOs include the following information from this interview: Mr. Sandhu saw and followed a white Toyota Four Runner driving erratically; Mr. Sandhu exchanged words with the driver who produced a black handgun; Mr. Sandhu described the driver as an Indo-Canadian male under the age of 25 with facial hair on his chin and a black sweater; the Toyota Four Runner was a late 1990's model with a silver trim, beige leather interior, and had a bush bar along the front of the grill.

[39] As a follow up to the April 29, 2011 interview, Mr. Sandhu was brought in for a photopack lineup which was conducted by Corporal Derek Thibodeau on May 12, 2011. The ITOs state that the Affiant reviewed a report prepared by Corporal Thibodeau which summarized what happened in the photopack with Mr. Sandhu. The ITOs include the following information, taken from Corporal Thibodeau's report, regarding Mr. Sandhu's photopack interview:

1. Corporal THIBODEAU presented the ten images one at a time to SANDHU. SANDHU did not make a selection;
2. A second presentation was made to SANDHU. SANDHU did not make a selection;
3. Corporal THIBODEAU shuffled the photographic lineup package for the third time and presented the images one at a time to SANDHU. No selection was made again by SANDHU but he did comment that he was pretty sure he recognized the driver as being one of two photos. SANDHU said he did not wish to guess;
4. Corporal THIBODEAU observed that during each viewing of the photographic lineup package SANDHU paused on the same two images.

[40] According to Corporal Thibodeau's report, as is relied upon in the ITOs, Corporal Thibodeau did not know which photopack photo was of Mr. Gill prior to conducting the interview, and he showed the two photos that Mr. Sandhu had paused on to one Corporal Emam. The ITOs state that the Affiant also reviewed a report completed by Corporal Emam, in which Corporal Emam reported that he was shown two photos by Corporal Thibodeau after Mr. Sandhu's photopack, and that he identified one of the two males that "stuck out" to Mr. Sandhu as being Mr. Gill. Corporal Emam was aware of the identity of all ten persons in the photopack.

[41] During this voir dire, defence counsel has brought to my attention that the full transcript of Mr. Sandhu's interaction with Corporal Thibodeau paints a very different picture of the photopack interview than the one that emerges from the description of the interview in the ITOs. Specifically, excerpts from the transcript of Mr. Sandhu's photopack interview records the following exchange:

[second presentation is concluded]

Cpl. Thibodeau: Did you wanna see it one more time?

Mr. Sandhu: N- no, I'm good. Th- there's two that stand out. That's the thing (INDECIPHERABLE) this it was such a blur, that there's just two that kinda stick out in my head that could potentially be. But. There's nothing, and I told Darren that too. (FURNITURE CREAKS) (INDECIPHERABLE) I don't know if there's anything like I don't have a clear like, I thought if I saw him I'd be able to i.d. it, but

it's I mean I can't go and just two guessing the two right?

right? So there's no guessing involved, so

(PAUSE) But I mean from the one initial flip over it looked like none of 'em really. From what I'd saw.

[Mr. Sandhu asks for third presentation]

The more times I look at it the m- lee- less it looks like the person that I had in my head,  
(LAUGHS) so

This is definitely the one that sticks out the most. (PAUSE) But I don't have enough to go by.  
(PAPER AND/OR 313 WRITING SOUNDS) 'Cause it, this doesn't even All, none of 'em r- looked like what I seen, so To tell you the truth there's it doesn't look like there's anything there that looks like what I saw, saw.

[42] With the benefit of the interview transcript, I agree that the summary of Mr. Sandhu's photopack interview in the ITOs, which omit Mr. Sandhu's statements to the effect that "it doesn't look like there's anything [in the photopack] that looks like what I saw" and instead only summarize that two photos "stuck out" to Mr. Sandhu, -- is materially misleading and is to the prejudice of Mr. Gill. Nonetheless, the summary of Mr. Sandhu's photopack interview included by the Affiant in the ITOs is an accurate re-statement of the information included in Corporal Thibodeau's summary report of his interview with Mr. Sandhu.

