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R. v. Kang

2020 BCSC 1151

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2020 BCSC 1151 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2020 BCSC 1151

Date: 20200805

Docket: 29411

Registry: Vancouver

Regina

v.

Sam Kang

Gary Kang

Manveer Braich

Kristoffer Ghuman

Jitesh Vagh

Gurcharn Singh Kang

Mohanbir Kaur Kang

Kyle Latimer

Craig Latimer

Jacob Pereira

Anduele Pikientio

Csongor Szucs

Pashminder Bopari

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Before: The Honourable Madam Justice Ker

Reasons for Judgment on Joint Hearing #3 Re: Legal Framework for Excision from a Prior Judicial Authorization

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Place and Date of Ruling given to Parties with Reasons to follow:

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I. INTRODUCTION

- [1] This application deals with a discrete legal issue. All parties seek a ruling setting out the applicable legal framework to be applied when excising information, found to have been obtained contrary to an accused's Charter rights, from an affidavit filed in support of an application to obtain a Part VI wiretap authorization - frequently referred to as the information to obtain or "ITO" in much of the case law.
- [2] More specifically, the issue is when such information is obtained in violation of the Charter rights of one or some accused, is it excised from the affidavit solely as against the accused whose Charter rights were breached, as the Crowns argue; or, as the defence contend, as against all accused before the court. To put it another way, and as referred to throughout the hearing on this application, is it "excision for one" or "excision for all"?
- [3] While the federal Crown filed the application for this joint hearing, it did so as a courtesy and on a pro forma basis. There is no persuasive or evidentiary burden on this application. The issue is strictly a legal one, the determination of which rests on first principles and the interpretation of the authorities provided.

- [4] This application was conducted as a joint hearing pursuant to s. 551.7 of the Criminal Code, R.S.C. 1985, c. C-46 [the "Code"] for the 12 accused charged on three related indictments (VA 27786, VA 27787 and VA 27798) as well as one accused on a fourth related indictment (VA 28709). There was only one Part VI application with one very lengthy affidavit filed in support. The intercepted communications obtained pursuant to that authorization cross-pollinate and relate to all four indictments.
- [5] The argument on this hearing was conducted during the suspension of regular court operations due to the public health emergency wrought by the coronavirus pandemic and so was heard by means of remote video conferencing through the Microsoft Teams platform. All defence counsel agreed to proceed in this fashion. All accused agreed to be excused pursuant to their filed waivers and the provisions of s. 650(2) of the Code. The Crowns[1] were also content to proceed in this fashion. Comprehensive written arguments were filed electronically as were the over 100 authorities cited in the various legal briefs and referred to in oral argument. The Court is indebted to counsel for the quality of the written and oral submissions as well as the nimbleness of all to be willing to conduct this hearing by remote video conferencing.
- [6] On June 30, 2020, through a Memorandum to Counsel, I advised all counsel of the result of this hearing stating that I was satisfied that the proper approach to excision of established Charter breaches contained in an affidavit was that advanced by the Crowns - excision in this context is excision for one, not excision for all. I indicated in the Memorandum that written reasons would follow. These are my reasons.

II. FACTUAL BACKGROUND

- [7] For the purposes of this application, the factual background is largely undisputed.
- [8] All of the charges on the four indictments included in this joint hearing have their genesis in an investigation that was spawned from "Task Force Tourniquet" in the spring of 2017. Task Force Tourniquet was a proactive task force that the Vancouver Police Department [the "VPD"] and other neighbouring police agencies commenced in the spring of 2017 to investigate a number of criminal groups operating in the Lower Mainland of BC that were believed to be in conflict with one another and responsible for numerous acts of violence across the Lower Mainland. Out of Task Force Tourniquet various project investigations were initiated. The indictments under this joint hearing are all housed in an investigation with the moniker "Project Territory", an investigation of the alleged drug trafficking activities of two different groups - the Kang group and the Latimer group.
- [9] Three separate direct indictments charging a total of 12 individuals have been preferred in respect of Project Territory. A brief background overview to the investigation can be found in my reasons on an earlier application, *R. v. Kang*, 2019 BCSC 2109 at paras. 19-32, which I incorporate into these reasons by reference hereto.

- [10] A fourth direct indictment under the Project Territory umbrella, VA 28709, charges Pashminder Bopari and three others with conspiracy to commit murder and firearms offences in relation to events that occurred in June 2018 during the course of and related to the Project Territory investigation [the "Bopari indictment"].
- [11] The Kang brothers, Sam and Gary Kang, are unindicted co-conspirators on the Bopari indictment. Mr. Bopari, an alleged associate of Sam and Gary Kang, is an unindicted co-conspirator on the Kang Indictment and is said to be a member of the Kang group, an alleged criminal organization.[2]
- [12] The Project Territory investigation was a sequential investigation in that subsequent investigative steps built on previous steps. It started out focused mainly on the accused charged in the Kang Indictment but expanded to Kyle Latimer and his associates as the surveillance continued and established some sort of working relationship between the Kang group, Kyle Latimer and his associates.
- [13] The various alliances and associates were identified and monitored using a number of investigative techniques including:
- Informant information;
 - Surveillance and observation, e.g. the events of May 4, 2017 at the Brighthouse Way location in Richmond, BC;[3]
 - Arrests and searches of vehicles incidental to arrest, e.g. the arrest of Csongor Szucs on June 19, 2017 outside Hope, BC[4] and the arrest of Jacob Pereira on March 12, 2018 in Vancouver, BC;[5]
 - Tracking devices placed on the vehicles of certain associates (pursuant to tracking warrants obtained by the Project Territory investigators);
 - CCTV security video from the common areas of different stash sites in condominium towers in the Lower Mainland (some initially obtained through production orders until November 2017 when the practice of seeking production orders ceased);[6]
 - Key fob records for the stash sites (initially obtained through production orders until November 2017 when the practice of seeking production orders ceased);[7]
 - Telephone conversations intercepted at the correctional centre where Sam Kang was in custody (obtained by Project Territory pursuant to production orders);
 - Intercepted conversations in the visiting areas of the correctional centre where Sam Kang was in custody;
 - A formal authorization to intercept communications obtained on February 14, 2018 (P.2018/05F);
 - Audio and video room probes installed at stash site locations that were the subject of general warrants; and

· General warrants and search warrants issued in April 2018 through June 2018 in respect of various locations that various members of the groups appeared to be associated with - residences, stash sites, and an auto body shop.

