

CANADA / JUDGMENT

R. v. Islam

2024 BCSC 1525

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2024 BCSC 1525 R. v. Islam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Islam,

2024 BCSC 1525

Date: 20240819

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Registry: Vancouver

Rex

v.

MD Rafiqul Islam, Charles Lawrence Flynn, Quintin Jerome Anthony and Jordan Gregory Trembley

Before: The Honourable Justice MacNaughton

Reasons for Judgment

(Voir Dire #4: Challenge to General Warrants issued June 19, 2021)

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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Place and Date of Judgment:

Vancouver, B.C.

August 19, 2024

Table of Contents

Overview.. 3

Earlier Decisions. 4

Issues on this Application and the Parties' Positions. 5

Summary of the ITO.. 6

General Legal Principles Applicable to the Review of Judicial Authorization of General Warrants.
9

Applicable Code Provisions and the Reasonable Grounds to Believe Standard. 9

Review of Judicial Authorizations. 11

Onus is on the Applicant 13

Analysis. 14

Best Interests of the Administration of Justice. 14

Legal Principles. 15

Analysis. 15

Interests of Law Enforcement 15

Privacy Interests. 16

Terms and Conditions. 18

Legal Principles. 18

Analysis. 21

APPENDIX "A". 24

Overview

- [1] These reasons deal with Quintin Anthony's and Jordan Trembley's (the "Applicants") challenges under s. 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter], to the facial validity of two general warrants.
- [2] Both general warrants were obtained based on a June 19, 2021 Information to Obtain ("ITO") sworn by Vancouver Police Department ("VPD") Det. Cst. David Leslie-Greaves (the "Affiant").
- [3] In particular, Mr. Anthony challenges the validity of a general warrant issued under s. 487.01 of the Criminal Code, R.S.C. 1985, c. C-46 [Code], to conduct covert physical surveillance inside a multi-unit residential building located at 933 Hornby Street/938 Smithe Street, Vancouver, BC ("933 Hornby"). Mr. Trembley challenges the validity of an identical general warrant to conduct covert physical surveillance inside another multi-unit residential building located at 1283 Howe Street, Vancouver, BC ("1283 Howe").
- [4] Both general warrants were obtained during a VPD investigation, known as Project Tache, into alleged drug trafficking in downtown Vancouver.
- [5] Project Tache was initiated as a result of a confidential informant tip about a dial-a-dope drug trafficking operation involving a Vancouver taxi ("Taxi V41"). After conducting surveillance, and tracking of the movements of Taxi V41 pursuant to a tracking warrant, police obtained production orders for CCTV footage from 933 Hornby and 1283 Howe. Both addresses were frequently visited by Taxi V41 and certain unknown males associated with the taxi.
- [6] By reviewing the CCTV footage from the buildings corresponding with physical surveillance observations outside the buildings, the police were able to identify specific floors being visited by the investigation targets. Police subsequently sought judicial authorization for general warrants to conduct surveillance of the common areas of 933 Hornby and 1283 Howe and the identified floors. As explained by the Affiant, the goal of the surveillance was to afford evidence necessary for a search warrant by identifying the specific suites within the buildings that the targets were using: ITO at para. 13.

Earlier Decisions

- [7] This matter has involved a series of cascading voir dires relating to challenges to various production orders and warrants. My earlier decisions on these challenges are briefly described as follows.

- [8] In oral reasons cited at R. v. Islam et al., 2024 BCSC 235, I granted limited leave to the Applicants and Charles Flynn to cross-examine then Det. Cst., now Sgt. Kevin Yuen, who swore a June 17, 2021 ITO in support of production orders, and, if necessary, to cross-examine the Affiant who swore an earlier ITO in support of the tracking warrant for Taxi V41 (the "Tracking Warrant").
- [9] In reasons cited at R. v. Islam, 2024 BCSC 896, I dismissed Mr. Flynn's Charter application alleging that the VPD conducted a warrantless search of CCTV footage from 933 Hornby.
- [10] In reasons cited at R. v. Islam, 2024 BCSC 1000, I dismissed Mr. Islam's facial challenge to the validity of the Tracking Warrant.
- [11] In reasons cited at R. v. Islam, 2024 BCSC 1025, I dismissed Mr. Anthony's application to cross-examine Sgt. Yuen on the tracking data obtained pursuant to the Tracking Warrant on the basis that Sgt. Yuen had not reviewed the tracking data for the purpose of preparing his ITO.
- [12] In reasons cited at R. v. Islam, 2024 BCSC 1090 ("Voir Dire #3 Reasons"), I dismissed the Applicants' and Mr. Flynn's facial and sub-facial challenges to the production orders for CCTV footage obtained based on Sgt. Yuen's June 17, 2021 ITO.
- [13] Production orders were also granted for key fob records and Form K documents for both buildings. Those orders were challenged under s. 8 of the Charter, and, during the course of Voir Dire #3, the Crown conceded that there had been a breach of the Applicants' rights with respect to the key fob records and Form K documents: Voir Dire #3 Reasons at para.13.
- [14] In this Voir Dire #4, the parties agree that it is appropriate to excise certain evidence relating to the fob records and Form K documents from both 933 Hornby and 1283 Howe from the Affiant's ITO. I set out those excisions in Appendix A to these reasons.
- [15] There are three undisputed amplifications to the ITO to correct typographical errors. In particular, the heading before para. 49, on page 60, should be 933 Hornby Street; the heading before para. 50 should be 1283 Howe Street; and the reference back to an earlier paragraph, in the opinion following para. 49.5, should be to para. 37.8.
- [16] The Crown submitted, and the Applicants did not dispute, that the excisions do not impact the considerations with respect to the imposition of conditions from the issuing judge under s. 487.01(3) of the Code or the best interests of the administration of justice test under s. 487.01(1)(b).