[43] As outlined at the outset of these reasons, on a sub-facial challenge, erroneous statements or false claims in an ITO that the affiant knew or ought to have known were (1) inaccurate or (2) would permit inaccurate inferences, may be excised on review. However, what the Affiant knew or ought to have known is tested against the affiant's reasonable belief at that time the ITO was sworn: World Bank at para. 121. In the absence of anything that would put an affiant on notice that something was amiss, an affiant is entitled to rely on the work product of their fellow officers:

[123] "When assessing a subfacial challenge, it is important to note that affiants may not ignore signs that other officers may be misleading them or omitting material information. However, if there is no indication that anything is amiss, they do not need to conduct their own investigation (R. v. Ahmed, 2012 ONSC 4893, [2012] O.J. No. 6643 (QL), at para. 47; see also Pires, at para. 41).

[World Bank at para. 123]

[44] Despite the clear discrepancies between Corporal Thibodeau's summary of Mr. Sandhu's interview and the transcript of the interview (and thus the summary of Mr. Sandhu's interviews in the ITOs), in the absence of information that the Affiant was put on notice that Corporal Thibodeau's summary was misleading, the case authorities in this area do not support excising the summary of Mr. Sandhu's photopack interview. This information properly informed the Affiant's reasonable belief at the time the ITOs were sworn.

[45] To look at what Corporal Thibodeau may have known and ascribe that to what the Affiant ought to have known is to blur the line between the Affiant's knowledge and the knowledge of others: World Bank at para. 137. While defence counsel points out that the Affiant could have accessed the transcript or a video recording of the photopack, and did not, defence counsel has provided me no authorities that stand for the proposition that an Affiant was obligated to do so instead of relying upon Corporal Thibodeau's summary. As cited above from the Supreme Court of Canada, officers are not required "to conduct their own investigation": World Bank at para. 123. Ultimately, I find, having reviewed both the ITOs and Constable Thibodeau's summary report, that the information in the ITOs accurately reflects the contents of Constable Thibodeau's summary of Mr. Sandhu's interview, and the ITOs clearly state that the information is based upon this summary report.

### **C. Assertions that the applicant was involved in criminal activity**

[46] Defence counsel submits that the inclusion in the ITOs of Mr. Gill's previous involvement in activities of a "criminal nature," which are (a) irrelevant to the subject offence, or (b) are unproven and uncharged activities, must be excised. In this regard, defence counsel points me to authorities in which the courts have disapproved of the practice of including references in an ITO to prior criminal activities of the subject accused in which no charges are laid: R. v. Nguyen and Nguyen, 2012 BCSC 1758 at para. 38; R. v. Van Eaton, 2015 BCSC 858 at para. 21; and R. v. Cheng, 2013 BCSC 1979 at para. 52.

[47] The ITOs set out a list of prior interactions that Mr. Gill has had with law enforcement agencies, which include:

1. An RCMP officer investigated a motor vehicle offence on October 25, 2010. Samandeep Gill was the passenger in a vehicle that was impounded. Samandeep Gill provided his address of 12726 67B Avenue in Surrey.
2. On June 6, 2010, an RCMP officer attended a shots fired complaint. There were ten males at the scene, two of the males had swords and two had pipes. A group of three males, which included Samandeep Gill, were standing near a loaded handgun. Samandeep Gill provided his address.
3. On May 24, 2010, a constable served Samandeep Gill with a six-month driving suspension.
4. On June 14, 2009, and September 12, 2009, an RCMP officer attended a shots fired complaint at Samandeep Gill's address. On the former occasion, shell casings were found on the street and bullet holes on the Residence. On the latter occasion, shell casings were found on the street and investigators concluded that Samandeep Gill and his brother Sandeep Gill were the intended targets of the shooting.
5. On June 24, 2009, a constable observed an erratically driving vehicle. Samandeep Gill was identified as the driver of this car. He blew into an alcohol screening device and the result was a warning level reading. He was issued a 24-hour driving suspension.