- [14] In so far as the application for the Part VI wiretap authorization (the "Part VI") is concerned, on or about February 13, 2018, Detective Constable Kyle Davies (the "affiant") swore an affidavit seeking a judicial authorization to intercept private communications pursuant to s. 185 and s. 186(1.1) of the Code. The affidavit was approximately 464 pages in length. On or about February 14, 2018, Madam Justice Gropper granted the application and P.2018/05F was issued ("P5").
- [15] Starting shortly after the issuance of P5, the "wire went up" and the conversations of all the accused before the Court on this application were intercepted in some fashion between February 15, 2018 and approximately August 7, 2018 when take down arrests were initiated.
- [16] The Crown will seek to tender the private communications intercepted by the police pursuant to P5 as evidence against the accused at their trials. In respect of the two Kang Indictments (VA 27786 and VA 27787) as well as the Latimer Indictment (VA 27798), the bulk of the case against these 12 accused lies in the intercepted communications.
- [17] All of the accused intend to challenge the validity of the P5 intercepts alleging, amongst other things, that the affidavit filed in support of the application for P5 is invalid and that the interception of their private communications constitutes a breach of their rights under s. 8 of the Charter. All accused intend to seek to have their intercepted conversations excluded from the trial proper, pursuant to s. 24(2) of the Charter.
- [18] In order to achieve exclusion of the intercepted conversations, the accused, as one of many pre-trial applications, intend to bring a s. 8 Charter challenge to the validity of P5 and will seek a Garofoli review of the wiretap authorization. However, before the Garofoli reviews commence on the four indictments, many of the accused intend to pursue applications challenging the police conduct in a series of precursor searches that led up to and were included in the affidavit in support of the application for P5. They contend that the searches they intend to challenge were illegal and therefore in violation of the s. 8 Charter rights of various accused. For example, on the Latimer Indictment two such searches, the Brighthouse Way and the Pacific Rim Estates searches, have already been found to infringe the s. 8 rights of three of the accused - Kyle Latimer, Jacob Pereira and Csongor Szucs: *R. v. Latimer*, 2020 BCSC 488 ("Latimer 488"). Other applications to similar effect will be made with respect to other locations covered in the Latimer Indictment proceedings before me as well as on the Kang Indictment before the assigned trial judge.
- [19] A complicating feature of this application is that one affidavit was filed in support of the application for the wiretap authorization. The wiretap, when it went up, intercepted the conversations of all 13 accused who are before the Court on this joint hearing application. The 13 accused are not jointly charged on one indictment. Rather there are three separate direct indictments that have been preferred in respect of 12 of the accused. The

conversations of the 13th accused, Mr. Bopari, relate to his being both an unindicted co-conspirator on one of the indictments and an accused charged on the fourth direct indictment.

- [20] The lead defence parties on this legal argument are Csongor Szucs (VA 27798), Jacob Pereira (VA27798), Manveer Braich (VA27786), Jitesh Vagh (VA 27786) and Pashminder Bopari (VA 28709). Their counsel carried the bulk of the argument on this hearing. The remaining eight accused, through their counsel, either added further perspectives to the argument in oral submissions, or simply adopted the submissions of the lead defence parties.

III. ISSUES AND POSITIONS OF COUNSEL

- [21] The overarching issue raised on this application is this - what is the proper analytical framework to employ when excising unconstitutionally obtained information from an affidavit filed in support of a wiretap authorization: is it excision for one or excision for all? More specifically, is information derived from investigative steps found to have been in breach of the Charter excised from an affidavit solely as against the accused whose Charter rights were breached or as against all accused before the Court?
- [22] The issue of the scope of excision of information obtained in breach of one accused's Charter rights in cases with multiple accused on one indictment, let alone multiple accused on related indictments that arise out of one investigation, has not been addressed by the Supreme Court of Canada. Nor does it appear to have been directly addressed in decisions from the appellate courts of this country.

A. The general position of all 13 accused

- [23] The defence contend, collectively in essence, that excision is not a Charter remedy that springs from s. 24 of the Charter; rather it is a common law remedy informed by Charter values and as such is an aspect of the s. 8 evaluative stage. To that end, excision does not depend on the violation of one's own Charter rights.[8]
- [24] Excision, say the defence, is grounded in the rationale that the state is not entitled to benefit from the unconstitutional or illegal behaviour of the police, and that courts cannot condone police conduct in furthering an investigation in violation of an accused's Charter rights. The defence rely on three Supreme Court of Canada cases to support their position - R. v. Grant, [1993] 3 S.C.R. 223, R. v. Plant, [1993] 3 S.C.R. 281 and R. v. Wiley, [1993] 3 S.C.R. 263 (the "Grant trilogy").
- [25] As excision involves no balancing, the information is either "left in the ITO or affidavit" as it was not obtained in an unconstitutional or illegal manner or it is "out of the ITO or affidavit" because it was obtained in such a manner. All accused who have standing to challenge the wiretap authorization are entitled to the benefit of the excision. I will refer to this as the "excision for all" approach as advanced by counsel for Mr. Pereira.

[26] The thrust of the defence submission can be distilled to the following points:

- all 13 accused have standing to challenge the wiretap authorization as their private communications were intercepted pursuant to P5;
- all 13 accused are inextricably tied together from the same overall police investigation - Project Territory - that was built sequentially, i.e. investigative step upon investigative step;
- 12 of the 13 accused were originally charged together on one or other of two different informations filed in the Provincial Court of British Columbia but were separated out into three different direct indictments in the Supreme Court of British Columbia;
- there is only one wiretap authorization and it is common to all 13 accused currently before the Court;
- all 13 accused intend to challenge the precursor searches that were included in the affidavit where they are able to establish a reasonable expectation of privacy in the location or item searched;
- none of the 13 accused seek to invoke a third party's interest and endeavour to establish a breach of the rights of an individual foreign to the four indictments in order to challenge a search that is the subject of the proposed excision;
- the 13 accused only seek to share in the excisions for established Charter breaches - excision will only be sought after a challenge has already been successfully mounted by the individual whose Charter-protected interests were engaged;
- all 13 accused intend to challenge the facial validity of the wiretap authorization;
- all 13 accused intend to apply to conduct a sub-facial challenge to the validity of the wiretap authorization;
- excision pursuant to the common law and the principles from *Garofoli* does not require a second showing of standing by each accused to have unconstitutionally obtained evidence excised as against them personally;
- once standing to challenge the wiretap authorization is established, as it is in this case, each accused does not have to establish a second level of standing, that is, that his personal rights have been violated, to have information obtained in violation of the rights of other accused who are on one of these four indictments also excised as against him; and
- the basis for "excision for all" rests on the premise established in a line of decisions from the Supreme Court of Canada - known as the Grant trilogy - that the state ought not to be able to benefit from the illegal acts of the police.

[27] The accused approach the issue of excision from different perspectives but also adopt the positions advanced by their co-accused.