Issues on this Application and the Parties' Positions

- [17] The Applicants do not allege that there were insufficient grounds to issue the general warrants. In the totality of the circumstances, the Affiant's affidavit supports a reasonable belief that Taxi V41 was involved in drug trafficking and that information concerning that offence would be obtained through covert surveillance inside 933 Hornby and 1283 Howe.

- [18] Instead, the Applicants submit that the general warrants are deficient with respect to two preconditions under s. 487.01 of the Code. First, they submit that the issuing judge, Judge Brownstone of the BC Provincial Court, failed to turn her mind, as she was required to do under s. 487.01(3) of the Code, to whether terms and/or conditions were advisable or required to ensure that the authorized search was reasonable in the circumstances. Second, the Applicants submit that by failing to turn her mind to appropriate terms and/or conditions for the issuance of the general warrants, the warrants do not strike an appropriate balance between a reasonable expectation of privacy and the government's interest in law enforcement, and consequently, their issuance was not in the best interests of the administration of justice under s. 487.01(1)(b) of the Code.
- [19] The Crown submits that, on review, there was a sufficient basis on which the authorizing judge could have issued the general warrants, and that the Affiant's ITO remains sufficient to satisfy all preconditions under s. 487.01 for the issuance of the general warrants, particularly under the limited standard of review in a Garofoli review. Therefore, the applications should be dismissed.

Summary of the ITO

[20] In his June 19, 2021 ITO, the Affiant:

- (a) set out his background and experience as a drug investigator and his role in Project Tache (at paras. 2-5);
- (b) gave a brief overview and the reasons for the application for the General Warrants (at paras. 7-13);
- (c) outlined the terms of authorizations sought pursuant to s. 487.01(1) of the Criminal Code (at para. 14);
- (d) explained how he distinguished his opinions in the ITO from the investigative information through the use of square brackets and italics, and defined the terms he used in the ITO (at paras. 16-23);
- (e) set out the previous authorizations obtained during Project Tache (at para. 24)
- (f) set out the sources of his information (at para. 25);
- (g) explained the confidential informant information and its pedigree (at paras. 26-29);
- (h) detailed the investigative steps taken to that point including:
 - i. police database inquiries (at para. 31);
 - ii. surveillance on June 1, 3, 8, 9, and 10, 2021 (at paras. 32-37);
 - iii. electronic tracking of Taxi V-41 on June 11-17, 2021, pursuant to the Tracking Warrant issued on June 9, 2021 (at paras. 38-47);

iv. VPD review of fob records and CCTV after execution of the production orders issued on June 17, 2021 (at paras. 48-50); and

v. steps taken to identify Mr. Islam (at para. 53)

[21] At paras. 54-55, the Affiant set out that he had reasonable grounds to believe that the offences named in the ITO (the "Offences")--possession of a controlled substance, for the purposes of trafficking and trafficking of a controlled substance, pursuant to ss. 5(2) and 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19--have been committed.

[22] At para. 61, the Affiant set out the general warrants he was seeking as follows:

Covertly enter the interior and exterior common areas of 1283 Howe Street as many times as necessary between June 18, 2021 and June 28, 2021 (subsequently changed to June 19, 2021 to June 29, 2021), including by night, specifically:

61.1. To allow police officers to enter onto and into all common property associated to 1283 Howe St. to conduct physical surveillance;

61.2. To allow police officers to enter into the hallway on the 35th floor of 1283 Howe Street, for the purpose of conducting covert physical surveillance [excised].