6. On June 24, 2008, a constable attended to a complaint of two brothers fighting with swords on the street at Samandeep Gill's address. One of the brothers was Samandeep Gill.
  7. On July 7, 2007, a constable observed a car make a U-turn in front of their police vehicle. Samandeep Gill was identified as the driver of this car. He blew into an alcohol screening device and the result was a warning level reading. He was issued a 24-hour driving suspension.
- [48] While defence counsel has pointed me to authorities that generally stand for the proposition that including information in an ITO about "investigations and charges which did not result in criminal convictions" are "prejudicial and irrelevant," (see *R. v. Gardner and Howard*, 2015 BCSC 801 at para. 59), I note that there is also a line of authorities which hold that the rule against referring to uncharged criminal conduct or bad character evidence is a rule that only applies in the trial of a criminal charge, and it is not a rule that applies to an ITO sworn in support of a search warrant: *R. v. Sunner*, 2017 BCSC 2445 at para. 29; *R. v. Della Penna*, 2012 BCCA 3 at para. 36-37; *Her Majesty the Queen v. Guindon et al.*, 2015 ONSC 4794 at paras. 64-66.
- [49] I am persuaded by the often cited approach taken by the Supreme Court of Canada in *R v. Debot*, [1989] 2 S.C.R. 1140, [1989] S.C.J. No. 118 [Debot]. The Court in *Debot* addressed defence counsel's argument that a person's past, uncharged criminal activities and reputation should not be used to buttress a search warrant. Ultimately, the Court could not accept the proposition that the past activities of a suspect are irrelevant, provided they relate to the investigation at hand, and that they do not form the primary grounds for the search:

The significance of the past record and reputation of the appellant, as well as the background of the other participants, presents a more difficult problem. It is surely beyond question that reputation alone would never provide reasonable grounds for a search

I am sensitive to the argument advanced by counsel for the appellant that the reputation of a suspect should not be used to buttress an otherwise insubstantial case for searching a suspect. At the same time I find it difficult to accept the proposition that the past activities of a suspect are irrelevant. Indeed, as Martin J.A. points out at pp. 220-21 of his judgment:

Evidence of bad character or prior criminal misconduct by an accused is excluded at his or her trial on a criminal charge, not on the ground that the evidence has no probative value, but on policy grounds, because the prejudicial effect of such evidence outweighs its probative value.

These policy reasons are obviously not as cogent at the investigatory stage where the liberty of the subject is not directly at stake. Moreover, I think it is somewhat artificial to assume that any one factor, be it reputation or something else, is responsible for turning a previously "insubstantial" case into a sufficient one. Having said that, I add the following caveats to the use of reputation as germane to the issue of a reasonable search. First, the reputation of the suspect must be related to the ostensible reasons for the search. A background of driving offences, for example, has little relevance to drug trafficking. Second, if the reputation of the suspect is based

on hearsay rather than police familiarity with the suspect, its veracity cannot be assumed.

[p. 1169.]

- [50] Ultimately, I take from the Court in *Debot* that while evidence of prior conduct would not be enough on its own to justify the authorization, it is a piece of information that can be considered in the context of the ITOs as a whole. However, I would place a weighted emphasis on the requirement that the evidence of prior conduct be directly, and defensibly, relevant to the ostensible reasons for the search.
- [51] While ITOs are investigative tools that do not import a trial-like analysis, I find it important, and timely, to note the considerable prejudicial and systemic impact of permitting the inclusion of a laundry list of a person's prior uncharged interactions with the police and unsubstantiated involvement in "criminal activity" into ITOs. The Supreme Court of Canada has recently addressed the insidious nature of racial profiling in policing and the higher levels of speculative interactions between police officers and persons of colour: see *R v. Le*, 2019 SCC 34 and *R v. Ahmad*, 2020 SCC 11. This is a systemic issue that has many contributing factors, including but certainly not limited to, decisions regarding which neighbourhoods are more heavily policed and subjected to street checks; investigative officers' "intuition" or "hunches" that easily disguise unconscious racism and stereotyping and which likewise impacts members of the public's decisions to report "suspicious" activities or persons; and overt discrimination. Thus, if all documented interactions between a subject person and the police are permitted, for inclusion in an ITO, and are taken as a permissible factor in establishing reasonable and probable grounds (i.e. based on a general propensity to commit crime or "bad character"), this would disproportionately and unacceptably impact racialized minorities in Canadian society.
- [52] It is with this context that I will now assess which of the instances included in the ITOs detailing Mr. Gill's prior interactions with the police are relevant to the grounds of the search warrant --specifically the question of whether it may objectively inform the reasonable and probable grounds that evidence of Mr. Kajla's murder will be found at the Residence and in the 4Runner.
- [53] On this basis, I would excise the October 25, 2010 motor vehicle offence in which Mr. Gill was a passenger. In the absence of further details regarding Mr. Gill's six-month driving suspension issued on May 24, 2010, I would excise this activity for lack of relevance. However, I would keep the references to the June 24, 2009, and July 7, 2007, driving suspensions which both identify erratic driving, in light of the fact that the subject offence allegedly began with erratic driving and the collision with Mr. Kajla's car.
- [54] I would excise the June 24, 2008 incident in which Mr. Gill and his brother were reported fighting with swords on the street for lack of relevance. The subject offence before the court allegedly involves persons who do not know each other and gun violence. I would also excise, for lack of relevance, the reference to the June 6, 2010 incident involving a shots fired complaint at an unrelated address, at which there were ten different males gathered, and at