1. The position of the accused Szucs and Vagh

[28] Counsel for Szucs and Vagh contend that once an accused has established standing to challenge the validity of the wiretap authorization, i.e. the accused has a reasonable expectation of privacy in the intercepted conversations, then it matters not to whom the unlawful conduct of the police relates. As the focus of the Garofoli hearing is on the material relied upon in support of the application for the particular authorization, all unlawful conduct must be excised from the affidavit, regardless of whose rights have been breached. The policy reason for automatic excision, they contend, is that the state cannot benefit from the illegal acts of the police. They rely upon the comments of the Supreme Court in Kokesch and the Grant trilogy as providing the foundational pillars for this proposition.[9] Moreover, the purpose of excision is to ensure that the court prevents itself from becoming an "unintentional instrument of fraud".[10]

2. The position of the accused Braich, Pereira and Bopari

[29] Counsel for the accused Braich, Pereira and Bopari adopt the position advanced by counsel for Szucs and Vagh. In the alternative, they contend that the Court does not need to make a general ruling on the scope of the law of excision. Instead, they propose that the Court adopt what they describe as the "principled and flexible approach" to excision, based on the particular facts before the Court.[11]

[30] The factors they say support the application of a principled approach, which in this case lead to "excision for all", are as follows:

- a. The "Kang indictment" and the "Latimer indictment" are factually linked and result from the same investigation. The unlawful conduct alleged by the accused on the three indictments is highly inter-related.
- b. The investigation culminated in P5, a Part VI authorization to intercept private communications. All accused on the three indictments have standing to challenge the Part VI and intend to challenge the Part VI subfacially. Prior to the Garofoli review, a series of voir dires will be held to determine a number of alleged breaches.
- c. The Garofoli review, it is submitted, should take place in one joint hearing. The [accused] would only seek to excise information obtained in violation of the Charter rights of one (or more) of the accused presently before the Court. In other words, the [accused] will only seek to excise information obtained in violation of their own Charter rights or the Charter rights of their co-accused; [they] do not seek to establish or rely upon Charter breaches that relate to individuals not before the Court.
- d. The approach advocated by the Crown would lead to potentially unfair and inconsistent results, and would create unnecessary complexity and prolong the litigation.[12]

- [31] The position advanced by Braich, Pereira and Bopari finds direct support in two decisions from the Ontario Superior Court of Justice: *R. v. Guindon*, 2015 ONSC 4317 and *R. v. Hamid*, 2019 ONSC 5622. Additional authorities proffered in support of the excision for all approach include *R. v. Guilbride*, 2003 BCPC 177, *R. v. Sanghera*, 2012 BCSC 385 ("*Sanghera #1*"), *R. v. Sanghera*, 2012 BCSC 1197 ("*Sanghera #2*"), *R. v. Ali-Kashani*, 2017 BCPC 357, *R. v. Mediati*, 2018 ONCJ 164, and *R. v. Hibbert*, 2019 ONSC 3219.
- [32] The remaining accused adopted the positions advanced by the lead defence parties.
- [33] All 13 accused urge this Court to follow the Ontario decisions and conclude that excision should benefit all accused before the Court on this joint hearing.
- [34] The overall position of the defence then is that once a Charter breach has been established, no matter whose rights were violated, all accused on the indictments captured by this joint hearing should have the unconstitutionally obtained information excised from the affidavit in the Garofoli review. Thus, they contend excision for all is the appropriate approach.

B. The position of the Crowns

- [35] The Crowns contend that excision is a Charter remedy. They part company over the source of the remedy under s. 24 of the Charter. However, both Crowns maintain that excision is personal to the accused when it comes to excising information that has been obtained in breach of an accused's Charter rights. In other words, an accused cannot seek to have information obtained in breach of a co-accused's Charter right excised from an ITO when assessing the sufficiency of the information before the authorizing judge vis-à-vis the accused whose Charter rights have not been violated.
1. The position of the provincial Crown
- [36] The provincial Crown contends that excision is a Charter remedy grounded in s. 24(1) of the Charter. In order to excise unconstitutionally obtained information from an ITO, the accused must establish personal standing with respect to the Charter breach. In other words, it is insufficient for the rights of the accused to be engaged by what the authorization was seeking (private communications). Rather, to obtain excision, the accused's personal rights must be engaged by the information they seek to have excised from the affidavit.
- [37] The provincial Crown contends that the broad proposition from the Grant trilogy that the defence rely upon in this case - that the state cannot benefit from the unlawful conduct of the police - cannot be extrapolated so far as to mean all accused are entitled to have information obtained in breach of any one accused's Charter rights excised from the ITO. The reason for this, contends the provincial Crown, is simple; the Grant trilogy considered only a first party's Charter rights and excision. It did not examine the role of excision in the context of multiple accused.

- [38] The weight of appellate authority, argues the provincial Crown, repeatedly prohibits an accused from establishing and relying upon the breaches of third party Charter rights when challenging a prior judicial authorization to search something related to the accused. The decisions in *R. v. Vickerson*, 2018 BCCA 39 and *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.) are but two of the decisions the provincial Crown relies upon to support its thesis of excision for one. As Charter rights are personal to an accused, any benefit of those rights accrue only to the affected person and therefore excision of information obtained in breach of Charter rights must honour this foundational principle.
2. The position of the federal Crown
- [39] The federal Crown contends that excision is a Charter remedy that finds its basis in s. 24(2) of the Charter. To that end, they contend that there is a standing requirement that must be satisfied in order to have unconstitutionally obtained evidence excised from an ITO. They acknowledge their position sets up a "double standing" requirement for excision. First, the accused must have standing to assert a breach of a Charter right, e.g. a reasonable expectation of privacy. In the case at bar, all accused have standing to challenge the validity of P5 given that their private conversations were intercepted. In order to obtain excision from the affidavit, however, the accused must also establish that the information they seek to have excised relates to a breach of their own Charter right, not the right of a co-accused or a third party.
- [40] Thus, the federal Crown asserts that excision for one is the proper approach mandated by the jurisprudence and therefore only the individual whose Charter rights were breached is entitled to have unconstitutionally obtained evidence excised from an ITO. In support of their position, the federal Crown relies upon a number of authorities including: *Chang*, *R. v. Croft*, 2013 ABQB 716, *R. v. Nicholson*, 2016 BCSC 1375, *Vickerson*, and *R. v. Chau*, 2019 BCPC 246.

IV. ANALYSIS

- [41] At first blush, the excision for all approach has a superficial attraction by making it appear that the review of the sufficiency of the affidavit for P5 would be less complicated; however, that would not in fact be correct. The review of the sufficiency of the affidavit remains tied to the assessment as to whether the statutory criteria have been met as against each accused - thus the sufficiency of the affidavit will have to be reviewed 13 times, not once, no matter whether the approach is excision for one or excision for all.
- [42] As noted in the introduction section, comprehensive written arguments were filed and in excess of 100 authorities were cited in the various legal briefs and referred to in oral argument. While I have considered the authorities provided, I have not found it necessary in these reasons to refer to every single case cited.