[23] In addition, the Affiant sought to have the strata building management provide VPD officers and an electronic fob to allow them to covertly enter 1283 Howe.

[24] At para. 62, the Affiant explained his belief that covert physical surveillance inside 1283 Howe would afford evidence of the Offences and was required in order "to make observations of the persons associated (excised)". Specifically, observations of an unknown male, designated as UM102, or other persons associated to him or the drug trafficking group, using a key to enter a suite will be used to form grounds for a search warrant to obtain evidence of the Offences.

[25] At paras. 62.2 and 62.4, the Affiant explained that a fob was required from strata management to enter the premises covertly and that while strata management was prepared to provide a fob without a warrant, he believed based partly on *R. v. Pipping*, 2020 BCCA 104 [Pipping], that "the residents have a reasonable expectation of privacy inside the premises, and that a General Warrant [was] required".

[26] At para. 65 of his ITO, the Affiant explained the need for a 10-day window for the general warrants. In particular, he says that investigators would require time to coordinate the required police resources (surveillance officers, members of the Tactical Support Section, and security elements), and conduct surveillance on UM102 and his associates to ensure that police are not compromised during execution of the general warrants. Further, at paras. 62.3 and 63, the Affiant explained that the covert surveillance would need to be conducted when UM102 or one of his associates attended 933 Hornby or 1238 Howe to make observations of them entering the suites. Investigators could not say with certainty when UM 102 or one of his associates would attend. As a result, he sought a 10-day window, including at night, so

that the observations required to support grounds for a search warrant would be obtained.

[27] At para. 66, the Affiant explained why he believed the issuance of the general warrants would be in the best interests of the administration of justice. He acknowledged that the proposed covert surveillance would breach the privacy rights of the targets of the investigation and unknown third parties, but opined that the breach was outweighed by the seriousness of the offences being investigated. He then wrote:

66.3. While investigators shall confine themselves to common areas, I believe that the General Warrants are required in order to ensure the search is not a breach of UM102 or any of his associates' expectation of privacy, as well as any unknown third parties inside the buildings.

66.4. Investigators do not wish to notify UM102 or Quintin ANTHONY or [] of the execution of the General Warrants. Investigators are continuing to actively investigate UM102 and his associates for the Named Offences, and intend on using the evidence gathered by the use of the techniques sought to support grounds for warrants to search for both suites inside both buildings. As such, the integrity of the investigation would be threatened if parties were notified of the technique utilized pursuant to the General Warrants.

66.5. UM102, or the person identified as the tenant owner of the suites will be notified of the entry into both buildings at the end of this investigation and no longer than one year from execution.

[28] At para. 68 of the ITO, the Affiant said that there are "no other provisions in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, or procedure to be used." This was not disputed by the Applicants. He also repeated that he believed that information concerning the Offences would be obtained by the execution of the general warrants sought.

[29] Finally, at para. 69 of the ITO, the Affiant explained the urgency of his application for the general warrants. In particular, at para. 69.5, he emphasized that, if granted, the VPD investigative team intended to execute the general warrants immediately and begin building grounds for search warrants, with the goal of executing those search warrants while the stash houses were well-stocked.

[30] The two general warrants were issued on June 19, 2021, in the terms sought by the Affiant. In addition, as a term of the authorization, Judge Brownstone ordered that "a copy of this Warrant be carried by the peace officers while engaged in the execution of the Warrant."

General Legal Principles Applicable to the Review of Judicial Authorization of General Warrants
Applicable Code Provisions and the Reasonable Grounds to Believe Standard

[31] Section 487.01(1) of the Code addresses the three requirements that must be met to obtain a general warrant. It provides:

Information for general warrant

487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

- (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
- (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
- (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

[32] In summary, the issuing judge has to be satisfied that: (a) there are reasonable grounds to believe that an offence had been or would be committed and that information concerning the offence would be obtained through the use of the investigative technique authorized by the general warrant; (b) it is in the best interests of the administration of justice to issue the warrant; and (c) there is no other federal statutory provision that would provide for a warrant permitting the technique or the thing sought to be done.

[33] In addition, s. 487.01 contains a number of other provisions curtailing or permitting various aspects of a general warrant authorization. Importantly, this includes subsection (3), which reads:

Search or seizure to be reasonable

- (3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

[34] In *R. v. Ha*, 2009 ONCA 340 at para. 26, leave to appeal ref'd, 33256 (12 November 2009), Justice MacPherson explains that the general warrant sections of the Code focus on whether the public interest in authorizing the proposed investigative technique is sufficiently strong, in the context of the investigation, to overcome an individual's constitutional right not to be subject to an unreasonable search or seizure. It does not focus on authorizing specific techniques.