which Mr. Gill was identified as one of three members of this group who was found "standing near" a loaded handgun. I would also excise the June 14, 2009 and September 12, 2009 shots fired incidents that occurred on Mr. Gill's Residence, the latter in which it was determined that Mr. Gill and his brother were the intended targets of the shooting. I take defence counsel's argument that it would be a miscarriage in this case to take the fact that a victim of a crime into information that may prejudice them for being associated with "violence". This would be unfair here and in line with my earlier comments, would disproportionately impact persons in neighbourhoods subject to higher levels of crime.

[55] In light of the cumulative excisions I have made to the ITOs list of interactions between the police and Mr. Gill, namely the removal of incidents indicating any personal violent behaviour, and removing the reference to the "shots fired" incidents of June 6, 2010, June 14, 2009 and September 12, 2009, I would also excise the following conclusions, and their counterparts, from the ITOs:

1. The history of violence especially the shootings at Samandeep Gill's residence, supports his involvement in violence and the likelihood that he would be carrying a gun;
2. The history of violence, especially the shootings at Samandeep Gill's residence, supports the fact that he would still have a firearm;
3. I believe that due to Samandeep Gill's involvement in criminal activity, he has been the subject of several police investigations involving firearms and is likely to have access to firearms on a regular basis.

[56] Finally, I would also amplify the record on review with the information that Mr. Gill does not have a criminal record. While I agree with Crown's submissions that the Issuing Justice's could not have relied on the absence of a mention of Mr. Gill's criminal record history to infer that he had a criminal record, I do agree with defence counsel that given the list of several police interactions that are included in the ITO, the inclusion of this piece of information forms a part of the entire picture of the circumstances that should have been included in accordance with the Affiant's duty to make full and frank disclosure.

#### **D. Information from Informer I and references to the hidden vehicle 4Runner**

[57] In the ITOs, the Affiant included several pieces of information that came from a confidential informer ("Informer I") on May 9, 2011, and relied upon this information as part of the totality of the circumstances that gave rise to reasonable and probable grounds that Mr. Gill was linked to the offence (ITOs at paras. 14, 40-42; ITO #1 at paras. 61(c)(viii), 62(c)(i), 63(b); and ITO #2 at paras. 65(g)(viii) 66(j)(i)). The ITOs identify Informer I as a first time informer, with no criminal record, who provided the information voluntarily (and with no exchange of benefits) in order to assist the police in solving the murder of Mr. Kajla. Informer I's information is key to linking Mr. Gill to the 4Runner.