A. General Principles

- [43] It is a foundational principle of Charter jurisprudence that all substantive Charter rights are personal to the accused: *R. v. Edwards* [1996] 1 S.C.R. 128, para. 45(2); *R. v. Cheung* (1997), 119 C.C.C. (3d) 507 (B.C.C.A.) (paras. 65-71 and cases cited therein), leave to appeal to S.C.C. ref'd [1997] S.C.C.A. 596; *R. v. Ferguson*, 2008 SCC 6, paras. 59-61; Croft.
- [44] A further touchstone of Charter analysis is the importance of context, especially when it comes to searches and the reasonable expectation of privacy: *Edwards*, para. 45; *R. v. Cole*, 2012 SCC 53, para. 52; *R. v. Spencer*, 2014 SCC 43, para. 17; *R. v. Marakah*, 2017 SCC 59.
- [45] The accused take no issue with the proposition that Charter rights are personal to the accused; however, they confine it to the issue of remedies under the Charter be it s. 24(1) or s. 24(2). Their premise is that excision is not a Charter remedy but rather a common law remedy informed by Charter values. To that end, then, they contend that because excision is not a Charter remedy there is no need for a personal connection between the accused and the unlawful conduct that led to the information sought to be excised.
- [46] I must respectfully disagree. If the thesis advanced by the defence were correct, then accused would be permitted to litigate breaches of the Charter rights of third parties in order to have unconstitutionally obtained material excised from an affidavit filed in support of a judicial authorization. The jurisprudence unequivocally establishes they are not permitted to do so: *R. v. Klassen*, 1994 CanLII 2831 (B.C.C.A.); *Chang*; *R. v. Hockley*, Unreported Judgment (October 8, 2004), Kelowna Registry 55440 (B.C.S.C.); *R. v. Hok*, 2005 BCCA 132, para. 11; *Vickerson*; *R. v. Holmes*, 2019 BCCA 138, para. 24; *R. v. Shayesteh* (1996), 111 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Brounsuzian* (sub. nom. *R. v. Maric*), 2019 ONSC 4481.
- [47] In order to analyse the excision for all approach and address the flaw in its logic, it is appropriate to commence with some pre-Garofoli history to set the context for the development of the concept of excision.

B. Prior to the Charter what did the jurisprudence permit for the review of wiretap authorizations?

- [48] Prior to the ground breaking Supreme Court decision in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the review process for challenges to wiretap authorizations was severely circumscribed and somewhat cumbersome. As noted by Hubbard et. al in their text *Wiretapping and Other Electronic Surveillance: Law and Procedure* ("Wiretapping"), [13] pre-Garofoli, the review of wiretap authorizations was a procedural quagmire. The Supreme Court in *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 noted as much and succinctly summarized the pre-Garofoli morass that existed for the review of wiretap authorizations:

- [6] In the years leading up to *Garofoli* and its companion cases, the law with respect to testing the admissibility of wiretap evidence had become what Sopinka J. described as a "procedural quagmire" (*Garofoli*, at p. 1445). The various procedures, each addressing a discrete procedural challenge and drawing on different bases for jurisdiction, had generally become known by the name of the cases that initiated them. They were the following:
- (1) a *Parsons* voir dire before the trial judge to determine whether the authorization is valid on its face whether the interception was executed within its terms, and whether statutory terms were complied with, the remedy being exclusion under the former s. 178.16 of the Criminal Code (*R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), aff'd [1980] 1 S.C.R. 785 (S.C.C.) (sub nom. *Charette v The Queen*));
 - (2) a *Wilson* application before the issuing court to determine the substantive or subfacial validity of the affidavit, the remedy being the setting aside of the authorization (*R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.));
 - (3) a *Garofoli* hearing before the trial judge to determine whether the authorization complies with s. 8 of the Canadian Charter of Rights and Freedoms, the remedy being a determination of whether the evidence should be excluded under s. 24(2) of the Charter; and
 - (4) a *Vanweenan* hearing before the trial judge to determine whether the authorization names all "known" persons as required by the former ss. 178.12(1)(e) and 178.13(2)(c) of the Criminal Code, the remedy being exclusion under the former s. 178.16 (*R. v. Chesson*, [1988] 2 S.C.R. 148 (S.C.C.)).
- [49] The *Wilson* application, the nomenclature derived from the pre-Charter case of *R. v. Wilson*, [1983] 2 S.C.R. 594, was the main mode of challenging a wiretap authorization prior to *Garofoli*. To succeed on a *Wilson* review the applicant was required to demonstrate serious non-disclosure or material misrepresentations in the affidavit supporting the authorization. Thus, the threshold to challenge a wiretap under the *Wilson* procedure was extremely high. Essentially, the applicant had to demonstrate that the authorization was obtained by nothing less than fraud.[14] This restrictive approach was grounded, in part, by the Court's conclusion that collateral attacks on wiretap authorizations were not permitted. Indeed, the decision in *Garofoli* noted as much where Mr. Justice Sopinka, writing for the majority, observed (pp. 1449j-1450b):

The source of review under *Wilson* was the general jurisdiction of the courts to set aside their own orders, either by action in the High Court or by a motion to set aside an *ex parte* order. Resort to this jurisdiction attracted the restrictions inherent in the exercise of this jurisdiction both with respect to the available grounds and with respect to collateral attacks on court orders. These restrictions are fully explained in *Wilson*. The Charter provides a clear alternative basis for resort to the court and with it the appropriate grounds for a determination as to whether there has been a breach of s. 8.

[Emphasis added.]

- [50] Thus, Wilson established that authorizations could only be set aside for sub-facial validity if fraud on the issuing judge was established.[15]
- [51] In *R. v. Bisson* (1994), 87 C.C.C. (3d) 440, aff'd [1994] 3 S.C.R. 1097, Mr. Justice Proulx outlined (at pp. 451-52) the particular difficulties that the pre-Garofoli procedure of Wilson created - a division of jurisprudential opinion on the effect that non-disclosure, misleading disclosure and even fraud had on the authorization. One line of authority concluded that it vitiated the authorization outright, whereas another line of authority required an applicant to go on and establish a "causal nexus" between the granting of the authorization and the non-disclosure, misleading disclosure or even fraud (*Bisson*, p. 451b-c).[16] In the era of the Wilson application, the result of meeting the high threshold was that the authorization was usually set aside, and so excision was not an instrument in the judicial toolkit.

C. How did Garofoli and Bisson change the landscape for challenging wiretap authorizations?

- [52] With the inception of the Charter and the rapid development of the s. 8 jurisprudence, the Court in *Garofoli* consolidated the different review hearings (*Parsons*, *Wilson*, *Vanweenan*), and removed the complexity created by the earlier jurisprudence. *Garofoli* used the overriding constitutional nature of the challenge to the admissibility of the evidence as the relevant framework of analysis: *Pires*, para. 7. In doing so, the decision in *Garofoli* expanded the grounds for review beyond the restrictions imposed by *Wilson*: *Bisson*, p. 453b-h.
- [53] The streamlining of the authorization review processes brought about by *Garofoli* makes it the main mechanism for reviewing wiretap authorizations. Indeed, the nomenclature for a review of the validity of a wiretap authorization is a *Garofoli* hearing. Although *Garofoli* outlines how wiretap authorizations are reviewed under the Charter, it has come to encompass the process for the review of any prior judicial authorization - be it production order, tracking warrant, search warrant, or a Part VI wiretap authorization.[17]
- [54] The purpose of a *Garofoli* hearing is to explore whether the affidavit material filed in support of the application justified the issuance of the authorization (or warrant). *Garofoli* is essentially a Charter-based application and occurs in the context of a claim that the applicant's s. 8 Charter rights have been breached as the authorization should not have issued. If the applicant is successful in setting aside the authorization, any searches conducted pursuant to it become warrantless. If the Crown cannot otherwise justify the warrantless search, then the search conducted pursuant to the quashed authorization amounts to a s. 8 Charter violation.
- [55] The *Garofoli* hearing has two stages - the threshold stage and the assessment or evaluation stage. The threshold stage involves determining whether applicants have standing to challenge the authorization. If their privacy interests are engaged - e.g., their conversations have been intercepted - they have standing to challenge the authorization.