[35] The "reasonable grounds to believe" standard in s. 487.01(1)(a) of the Code is often described as one of "reasonable probability" or "credibly-based probability" or the point at which sufficient grounds exist where the inference of criminal activity is reasonable from the facts. The reasonable grounds standard is less than a *prima facie* case and less than "on a balance of probabilities" or "more probable than not", the civil standard of proof: *R. v. Whitaker*, 2008 BCCA 174 at paras. 39-41, leave to appeal ref'd, [2008] S.C.C.A. No. 296; *R. v. Glendinning*, 2019 BCCA 365 at paras. 3, 7. It requires more than a possibility that evidence may be found, and more than hunch or mere suspicion: *Stoughton v. Canada (Attorney General)*, 2022 BCCA 212 at paras. 28, 30.

Review of Judicial Authorizations

[36] The principles that apply on the review of judicial authorizations are well-settled. I must consider whether the issuing judge had a basis on which to issue the warrant: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CanLII 52.

[37] In *Garofoli*, the Court emphasized that a trial judge's role on a Charter review of the sufficiency of judicial authorizations is not to second-guess the issuing judge or justice or to substitute their view for that of the issuer. It is not a hearing *de novo*. Instead, the trial judge considers the record that was before the issuer, as amplified by the record on review, to determine whether there was any basis for the warrant.

[38] A trial judge must not set aside the authorization unless satisfied, on the whole of the material presented, that there was no basis for the authorization: *Garofoli* at 1452.

[39] The standard of review was also considered in *R. v. Araujo*, 2000 SCC 65 [*Araujo*]:

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

[Emphasis in original.]

[40] In *R. v. Wilson*, 2011 BCCA 252, the Court described the test as whether the ITO, as amplified on review, was capable of supporting the issuance of the warrant: at para. 52. Put another way, could an issuing judge or justice assessing all the facts, on a practical, non-technical, and common-sense basis, have been satisfied that reasonable grounds existed to believe that the statutory pre-requisites to the authorization were met? This was recently affirmed in *R. v. Slemko*, 2020 BCCA 207 at para. 55.

[41] The assessment of whether the "reasonable grounds to believe" standard was met before the issuing judge or justice involves considering the totality of circumstances, meaning all the information submitted in support of the authorization as a whole, not one piece of evidence

at a time. It is an assessment of all the grounds, taken together, not a microscopic analysis of each and every averment. This is because "each piece of evidence colours other pieces of evidence and a fuller picture emerges by considering all of the evidence together": Whitaker at para. 41, citing *R. v. Lam*, 2002 BCCA 99 at para. 10.

- [42] The question for the reviewing judge is to assess whether there is "reliable evidence that might reasonably be believed on the basis of which the authorization could have been issued" not whether it should have been granted: *R. v. Vu*, 2013 SCC 60 at para. 16, citing Araujo at para. 54. The reviewing judge must take into account that authorizing justices are entitled to draw reasonable inferences from the information set out in the ITO. The affiant need not expressly state their belief nor underline the obvious: *Vu* at paras. 16-17.
- [43] The reasonable grounds standard does not involve exclusion of possible innocent inferences that could be drawn from observed activity: *R. v. MacCannell*, 2014 BCCA 254 at para. 46; *R. v. Luong*, 2010 BCCA 158 at para. 17.
- [44] In evaluating whether reasonable grounds existed for the issuance of a warrant, the issuing justice may view the facts set out in the ITO through the lens of the affiant's experience and knowledge: Glendinning at para. 31. Observations that may lack significance to the untrained eye may be highly significant to trained and experienced investigators: *R. v. MacKenzie*, 2013 SCC 50 at para. 62.

Onus is on the Applicant

- [45] The general warrants are presumed to be valid. The onus is on the Applicants to establish that the ITO is insufficient: Wilson at para. 63.
- [46] In this case, the Applicant's challenge to the general warrants is facial. A facial challenge attacks the sufficiency of the ITO based only on the information it contains.
- [47] I am satisfied that the ITO sets out evidence that might reasonably be believed on which the authorizing judge could conclude that there was a basis for issuing the general warrants. As set out in more detail in my decision in *R. v. Islam*, 2024 BCSC 1090, a reliable confidential informant provided detailed information about drug trafficking activities involving Taxi V41. The VPD corroborated several parts of the informant's information including specific aspects of what the informant said. The VPD then conducted surveillance of Taxi V41 over a number of days and observed behaviour consistent with drug trafficking and with the informant's information.
- [48] Most notably, during surveillance, the VPD observed a pattern of Taxi V41 making repeated trips, often with the same passenger, to areas nearby 933 Hornby and 1283 Howe. Often, trips to those locations were preceded by short-duration meetings with unknown individuals that the Affiant described as being consistent with drug trafficking. In addition, Taxi V41 engaged in driving patterns that the Affiant described as designed to expose or detect surveillance.