- [58] The ITOs identify information that (1) Informer I heard second hand from a personal acquaintance and (2) Informer I knows first hand. The second hand information included that Mr. Gill was driving a 2000 or 2001 Toyota Four Runner around the time of Mr. Kajla's murder; the car is limited edition; the car belongs to Mr. Gill's sister, Malkit; Malkit was trying to hide the car after the murder, was telling people there were problems with it, and was talking about the possibility of selling it; Mr. Gill is 24 years old; Mr. Gill's house has been "shot up" in the past year; Mr. Gill's house is located at 12726 67B Avenue in Surrey. The first hand information stated that Informer I has personally observed one of Mr. Gill's family members drive the white Toyota Four Runner, Limited Edition which has chrome push bars, and which he believes is a 2000 or 2001 model; they know the Gill family (including naming all of Mr. Gill's siblings), but do not know Mr. Gill personally; Mr. Gill's older sister Malkit is married to a man named Jas; they confirmed the family home address and knew that the house was "shot up".
- [59] The ITOs provide that Corporal Emam, who met with Informer I, was able to conduct police database searches corroborating the address provided as Mr. Gill's home; checked and confirmed the report of shots fired at the Residence on two occasions; identified that a white 2000 Toyota Four Runner was registered to a Jaswant Gandham, the husband of Mr. Gill's sister Malkit; and determined that Mr. Gill was 23 years old as of May 11, 2011.
- [60] Defence counsel for Mr. Gill submits that Informer I was an untested, first time informant who did not know Mr. Gill personally and who provided hearsay information without indicating its source. Defence counsel submits that the combination of the use of unsourced information; the absence of a track record of reliability for the informant as a first time informant; and a lack of meaningful corroboration, are all factors that cumulatively render the information valueless. On this basis, defence counsel submits that the Informer I information be excised.
- [61] It is well established law that hearsay statements of an informant can provide reasonable and probable grounds to support the issuance of a search warrant: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at pp. 1456-1457 [Garofoli]. However, evidence of a tip from an informer, by itself, is insufficient, and the reliability of the tip is to be assessed by recourse to "the totality of the circumstances": *Garofoli*, p. 1457. This entails the court looking at a variety of factors including, the level of detail provided; how compelling the information is; the source of knowledge (i.e. firsthand information or rumour); and indicia of reliability such as the informant's past performance and the level of corroboration of the information from other investigative sources: *Garofoli*, p. 1457; and *Debot*. Weakness in one category may be compensated for with strength in the others. While the police do not need to corroborate each detail in an informant's tip, the level of verification required would be higher where the informant is a first time informer and untested: *Debot*, p. 1171-72.
- [62] I agree with the defence's submissions that as Informer I is a first time informer, the higher level of corroboration contemplated in *Debot* applies to the case at bar. However, I also find that an inquiry into whether there has been a higher level of corroboration generally takes

place, or takes on particular significance, where the informer's tip provides the primary basis for the reasonable and probable grounds of the search warrant sought. I also disagree with defence counsel's submissions that Informer I's corroboration of "innocent facts" only, and Informer I's failure to specifically identify their personal acquaintance's specific source of knowledge, is likely fatal to the search warrant. Again, I find that these concerns arise where the reasonable and probable grounds for the issuance of the search warrant are based primarily on an informant's tip. In contrast, there are many basis and pieces of information contained in the ITOs that might contribute to a finding of reasonable and probable grounds.

- [63] As stated in *R. v. Lewis*, [1998] O.J. No. 376 (ONCA), a case referred to me by defence counsel:
- [19] Absent confirmation of details other than details which describe innocent and commonplace conduct, information supplied by an untested, anonymous informant cannot, standing alone, provide reasonable grounds for an arrest or search.
- [20] The present case is distinguishable from *R. v. Plant* (1993), 84 C.C.C. (3d) 203 (S.C.C.), the authority most heavily relied on by the Crown. In *Plant*, the court had to decide whether information provided by an anonymous tipster was properly included as part of the reasonable grounds relied on to obtain a search warrant. The tipster had told the police that marijuana was being grown in a "cute" house at a certain geographic location. The tipster could not provide an address. Police recognizance, based on the tip, led them to the appellant's house and a search warrant was eventually obtained. In holding that the information provided by the anonymous tipster was properly considered by the justice of the peace in deciding whether there were reasonable grounds to issue a search warrant, Sopinka J. said, at p. 216:

The tip itself, therefore, was compelling enough in its specification of the place in which the offence was occurring for the police to readily locate the exact address of the appellant's residence and corroborate the report of the informant. I conclude that the anonymous tip, although made by an unknown informant, was sufficiently reliable to have formed part of the reasonable grounds asserted in the information to obtain the warrant. Therefore, I would not excise that piece of evidence from the warrant.

[Emphasis added.]