- [56] The concept of excision, in the sense of removing offending information from an affidavit or ITO, was not specifically addressed in *Garofoli*, save for a brief reference in the *Garofoli* Step Six procedure - where information redacted to protect informer privilege might have to be considered by the reviewing judge in the absence of the accused (p. 1461).
- [57] The evaluative stage of a *Garofoli* hearing can generally be divided into three steps:
- i. The first step involves determining what, if any, information must be removed - also frequently referred to in the case law as subtraction, excision, deleting or expunging - from the ITO.
 - ii. The second step is removing or excising all offending material, including erroneous, misleading and fraudulent statements, from the ITO. Depending on the number of accused involved in the application and the nature of the reason for the excision, e.g. misleading statements vs. breach of a Charter right, excision occurs for all or some of the accused. A related step in this part of the assessment process is amplification. As that process is not engaged on this application, nothing further needs to be said about it.
 - iii. The final step is reviewing the ITO as edited to determine whether there remains sufficient information that could support the issuance of the authorization.
- [58] The Quebec Court of Appeal noted in *Bisson* that the *Grant* trilogy explained and completed the *Garofoli* decision (p. 460).
- [59] In *Bisson*, a case with multiple accused facing charges of conspiracy to traffic in narcotics, the trial judge set aside a wiretap authorization on the basis of what he considered to be fraud or non-disclosure. He concluded that the issuing judge had been deliberately misled when the police failed to disclose that the target's son, who had implicated the target in drug trafficking and on whom the police were relying to justify the order sought, had recanted his information two days later. The trial judge concluded that if the issuing judge had known the truth - that the son had recanted - he might not have issued the authorization. In overturning the acquittals and ordering a new trial, Proulx J.A., wrote (pp.456h-457c):

Since the approach to be taken by the reviewing judge consists of asking himself about the consequences of the non-disclosure, fraud or misleading evidence, how must one assess their effects on the affidavit as a whole? The misleading element which is established during the review can very well, as in the present case, only go to some of the facts set out in the affidavit: if it were possible to overcome its effects at the time of the review, nothing prevents the remainder of the affidavit which exists independently of the correction, from being quite sufficient to permit the conclusion that the authorizing judge could have granted the authorization. In accordance with the above-mentioned principles, the remainder of the affidavit must be assessed using the "*Garofoli*" test: Could the judge have granted the authorization on the basis of the remainder of the affidavit, once the affidavit is purged of its erroneous elements?

I would refer to what this court decided in *Fafard and Hiscock* where it held that the remaining facts cannot be ignored despite the demonstration of materially different facts or other elements in the nature of non-disclosure.

[60] The paragraphs of the ITO that contained the false and deliberately misleading allegations were excised as against all accused, with good reason - there had been a fraud perpetrated upon the authorizing judge, conduct antithetical to the principles of full, fair and frank disclosure expected of applicants in the prior authorization process. Although there had been a fraud and the offending material was excised as against all accused, the authorization was not automatically vitiated, as it might have been in the pre-Garofoli era of a Wilson application. Instead, Proulx J.A., applying the tests set out in *Garofoli*, *Grant* and *Wiley*, stated (p. 458c-d):

As the reviewing judge must determine whether despite this defect the wiretap authorization could have been granted, there is a corresponding obligation for the reviewing judge to strike out the allegations which are defective, to reconsider the remaining evidence in the affidavit and to ask himself whether despite this defect, and based on the remaining evidence, the authorization could have still been granted.

[61] Justice Proulx determined that notwithstanding the excision of the offending paragraphs from the affidavit, the authorization could still have issued.

[62] The Supreme Court of Canada dismissed the appeal as of right by the accused and affirmed the decision in *Bisson*, stating (p. 1098b-e):

the trial judge proceeded to vitiate the wiretap authorization finding that the police officer deliberately misled the authorizing judge. In so doing, the trial judge fell into error.

As stated in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the wiretap authorization as was done by the trial judge. The trial judge should have examined the information in the affidavit which was independent of the evidence concerning Eric Lortie in order to determine whether, in light of his finding, there was sufficient reliable information to support an authorization. Proulx J.A., writing for the Quebec Court of Appeal (citation omitted), carefully reviewed and analyzed the affidavit after excluding the paragraphs directly affected by the retraction. On the basis of this analysis, we are satisfied that there was sufficient independently verifiable information which was not affected by the trial judge's finding and upon which an authorization could reasonably be based.

[63] *Bisson* is an example of excision for all but must be confined to the context of offending information that deliberately misled the authorizing judge. This is logical, as it is this conduct that offends the ex parte nature of such applications and the obligation of the police and Crown to ensure full, fair and frank disclosure in the materials submitted in support of the application for a wiretap authorization. This form of police misconduct has to be excised

against all affected by the authorization because its inclusion in the ITO would subvert the nature of the ex parte process.

- [64] That misleading information was excised from the affidavit as against all accused in Bisson does not mean the decision stands for the proposition that information obtained in breach of one accused's Charter rights must be excised as against all accused caught by the authorization. As in most facets of the criminal law and Charter litigation, context is what determines how broadly the excision instrument is to be employed.

D. What did Kokesch and the Grant Trilogy decide?

- [65] Resort to the nomenclature and procedure of excision in the context of the review of prior judicial authorizations appears to have made its jurisprudential debut at the Supreme Court of Canada in the Grant trilogy of 1993. Before the Grant trilogy there was *R. v. Kokesch*, [1990] 3 S.C.R. 3.
- [66] Kokesch involved an investigation into a marijuana grow operation. At issue in that case was a warrantless search of the perimeter of the accused's residence conducted by two RCMP officers in the absence of anything more than suspicion. During the course of the perimeter search - conducted at approximately 2 a.m. - the officers made observations consistent with a marijuana grow operation including the state of window coverings, sounds of electrical humming from the basement area and an odour of marijuana emanating from vent areas covered over by plywood. As a result of these observations and other information, the officers obtained a search warrant and executed it later that same day.
- [67] The trial judge, Mr. Justice Cashman, concluded that the officers had engaged in a warrantless search of the property surrounding the residence on the basis of mere suspicion. As the issuance of the search warrant was contingent upon what was obtained during the warrantless search of the perimeter of the accused's residence, the trial judge found the search warrant to be invalid. Having concluded that the accused's s. 8 rights had been reached, Cashman Co. Ct. J. went on to conduct a s. 24(2) analysis and concluded that the evidence obtained had to be excluded.
- [68] At the Supreme Court of Canada, while unanimous that the accused's s. 8 Charter rights had been violated in the circumstances, the Court split 4:3 on the result of the s. 24(2) analysis. Chief Justice Dickson in dissent concluded that notwithstanding the s. 8 breach, the evidence was admissible under s. 24(2) as the evidence was real evidence and the Charter violation was relatively minor and a product of the officers' misapprehension of the law (p. 26d-g).
- [69] Writing for the majority, Mr. Justice Sopinka determined that the evidence obtained pursuant to the warrantless search had to be excluded under s. 24(2). The majority took an entirely different view of the seriousness of the violation in issue and the effect that exclusion (or admission) would have on the reputation of the administration of justice. Characterizing the s. 8 violation as flagrant, Sopinka J. wrote (at p. 35a-b) that the Court

"must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy."