- [49] Tracking data later obtained for Taxi V41 pursuant to the Tracking Warrant showed more trips to the areas nearby 933 Hornby and 1283 Howe, often in quick succession. This was unusual behaviour as it related to a working taxi that also took regular fares.
- [50] After the production orders were granted, the VPD reviewed CCTV footage from both 933 Hornby and 1283 Howe corresponding to physical surveillance observations. As a result, the VPD identified target floors for further surveillance and sought the general warrants for each building.
- [51] I accept that the totality of the investigation to that point gave rise to a reasonable belief that Taxi V41 was involved in drug trafficking and that covert surveillance, authorized by the general warrants on the 15th floor at 933 Hornby and the 35th floor at 1283 Howe would provide information concerning the Offences. The fact that, in addition to the specific floors, the general warrants authorized VPD officers to enter onto and into all common property associated with the two addresses in addition to the two specific floors is, in my view, not concerning. To access the two specific floors, VPD officers would have to enter into other common areas of the buildings including, for example, the doorways, lobbies, and elevators.

Analysis

Best Interests of the Administration of Justice

- [52] As a precursory note, I accept that the issuing judge in this case is presumed to know the law, including that, in issuing a general warrant, she was required to consider whether the issuance of the warrant was in the best interests of justice and to consider any appropriate terms and conditions. The role of an issuing judge or justice is well-established, as is their role in the judicial authorization process. As set out in *Araujo* at para. 29, affirmed in *R. v. Pires*, *R. v. Lissing*, 2005 SCC 66 at para. 22:
- [29] the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view [themselves] as a mere rubber stamp, but should take a close look at the material submitted by the applicant. [They] should not be reluctant to ask questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant.

Legal Principles

- [53] Whether it is in the best interests of the administration of justice to issue a general warrant involves consideration of whether the authorization would further the objectives of justice, and balancing the state's interests in effective law enforcement against individual privacy rights: *R. v. Nguyen*, 2023 ONCA 367 at paras. 45-46; *R. v. Hafizi*, 2023 ONCA 639 at para. 70.

- [54] As set out in Ha at para. 46, citing *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 159-160, 1984 CanLII 33, the focus on the best interests of the administration of justice is "an assessment as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement".
- [55] Like the assessment of reasonable grounds, determining the balance in the "best interests of the administration of justice" criteria in s. 487.01(1)(v) is assessed from the perspective of the investigation that is underway and taking into account the totality of the ITO: Hafizi at para. 63.
- [56] Whether a general warrant satisfies the "best interests of the administration of justice" criteria is a legal determination made by the issuing justice: Nguyen at paras. 45, 55. The ITO must contain sufficient evidence to allow the judge to make the required legal determination.

Analysis

Interests of Law Enforcement

- [57] I agree with the Crown that, on this review, it is important to consider when the general warrant authorizations were sought in the context of the entire investigation. As set out by the Affiant at para. 69.5 of his ITO, the intention of seeking the general warrants was to build grounds for seeking search warrants for particular locations (stash houses), and to do so while they were likely to be stocked.
- [58] Taken together, the general warrants were intended to provide the VPD with an additional investigative technique to further the overall investigation into suspected drug trafficking and drug stash sites in the buildings at 933 Hornby and 1283 Howe.

Privacy Interests

- [59] In the totality of the ITO, the Affiant presented sufficient and logical reasoning on which the issuing justice could conclude that the VPD's interests in utilizing the covert surveillance in 933 Hornby and 1283 Howe overcame privacy interests held by the targets and third parties in these settings.
- [60] Specifically, at paras. 64.3 and 66.3 of the ITO, the Affiant says he has considered individual privacy rights engaged by the desired covert surveillance technique. At para. 64.3, he says that he believes that judicial authorization to conduct covert surveillance inside the common areas and on specific floors, stems from, in part, the decision in *Pipping*. Moreover, at para. 66.3, the Affiant explains that by obtaining the general warrants to conduct the covert surveillance, the resulting use of the technique would be judicially authorized. He demonstrates awareness of the Charter protected interests that may be infringed if the covert surveillance was not judicially scrutinized and authorized by the

general warrants.