- [21] Sopinka J. did not suggest that the tip, even as confirmed as to the location of residence, could justify a search. He said that it could form part of the reasonable grounds needed for a search warrant. In *Plant*, the additional information which completed the reasonable grounds consisted of public utility records showing that four times the normal amount of electricity was used at the residence. Such high levels of electrical consumption were said to be consistent with the hydroponic growth of marijuana. The data obtained from the records supported the tipster's allegation that the residence was being used to grow marijuana. There is no independent confirmation of this tipster's information which is analogous to the data provided to the police in *Plant*.

- [22] In concluding that the totality of the circumstances did not provide reasonable grounds for an arrest, I do not suggest that there must be confirmation of the very criminality of the information given by the tipster. The totality of the circumstances approach is inconsistent with elevating one circumstance to an essential prerequisite to the existence of reasonable grounds. Nor does *R. v. Zammit* (1993), 81 C.C.C. (3d) 112 (Ont. C.A.) hold to the contrary. In *Zammit*, at p. 121, the court stressed that the information provided by the tipster which the police confirmed "would not in any way substantiate the allegation that the respondent was involved in drugs." That observation was part of the court's detailed assessment of the reliability of the information provided and did not fix independent substantiation of the tipster's allegation of the criminal nature of the conduct as a prerequisite to the existence of reasonable grounds based on the tipster's information. The fact that the confirmed information did not relate to the criminal nature of the activity was one of several features of the evidence which the court looked to in assessing the "totality of the circumstances."
- [64] As the case at bar does not rely solely on informer evidence to establish reasonable and probable grounds, I will assess the quality and weight of Informer I's information in light of the "totality of the circumstances" of the entire ITOs.
- [65] The Crown submits that an affiant is entitled to rely on information from confidential informants, including hearsay information where it is clearly indicated. While the defense submits that the absence of a disclosure of the source of knowledge of Informer I's second hand information is likely fatal, I do not read the authorities to say this.
- [66] The Crown submits that Informer I's evidence benefits from a high level of corroboration, which may address any concerns regarding Informer I. The first-hand information provided indicates that Informer I has personal knowledge of the Gill family and the vehicle in issue. His description of the vehicle is correct. The information provided with regards to Residence having been previously "shot up" was verified by Corporal Emam. While I would excise the reference to the Residence being "shot up" on previous occasions, as it is used to draw conclusions about Mr. Gill's "propensity" or involvement in violence, I would permit general references to these events for the purposes of corroborating Informer I's information. Additionally, Informer I stated they believed that the "2000 or 2001" model-year, white Toyota Four Runner was actually Mr. Gill's sister's vehicle, Malkit Gandham and that she is married to a person named "Jas". A check of the registered owner information showed that a white 2000 Toyota Four Runner was registered to Jaswant Gandham, the husband of Malkit Gandham, who is Mr. Gill's sister. Additionally, nearly all the second-hand information provided, as listed above, is corroborated.
- [67] The Crown submits that to assess Informer I's information as a stand alone piece to the ITOs and import a reasonable and probable grounds analysis on just that information is to parse this information and is an error. Instead, the Court must look at all of the information in the ITOs, including Informer I's information. Based on the authorities provided I agree with the Crown's submissions and would not excise Informer I's information. While I find it would not be permissible for Informer I's information to form the sole basis of a valid search

warrant, I find that Informer I's information, with the level of corroboration provided, and while noting that some of the information was based on hearsay (and clearly indicated as such), is sufficient to form part of the reasonable and probable grounds in the totality of the circumstances.