- [70] Understood in this context, it is apparent that Kokesch was not about the excision of unconstitutionally obtained evidence from the ITO supporting the search warrant. Rather, it addressed the admission or exclusion of the evidence ultimately seized under the search warrant under s. 24(2) of the Charter. The case established that where the fruits of an unconstitutional search form the foundation for a subsequent judicial authorization, evidence gathered through execution of the authorization is "obtained in a manner" that infringes the s. 8 rights of the subject of the initial unconstitutional search.
- [71] In the Grant trilogy, Sopinka J. authored all three decisions, for a unanimous Court. Grant is the lead decision with the full Court participating in the hearing of the appeal. Plant and Wiley were heard five months before the appeal in Grant and involved only seven members of the Court.
- [72] All three cases dealt with the issue of police officers conducting unlawful perimeter searches - described as trespasses by state agents on private residential property in the absence of urgency or necessity to preserve evidence and with alternative investigative means available to the investigating officers. In all three cases, there were single accused charged with no co-accused.
- [73] In Grant, Sopinka J. noted that Kokesch involved a search warrant that was defective as the sole basis for its issuance was the information that the police obtained through the s. 8 Charter violation - the warrantless perimeter search (p. 251f-g). The issue the Court was faced with in Grant was whether the search warrant that had been issued could still stand, that is, still be valid, if the information obtained through the trespass perimeter search was removed from the ITO. The respondent accused had conceded that there were sufficient grounds to support the issuance of the search warrant prior to the police undertaking the warrantless perimeter searches. It is in that context that the concept of excision of information obtained in breach of an accused's Charter rights appears (at pp. 251g to 252a):
- [I]n circumstances such as the case at bar where the information contains other facts in addition to those obtained in contravention of the Charter, it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant: Garofoli, supra. In this way, the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event. Accordingly, the warrant and search conducted thereunder in the case at bar will be considered constitutionally sound if the warrant would have issued had the observations gleaned through the unconstitutional perimeter searches been excised from the information.
- [74] After determining that the search warrant would indeed have issued in the absence of the unconstitutionally obtained evidence, the Court went on to assess whether the evidence obtained pursuant to that valid search warrant nevertheless ought to be excluded under s.

24(2) due to the possibility that the entire search process had been tainted by the warrantless perimeter searches. Justice Sopinka noted that s. 24(2) was triggered by the initial s. 8 violation of the perimeter searches. In the end, after balancing the three competing considerations that the s. 24(2) analytical framework required, Sopinka J. concluded that the admission of the evidence would not bring the administration of justice into disrepute.

[75] In *Wiley*, Sopinka J. referred back to the earlier decision in *Garofoli* and stated (pp. 273j to 274b):

Having concluded that the warrantless perimeter search violated s. 8 of the Charter, it is necessary to determine the effect which inclusion of facts obtained during the unconstitutional search in the information in support of the warrant has on its validity. In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, this court concluded that a search warrant issued in reliance, in part, on facts which are found to be inadmissible on review will continue to be valid if it can be shown that the warrant would have issued even if the inadmissible facts had been excised from the information sworn to obtain the warrant.

[76] Justice Sopinka reviewed the circumstances in *Wiley* and concluded that once the perimeter search information was excised from the ITO, the search warrant nevertheless remained supported on the basis of the remaining evidence in the ITO and therefore no s. 8 breach occurred in respect of the search conducted pursuant to the warrant (p. 277f-j).

[77] In light of the s. 8 breach that occurred with the warrantless perimeter search, Sopinka J. went on to conduct the s. 24(2) analysis and reached the same conclusion as in *Grant* - the evidence, notwithstanding the s. 8 violation of the perimeter search, was admissible. Justice Sopinka noted that the circumstances in *Wiley* (and indeed *Grant* and *Plant*) were distinguishable from *Kokesch* as in the latter case the officers only acted on suspicion, whereas in *Wiley* they had acted on reasonable grounds (p. 279d-h).

[78] In *Plant*, the same issue arose: a search warrant issued in part on information obtained through an unlawful perimeter search. It is in this case that Sopinka J. stated (at p. 296e-f):

This Court has determined that peace officers cannot benefit from their own illegal acts by including in informations sworn to obtain warrants facts which were retrieved through searches without lawful authority. See *Grant* and *Kokesch*. As such, in order to assess whether the search and seizure conducted under warrant in the case at bar were in violation of s. 8, it is necessary to determine whether the officers can be said to have had reasonable grounds to believe that a narcotic was contained in the appellant's residence in contravention of the NCA in the absence of the observations made during the warrantless perimeter search. See reasons in *Grant* and *Wiley*.

[79] After removing the observations of the officers made during the warrantless perimeter search from consideration of the sufficiency of the ITO for the search warrant, Sopinka J. reviewed the balance of the information in support of the search warrant and concluded that even with the removal of the offending information, the search warrant remained supportable and properly issued. As in *Grant* and *Wiley*, Sopinka J. went on to assess

whether the evidence gathered pursuant to the execution of the search warrant ought to be excluded under s. 24(2) in light of the s. 8 breach occasioned by the warrantless perimeter search. He concluded that the balancing of the three s. 24(2) criteria militated in favour of admission of the evidence.

[80] For purposes of the present application, it is unquestionable that the Grant trilogy supports the proposition that evidence obtained in violation of an accused's own Charter rights must be excised from the ITO before a court moves on to consider whether the authorization could nevertheless have issued. How far this proposition can be extrapolated is the crux of the issue to be decided, as the Grant trilogy did not examine excision in the context of multiple accused, not all of whom had their Charter rights infringed. And so, in my view, the Court's comments about excision preventing the state from benefiting from the illegal acts of police officers cannot be extrapolated too broadly unless there is compelling appellate authority to the effect that it is appropriate to do so. Thus far, the Supreme Court of Canada has not been called upon to make such a determination. The question is whether any other appellate courts have.