- [61] The issue considered by the BC Court of Appeal in Pipping was whether a general warrant was defective because it did not include a requirement for notice as required in s. 487.01(5.1) of the Code (such a provision was contained in the general warrants authorized in this case). The Court considered whether Mr. Pipping had a reasonable expectation of privacy in the hallway leading to the unit he used in the multi-unit building that was the subject of the covert search.
- [62] The Court concluded, citing to three Ontario Court of Appeal decisions and an earlier decision from the BC Court of Appeal that, key to the assessment of a reasonable expectation of privacy is the manner in which public access is controlled to the common areas of a multi-unit residential building. Factors that were considered included: the ability to regulate access, including the right to admit or exclude others from the place; the exclusivity of occupation; the size of the building; whether property management or a condominium board has consented to the police presence; the breadth of the police observations; the ownership of the property; and the frequency with which a particular area is used: Pipping at paras. 30-31.
- [63] Based on the facts, the Court concluded that Mr. Pipping had a reasonable expectation of privacy in the hallway outside Unit 407 of the building: Pipping at para. 32. The Court also concluded that the police had engaged in a covert search and ultimately concluded that the absence of a mandatory notice provision invalidated the general warrant.
- [64] In *R. v. Yu*, 2019 ONCA 942 at para. 81, the Court relied on in Pipping at para. 29, and concluded that the appellants had a reasonable expectation of privacy in the hallways, although it was at the low end of the privacy spectrum. The Court discussed a contextual approach to assessing reasonable expectation within different shared common areas in a residential building: at paras. 81-84.
- [65] Presumably, the authorizing judge weighed the potential privacy interests in the common areas of 933 Hornby and 1283 Howe against the real need of the VPD to identify specific units being accessed to further their investigation into drug trafficking. The authorizing judge was entitled to draw reasonable inferences from the information provided by the Affiant. It was reasonable for her to infer that the two buildings, located in the downtown core of Vancouver, were multi-storey. She could infer that 933 Hornby had at least 15 floors and 1283 Howe had at least 35 floors. It was also reasonable for her to infer from the availability of CCTV footage, and the fact that the VPD required a fob from building management to access the building, that these were secured buildings in which residents had a reasonable expectation of privacy. However, the privacy interests engaged were at the lower end of the privacy spectrum as the VPD did not propose to install video cameras or other recording equipment in the hallways, and did not seek to enter the units believed to be associated with the drug trafficking being investigated.

[66] When taken in its totality, and in light of the specific technique (covert surveillance inside the target addresses) authorized by the general warrants, the ITO demonstrates that the interests of law enforcement outweighed individuals' privacy rights. I am satisfied that there was a basis in the evidence on which the issuing judge could have authorized the surveillance in the best interests of justice.

Terms and Conditions

Legal Principles

- [67] When considering whether to authorize a general warrant, the issuing judge must turn their mind to consider whether the warrant should contain terms and conditions to ensure that any search or seizure is reasonable in the circumstances.
- [68] In *R. v. Lucas*, 2009 CanLII 43418, [2009] O.J. No. 3415 (S.C.) at paras. 30, 32, 34, 35, and 38 [Lucas ONSC], Justice Nordheimer considered this requirement in a case involving a constitutional validity challenge to s.487.01 on a similar basis to that argued here by the Applicants.
- [69] Mr. Lucas advanced a number of arguments to support his position that the general warrant did not meet the s. 487.01(1)(b) criteria, including that: the general warrant was overbroad in terms of the number of places authorized to be searched (many residences and vehicles); the 60 days during which the warrant could be executed was too long; multiple covert entries were authorized into a single place; there was no justification for nighttime entry; and a different investigative technique or method could have been sought. The applicant argued that while individually, each of these factors might not undermine the issuance of the general warrants, collectively, they demonstrated the problematic nature of general warrants.
- [70] In *Lucas ONSC*, Justice Nordheimer considered the constitutionality of s. 487.01 of the Code and concluded that it did not offend s. 8 of the Charter. He recognized that it was possible for an excessively broad general warrant to be authorized, but the inclusion of the s. 487.01(3) precondition is a safeguard against granting excessive and far-reaching authority. The Court wrote:
- [45] If the police were to seek such far-reaching authority then I would expect the authorizing judge would impose terms and conditions that would preclude its in that way or deny the authorization outright as not being in the best interests of the administration of justice. The fact that a power can theoretically be misuse in a particular way is not a sufficient reason to deny the power for all purposes. Rather, it is a reason to ensure that appropriate restrictions are placed on the use of that power.
- [71] At para. 46, Nordheimer J. provided a non-exhaustive list of restrictions that might be imposed to curtail the scope of a general warrant in circumstances where the issuing judge considers them necessary:

- requiring reasonable and probable grounds to believe that the items of interest are in the place before a covert entry and search is undertaken;
- restricting the number of covert entries that can be engaged in of a single place;
- a reporting requirement on the results of each and every use of the general warrant especially where covert entries are involved;
- limits on any "collateral damage" that the police can inflict as a method of covering up their covert entries;
- live monitoring requirements for audio or visual recordings within private places; and
- limits on ruses that the police can use as part of any investigative technique authorized by a general warrant.