- [68] Before moving on, I will also address a particularly contested piece of information provided by Informer I--the characterization of the 4Runner as being "hidden." Specifically, Informer I stated that Mr. Gill's sister, Malkit, was trying to hide the 4Runner after the murder. Defence counsel submits that this portion of the informer's evidence is erroneous as the investigators had no difficulty locating the 4Runner at the address of the registered owner, the residence of Jaswant and Malkit Gandham. Specifically, the 4Runner was parked in the open drive way of Jaswant and Malkit Gandham. Additionally, defence counsel takes issue with the Affiant's stated conclusion in the ITOs that the 4Runner was being hidden, as a speculative, unfounded, and misleading inference that was not open for them to make. The Affiant states in the concluding portions of the ITOs, that he "belie[ves] that "the reason the vehicle [Samandeep Gill] was driving on the night of [Mr. Kajla's] murder [which occurred in Surrey] is parked at Samandeep Gill's sister's residence in Burnaby is to hide it from police" (ITO p. 38, para. 63(v)).
- [69] The information available to the Affiant, and which was put before the Issuing Justices is that (1) Informer I had stated that Mr. Gill's sister was attempting to hide the 4Runner; (2) the offence occurred in Surrey near Mr. Gill's residence; (3) Informer I stated that Mr. Gill had been driving the car at the time of the murder; (4) a CPIC check confirmed that the 4Runner was driving in the area of the offence and near Mr. Gill's residence in Surrey the day before the offence; (5) as amplified on review, Ms. A.B. had made a qualified identification of Mr. Gill as the driver of the 4Runner; and (6) the 4Runner was now parked at the registered owner's address in Burnaby.
- [70] On this basis, I cannot find that Informer I's information was shown to be necessarily false when investigators found the 4Runner parked in the driveway of the registered owner in Burnaby, or that this characterization cast doubt on other information provided by Informer I. I also find that the Affiant clearly stated in the ITOs the basis for his inference that the 4Runner was indeed being hidden, and included in the ITOs the information that might otherwise cut against this conclusion--i.e. that the 4Runner was visibly parked in the driveway of its registered owner. The full information placed before the Issuing Justices on the issues of the "hidden vehicle" was fairly characterized and provided enough detail to allow the Issuing Justices to determine whether they agreed or disagreed with the Affiant's inference. As recently stated by the Ontario Supreme Court in *R. v. El-Azrak*, 2018 ONSC 4450 at para. 59:

The duty to be full, fair and frank requires that an affiant provide a fair characterization of the evidence, and the inferences to be drawn from it. It does not require an affiant to outline every conceivable alternative explanation. Nor does a Garofoli review require the affiant to be correct in the inferences drawn. The inferences must simply be objectively reasonable and based on credible/reliable evidence.

## E. The Structure of the ITO

- [71] In addition to challenging specific sections of the ITOs, defence counsel submits that the overall structure of the ITOs are misleading. Defence counsel submits that the Affiant mislead the Issuing Justices by inserting certain statements or conclusions in the synopsis and conclusion sections of the ITOs, while omitting their full context. For example, in the synopsis of the ITOs this includes stating that Ms. A.B. identified Mr. Gill "as the suspect in the murder" without the inclusion of information about Ms. A.B.'s qualified statements. In the conclusion sections this also extends to: statements that Ms. A.B. positively identified Mr. Gill as the killer; statements regarding the family's attempts to "hide" the 4Runner without stating again that the 4Runner was parked in the driveway of the registered owner; statements that Mr. Gill is involved in "criminal activity" and "has been the subject of several police investigations involving firearms" without referencing the fact Mr. Gill has not been charged with an offence and was the victim in several of these "investigations involving firearms." Defence counsel also again points to the truncated quotes provided by Ms. A.B. as a problem of structure in the ITO.
- [72] With the benefit of the amplifications and excisions I have made on this review, I find that the above concerns of defence counsel have largely been addressed.

## F. Reasonable and Probable Grounds

- [73] I will now turn to the important task of determining whether upon excision and amplification the ITOs contained sufficient information that could reasonably be believed by the Issuing Justices to support the issuance of the warrants.
- [74] In summary, I have excised the following information on review:
1. Statements in the ITOs which unequivocally provide that Ms. A.B. "placed her signature and the date on the rear of this photograph in acknowledgment that she selected this photograph as the suspect"; and
  2. References to Mr. Gill's June 6, 2010 interaction with the police where he was found "standing near" a handgun; references to the Residence in Surrey being "shot up" (where this is relied upon to support inferences that Mr. Gill is involved in criminal activity, but permitted for the purposes of corroborating Informer I's information); all references to Mr. Gill's involvement in a sword fight with his brother and a "history of violence;" and references to an October 25, 2010 incident where Mr. Gill was a passenger in a vehicle that was impounded.