[81] My view as to the limitations of the Grant trilogy is not new. Rather, it is informed both by the obvious point that the trilogy cases only dealt with single, not multiple, accused and the observations in decisions such as Chang from the Ontario Court of Appeal; Croft, from the Alberta Court of Queen's Bench; Brounsuzian, from the Ontario Superior Court of Justice; and Hockley from the British Columbia Supreme Court, which all support this conclusion.

E. What is excision - a Charter remedy, a common law remedy informed by Charter values, or something else?

1. The general contours of excision

[82] The noun "excision" used in its ordinary, grammatical sense describes the act of cutting out or erasing a passage from a book, a clause from a bill, etc.[18] In the jurisprudential sense, employed in the context of reviewing judicial authorizations such as production orders, search warrants and Part VI wiretap authorizations, excision refers to the process of editing or removing "tainted" or questionable information contained in the ITO from the reviewing judge's consideration of the sufficiency of the application materials. Once those passages are removed, the question becomes whether there remains in the affidavit at least some reasonably believable evidence that could have formed a basis for issuing the authorization. [19] To this end then, excision is more akin to a mechanism or instrument than a remedy. It is but one procedural step in the Garofoli review of the materials placed before an authorizing judge or justice in the prior authorization process.

[83] The concept of excising information from an ITO made its jurisprudential debut with the Grant trilogy but its application is not limited to investigative information obtained in breach of Charter rights. The types of information that can be excised from an affidavit or ITO include:

- i. Certain types of erroneous or false information;
- ii. Irrelevant or improper information;
- iii. Misleading or inaccurate information;
- iv. Unlawfully obtained information;
- v. Conclusory information lacking any factual underpinning;
- vi. Privileged information;^[20] and
- vii. Information obtained as a result of breaches of an accused's Charter rights.^[21]

[84] A succinct description of the function of the Garofoli review process is found in *R. v. Paryniuk*, 2017 ONCA 87 where Mr. Justice Watt, writing for the Court, reviewed the Garofoli procedure in the context of an appeal challenging a trial judge's ruling on a Garofoli review of a search warrant.^[22] Justice Watt explained:

[42] A trial judge who has to determine whether a search was authorized by law must decide whether the conditions precedent to the search authority on which reliance is placed have been satisfied. To do this, the trial judge conducts a hearing -- a Garofoli application. At that hearing, the judge examines the material before the authorizing judge or justice, material which may differ from the original because portions have been redacted, for example, to protect confidential informer privilege. Evidence at the Garofoli hearing may persuade the trial judge that parts of the original material should be excised or amplified. In the end, the record becomes fixed for review purposes.

[43] What the trial judge is required to decide on the Garofoli application is whether, based on the record before the authorizing judge or justice, as amplified on the Garofoli review, the authorizing judge could have granted the enabling order: *Garofoli*, at p. 1452. The judge must decide whether, after excision and amplification, there was reliable evidence which might reasonably be believed on the basis of which the search authority could have been issued: *Araujo*, at paras. 51, 54; *R. v. Campbell*, 2011 SCC 32, [2011] 2 S.C.R. 549 (S.C.C.), at para. 14; *R. v. Morelli*, 2010 SCC 8, [2018] 1 S.C.R. 253 (S.C.C.), at para. 40. The onus of establishing that the search authority was improvidently granted rests upon the accused: *Campbell*, at para. 14; *Morelli*, at para. 131; *Québec (Procureur général) c. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708 (S.C.C.), at para. 68.

[45] The assessment required by Garofoli is contextual. What is involved is an analysis to determine whether there remains sufficient reliable information upon which the search authority could be grounded. This approach appropriately balances the need for judicial finality and the need to protect systems of pre-authorization: *Araujo*, at para. 54. In this analysis, facts originally omitted are also considered: *Morelli*, at para. 60.

[46] Essential features of the Garofoli application are excision and amplification. Erroneous information is excised from the ITO and disregarded in determining whether the essential evidentiary predicate remains: Araujo, at para. 58; Campbell, at para. 14; Morelli, at para. 41. But errors made in good faith may be corrected by amplification through the introduction of evidence that was available when the ITO was prepared: Morelli, at paras. 41-43.

[Emphasis added.]

[85] That excision is but a procedural step in the overall Garofoli review is made even more clear in *R. v. Booth*, 2019 ONCA 970. In *Booth*, Mr. Justice Paciocco, writing for the Court, examined the sufficiency of an ITO for search warrants issued for the residence and digital home security videos of the accused, a suspect in a robbery of a salon. The appellant was convicted by a jury and on appeal his challenge to the sufficiency of the ITO was allowed. Justice Paciocco found the trial judge had erred in upholding the validity of the two search warrants. When erroneous and misleading information was excised from the ITOs, there was insufficient information to support reasonable and probable grounds to issue the search warrants. The searches were found to be contrary to s. 8 of the Charter and the evidence ought to have been excluded (para. 7).

[86] After discussing the obligations of an affiant to provide full and frank disclosure and how that is dealt with if not done, Paciocco J.A. discussed the procedures of amplification and excision in the Garofoli review and wrote:

58. Sometimes erroneous information in an ITO will be corrected by simply removing it. Information that should not have been included in the warrant will always be "excised" in this way: Morelli, at para. 45.

[87] And in addressing when amplification of erroneous information is not permitted - where it is more than a minor, technical requirement - Paciocco J.A. wrote:

63. Where the erroneous information cannot be corrected because the error is not a "minor, technical" one, it is obvious that it must be excised in its entirety. This is because the uncorrected, erroneous information simply cannot be permitted to remain in the ITO, thereby providing an inaccurate boost to the case for reasonable and probable grounds.

[88] In *Booth*, five areas in the ITO for the residential search warrant were identified as being capable of misleading the authorizing justice (para. 83). Two areas (information about watches and a licence plate believed to belong to the robbers' get away vehicle) were excised (paras. 87-88) to correct the ITO before the sufficiency review was undertaken (para. 96). Once the corrections through excision and amplification were made, Paciocco J.A. went on to review the sufficiency of the ITO (paras. 98-107) and concluded that the ITO, as edited, fell "decisively short of showing a credibly-based probability that evidence of the crime" would be found in the residence. The search warrant for the residence was quashed.

- [89] In assessing the ITO in support of the search warrant for the digital video recorder, Pacicco J.A. did not excise any information, nor did he find it necessary to permit amplification of the information that had been left out because the ITO as it was before the Court did not disclose reasonable and probable grounds.
- [90] More recently in *R. v. Slemko*, 2020 BCCA 207 at paras. 53-55, our Court of Appeal endorsed the law with respect to challenges to the validity of search warrants as outlined by Watt J.A. in *R. v. Sadikov*, 2014 ONCA 72 at paras. 84-89 and by Moldaver and Côté JJ., writing for the Supreme Court, in *World Bank Group v. Wallace*, 2016 SCC 15 at paras. 121-123. These decisions refer to excision as a step in the Garofoli review process when assessing the sufficiency of a warrant or authorization; a process which remains a contextual analysis.
- [91] To characterize excision as simply a Charter remedy would necessarily circumscribe its application, limiting it to the person whose Charter right has been affected. Hence, the Crowns' contention of excision for one. But as outlined above, excision is employed to remove more than just information that has been obtained in breach of Charter rights. When the information to be excised is misleading or erroneous information, the information is excised as against all accused. The decision in *Bisson* makes that clear as does the decision in *Sanghera #2*, addressed later in these reasons.