[72] Ultimately, Nordheimer J. concluded that the absence of any such conditions does not necessarily vitiate the validity of an otherwise validly authorized general warrant. Any assessment of the necessity of terms and conditions is considered in the totality of the circumstances set out in the ITO:

[47] The absence of any such restrictions in the general warrant does not mean that the general warrant is not in the best interests of the administration of justice. The need for them will have to be determined on a case-by-case basis. The inclusion of such restrictions may simply make that form of subsequent attack against the general warrant a more difficult one to advance.

[73] The Ontario Court of Appeal upheld the trial decision in reasons cited at R. v. Lucas, 2014 ONCA 561 [Lucas ONCA]. The Court summarized the trial decision as follows:

[107] In thorough reasons reported at [2009] O.J. No. 3415, supra, Nordheimer J. concluded that, properly interpreted, s. 487.01 is valid. He held that the safeguards in s. 487.01 are similar to those that may be imposed as a term of an authorization to intercept private communications. The trial judge explained that s. 487.01 requires the authorizing judge (who must be a judge and not a justice of the peace) to make an advance determination that there are reasonable grounds to believe that an offence has been or will be committed and that the actions to be taken under the general warrant will lead to information concerning the offence (at paras. 9-10). These provisions of s. 487.01 "contain all of the recognized safeguards for a reasonable search set out in Hunter" (at para. 10).

[108] The trial judge went on to observe that s. 487.01 provides an additional safeguard by requiring the authorizing judge to be satisfied that issuing the warrant is in the best interests of the administration of justice. Still further, the provision requires that the authorizing judge impose terms and conditions that the judge considers advisable to ensure the reasonableness of any search or seizure authorized by the warrant (at para. 11).

- [74] In addition to the other protections in s. 487.01 of the Code, Justice Moldaver, in *R. v. TELUS Communications Co.*, 2013 SCC 16 [TELUS], in obiter, commented on the requirement for terms and conditions in general warrants:
- [81] Second, when judges are faced with an application for a general warrant where the investigative technique, though not identical, comes close in substance to an investigative technique covered by another provision for which more rigorous standards apply, they should proceed with extra caution. At a minimum, judges should look closely at the material filed and satisfy themselves that the request for a general warrant is genuine and not merely a device to escape the rigours of another authorization provision. Where careful scrutiny establishes that a proposed investigative technique, although similar, has substantive differences from an existing technique judges may grant the general warrant but they should be mindful of their obligation under s. 487.01(3) to impose terms and conditions that reflect the nature of the privacy interest at stake. In doing so, they may borrow as appropriate from the conditions that Parliament has chosen to impose on the substantively similar existing authorization.
- [82] With these twin considerations in mind if the police proceed in good faith and the authorizing judge proceeds with caution, it is unlikely that a general warrant issued in such circumstances will be found to be defective at trial - and even less so that evidence obtained pursuant to it will be excluded under s. 24(2) of the [Charter].

[Emphasis in original.]

Analysis

- [75] On a Garifoli review, deference ought to be afforded to the determination by the judge with respect to any terms and conditions necessary to satisfy s. 487.01(3). Ultimately, I am satisfied that, pursuant to her obligation under s. 487.01(3), the issuing judge in this case turned her mind to the necessity of imposing conditions on the general warrants in this case.
- [76] That she did so is apparent in the condition that she imposed that the VPD officers carry a copy of the general warrant while engaged in its execution. In addition to the carriage requirement, the warrant contained the required notice provision under s. 487.01(5.1).
- [77] Considering the totality of the ITO, and for the reasons outlined by the Affiant at paras. 64-69, it was entirely within the issuing judge's role and her duty to consider the term and condition she imposed as being reasonable in the circumstances. As the authorizing judge considered and included that condition, it is reasonable to infer that she considered others. As the VPD was not seeking authorization to covertly enter the units it identified through surveillance, it would have been reasonable for Brownstone J. to conclude that types of restrictions proposed by Nordheimer J. in *Lucas* ONSC were not directly applicable to the type of authorization sought in this case.