[75] I have also amplified the ITOs with the following information on review:

1. The full quotations provided by Ms. A.B. during her photopack lineup.
2. Where the ITOs state in the synopsis and conclusions that Ms. A.B. made a "positive identification" of Mr. Gill as the person who shot her husband, I correct these statements to read that Ms. A.B. made a "qualified identification" of Mr. Gill out of a selection of ten similar photographs (i.e. "I would say that it's this person, it's just I'd need to see him from that angle"). On review, I have also considered the following events during Ms. A.B.'s interview: (1) Ms. A.B. signed the back of Mr. Gill's photo; (2) immediately prior to signing Ms. A.B. was asked to sign the back of the photo by the interviewing constable; and (3) at the outset of the photopack process Ms. A.B. was informed that adding her signature to the back of a photo would indicate a positive identification.
3. I have included the information that Mr. Gill does not have a criminal record.

[76] After excision and amplification, the following information remains:

1. An extensive video camera canvass undertaken by members of the investigative team resulted in suitable video stills of the suspect vehicle as it travelled south bound on 128 Street in Surrey on April 27, 2011. These video stills were shown to the sales manager of a Toyota dealership who has worked for Toyota for 17 years. By looking at various still photographs and videos gathered from several locations along the suspect's path, the sales manager was able to positively identify the suspect vehicle in the video and stills to be a 1996 to 2002 white Toyota Four Runner Limited. It is identifiable by the roof rack, rear window shape, C pillar, rear side window, fender flare in contrasting colour and lower body side cladding.
2. Based on information provided by Informer I, Mr. Gill had access to a white 2000 Toyota Four Runner Limited, matching the exact description of the suspect vehicle, and was driving it around the time of the murder.
3. Mr. Gill lives near the scene of the incident at 12726 on 67B Avenue in Surrey and does not have another home address.
4. Ms. A.B. made a qualified identification of Mr. Gill as the shooter and over the course of the investigation provided a description of the suspect vehicle which matches the description of the 4Runner which Informer I stated Mr. Gill had access to during the time of the offence and which is owned by Mr. Gill's brother-in-law.
5. Ms. A.B. stated that she observed the suspect driver seated inside the Toyota Four Runner, point his gun towards the passenger side window of his vehicle and that the window was down. On the basis of this information and the other connections between Mr. Gill and the vehicle, the Affiant stated his belief that Mr. Gill discharged his firearm as he sat inside the Toyota Four Runner; this means that there may be gun shot residue or remaining bullet casings (of which at least two are unaccounted for) in the 4Runner as the subject of the

search warrant.

6. According to Mr. Sandhu, in the early evening hours of April 27, 2011, a young Indo-Canadian male was erratically driving a white Toyota Four Runner which matched the description of the vehicle allegedly erratically driven by Mr. Gill on the same day. Mr. Sandhu also stated that this male brandished a handgun. Mr. Sandhu later viewed a photographic lineup package. Although Mr. Sandhu did not identify Mr. Gill, Mr. Gill indicated that two of the males in the photographic lineup package stuck out to him, and one of these males was Mr. Gill.
7. The Affiant spoke with a member of the RCMP Lab who advised that gun shot residue is very durable and does not break down on fabrics or upholstery, gun shot residue will not dislodge as it will get deep into the fibers.

[77] I find that based upon the above information, there remains sufficient credible and reliable evidence to permit the Issuing Justices to find reasonable and probable grounds to believe that evidence of Mr. Kajla's murder would be found at the specified time and place of the search: Morelli at para. 40; and Paryniuk at para. 43. While references to Mr. Gill and his Residence being connected to "investigations involving firearms" have been excised (where used for the purposes of establishing that Mr. Gill may be more likely to commit violent crimes or own a gun), I find that the connections between Mr. Gill and the vehicle identified during the offence are sufficient enough that the Issuing Justices could have found that "credibly-based probability replaced suspicion" and that Mr. Gill was driving the car during the commission of the offence. Thus, as the probable perpetrator, there would be evidence at his only place of Residence (i.e. clothing items; the subject weapon) and in the offending vehicle, the 4Runner: Morelli at para. 128; and Booth at para. 56.

#### IV. Conclusion

[78] I conclude that there were reasonable and probable grounds for the subject search warrants to have been issued.

"The Honourable Mr. Justice Masuhara"

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Prepared on 25 October 2026 · Esheria