- [78] The Applicants take issue with the period of time for which the warrants were authorized and suggest that the general warrants ought to have included terms and conditions that limited the execution to times when the investigating officers had reasonable grounds to believe UM102 or any other associate of the drug trafficking group were in the building. The Applicants suggest that through tracking Taxi V41 and surveillance, the VPD would have ample opportunity to have reasonable grounds to believe that one of the targets was about to enter the building and police could have then executed the general warrants upon that triggering event.
- [79] The general warrants were limited to a specific ten-day period, although authorized for daytime or nighttime execution. They were also limited in terms of the specific areas of the respective building in which they could be executed. In addition to the interior and exterior common areas, the warrants only authorized access to specific floors linked directly to the investigation in order to conduct covert surveillance. The general warrants did not authorize the VPD to enter the units, merely to observe who was going in and coming out.
- [80] The general warrants were for the common areas of 933 Hornby and 1283 Howe and for specific floors in those buildings, and the purpose was to observe UM102 or other persons associated with him entering into a suite in the buildings for the purpose of forming grounds for a search warrant. At that stage in the investigation, the identity of UM102, a target of the investigation, remained unknown to the VPD.
- [81] The Affiant clearly set out the justification for the general warrants and why they were sought in the terms drafted, including his particular reason for the length of time for the warrant to be authorized, why nighttime execution was contemplated, and the specific objective and target for the cover surveillance.
- [82] The Affiant explained the need for a ten-day warrant at para. 65 of the ITO, which was based on police resourcing needs and surveillance safety considerations. The ITO sets out that the VPD had no way of knowing when the targets of the investigation or their associates would be at the buildings or the units. The Affiant advised in the ITO of the need to coordinate the required resources to conduct the covert surveillance and that the police would not have sufficient advance notice to set up the surveillance when the targets of the investigation or their associates were at the buildings.
- [83] Moreover, the surveillance to that point had not shown a regular pattern of times at which Taxi V41 was nearby to 933 Hornby or 1238 Howe. For example, on June 1, 2021 surveillance occurred over about nine hours from 12:10 p.m. to 9:00 p.m. and Taxi V41 was nearby to 1283 Howe on six occasions, and nearby to 933 Howe once. The visits were of differing lengths and some of them were quite short. Similar observations were made during surveillance on June 8, 9, and 10, 2021.
- [84] The Affiant indicated that, if granted, the VPD would act on the warrants immediately as he believed there was some urgency in doing so and he set out his reasons for that urgency.

[85] As a result of the it would have been reasonable for Judge Brownstone, on the whole of the ITO to have reached the conclusion that limiting the authorized surveillance to be in response to a triggering event, as proposed by the Applicants, would have been unworkable and would not have struck the appropriate balance between the interests of law enforcement in investigating the Offences and the Applicants and third parties' privacy interests.

[86] In the totality of the circumstances, I am satisfied that the judge appropriately balanced the interests of the police in investigating the Offences against the privacy interests of the target individuals and third parties and properly turned her mind to whether any terms and conditions should be imposed on the warrants.

[87] For the foregoing reasons the applications are dismissed.

"MacNaughton J."

APPENDIX "A"

Excisions by Agreement

933 Hornby Street (938 Smithe)

1283 Howe Street

Mr. ANTHONY

Mr. TREMBLEY

49.2

Reference to key fob at 10:23pm; suite number (1526)

50.2

Reference to key fob at 3:49pm; suite number (3501)

49.6

Reference to key fob at 10:21pm; suite number (1526)

50.5

Reference to key fob at 4:39pm; suite number (3501)

49.8

Reference to key fob at 10:23pm; suite number (1526)

50.8

Reference to key fob at 6:07pm; suite number (3501)

51

Reference to Form K

Suite number (1526)

Name (Quintin ANTHONY) & other Form K details

50.11

Reference to key fob at 7:18pm; suite number (3501)

58, 58.2

Reference to Form K

Suite number (1526)

50.15

Reference to key fob at 6:22pm; suite number (3501)

63.2

Suite number (1526) - "on Suite 1526" (which accords with the severable portion of the GW)

50.18

Reference to key fob at 8:03pm; suite number (3501)

64.1

Suite number (1526)

50.22

Reference to key fob at 5:32pm; related information to elevator access; suite number (3501)

50.25

Reference to key fob at 7:04pm; suite number (3501)

52

Reference to Form K

Suite number (3501) & other Form K details

61.2

Suite number (3501) - "on Suite 3501" (which accords with the severable portion of the GW)

62.1

Suite number (3501)

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