2. Excision is not a s. 24(2) Charter remedy

- [92] As noted earlier, the federal Crown takes the position that excision is a Charter remedy under s. 24(2) thus requiring standing be established by the accused in respect of the information to be excised - that is, that their personal Charter right has been violated, not a co-accused's.
- [93] I would not accede to this argument for the following reasons.
- [94] First, s. 24(2) of the Charter is a specific remedial provision aimed at addressing the admissibility or otherwise of evidence obtained in breach of an accused's Charter rights. Section 24(2) of the Charter provides:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- [95] Accordingly, by its express language, this remedial provision addresses admissibility of evidence, not excision of information. The decision of the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32 makes this abundantly clear.
- [96] Second, excision of information from an ITO is not the same thing as exclusion of evidence. Madam Justice Holmes (as she then was) determined this point in *Sanghera #1*.

- [97] In Sanghera #1, Holmes J. was asked to determine whether firearms seized in searches of the accused's vehicle were "obtained in a manner" that infringed the accused's s. 10(a) and (b) Charter rights. The facts of the case are convoluted. Summarily though, the Crown conceded breaches of s. 10(a) for four of the five accused and s. 10(b) for three of the five accused. Justice Holmes found a s. 10(b) breach for a fourth accused. The breaches occurred in the context of the de facto arrest of the accused and search of their vehicle. The defence sought to have the evidence about the guns and other items seized during the arrest excised from the ITO sworn in support of an application for a Part VI authorization. They argued that if the Court concluded that the seized items had been "obtained in a manner" which infringed the accused's Charter rights then the references to those items and their seizure from the vehicle had to be excised from the ITO. Thus, the defence endeavoured to import aspects of the s. 24(2) analysis into the Garofoli assessment.
- [98] Justice Holmes rejected the approach advanced by the defence and concluded that the Garofoli test for the review of the sufficiency of a wiretap authorization and the s. 24(2) test for exclusion of evidence are distinct creatures. In my view, Holmes J. makes it clear that excision is not a s. 24(2) Charter remedy.
- [99] To that end then, I disagree with the federal Crown that excision is a Charter remedy grounded in s. 24(2) principles. As Holmes J. noted in Sanghera #1, the decision in Mahmood makes this fundamentally clear:
- [30] The situation is not unlike that in R. v. Mahmood, 2011 ONCA 693, where Watt J.A. for the Court described two contexts in which prior unconstitutional conduct (from the previous constitutionally-flawed searches) had potential relevance in that case:
115. Prior unconstitutional conduct is relevant in two discrete contexts in this case. The first has to do with excision from the ITO of information obtained by unconstitutional means. The second relates to the influence of prior unconstitutional conduct on the application of s. 24(2) to evidence obtained later in the investigation and not directly as a result of the previous constitutional infringement.
116. The parties agree about excision. Information obtained by unconstitutional means must be excised from the ITO on Garofoli review and what remains, as amplified on review, must be assessed to determine whether the warrant could have issued: Araujo, at para. 52; Wiley, at pp. 273-274; and R. v. Grant, [1993] 3 S.C.R. 223, at p. 251.
117. Prior unconstitutional conduct may also have an impact on the decision about admissibility of evidence obtained by later Charter infringement, at least where there is a sufficient nexus between the prior infringement and the later gathering of evidence: R. v. Strachan, [1988] 2 S.C.R. 980, at pp. 1005-1006; Grant [1993], at pp. 254-255; Wiley, at p. 278; and Plant, at p. 299.
- [100] A third reason to reject the proposition that excision is a s. 24(2) Charter remedy lies in the comments of Mr. Justice Code in R. v. Jaser, 2014 ONSC 6052 where he too muses that excision is not a Charter remedy (para. 28). I address Jaser in further detail below.

- [101] Following on the comments of Code J. in Jaser, Mr. Justice MacDonnell in R. v. Lam, 2015 ONSC 2131 (aff'd 2017 ONCA 329) addressed the nature of excision as well. The federal Crown appears to suggest that MacDonnell J. found excision to be part of the first stage of the s. 24(2) analysis and from that reasons that excision is a s. 24(2) remedy. I cannot agree with this interpretation. To the contrary, MacDonnell J. determined that excision is not a s. 24(2) remedy:
- [55] As Justice Code observed recently in R. v. Jaser and Esseghaier, 2014 ONSC 6052, Grant, Wiley and Plant have been consistently interpreted as laying down a 'rule' requiring courts reviewing the sufficiency of informations to obtain search warrants to excise facts obtained by means of a Charter breach regardless of the gravity of the breach and without the kind of assessment of contextual factors that takes place in a s. 24(2) analysis. The rule has not been without its critics, however. It is anomalous, some have argued, that facts derived from a breach of the Charter must be 'automatically' excluded on a mere evidentiary hearing while at the trial itself, where guilt or innocence is at stake, unconstitutionally obtained evidence can only be excluded after the careful balancing required by s. 24(2) (footnotes excluded).
- [56] The short answer to that criticism, as Justice Code pointed out, is that if the rule of excision is to be modified, the modification will have to come from the Supreme Court of Canada. The better answer, however, may be that the criticism is based on a misconception. Excision has nothing to do with the admissibility of evidence. Unlike s. 24(2), it is not a remedy for a breach of the Charter. Its purpose is not to determine whether evidence obtained pursuant to a search warrant or other judicial authorization should be admitted or excluded at trial. Rather, it is a mechanism for determining the significance of prior unconstitutional conduct in the chain of events that led to the evidence that is sought to be excluded. It enables a court to determine whether the evidence would have been obtained in any event of the breach, which in turn will assist in determining whether the evidence was 'obtained in a manner' that infringed the accused's rights and the extent of the impact of the breach on the accused's Charter-protected interests.

[Underline emphasis in original. Italics emphasis added.]

- [102] Accordingly, I conclude that excision is not a s. 24(2) Charter remedy.

3. Excision is not a s. 24(1) Charter remedy

- [103] The provincial Crown argues that excision is not a remedy under s. 24(2) of the Charter but contends that the logical source for this remedial power lies in s. 24(1) of the Charter.

- [104] Section 24(1) of the Charter provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

- [105] The provincial Crown acknowledges that its position is novel and that there are no cases that specifically support it. Instead, counsel relies upon the decision in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62.
- [106] In *Doucet-Boudreau* the Court was dealing with a remedy for the enforcement of French language rights (protected by s. 23 of the Charter) in the province of Nova Scotia. It was the inaction of the government of Nova Scotia in fully funding and advancing French language rights within the school system that precipitated the litigation by Francophone parents seeking to have their children educated in the language of the minority in publicly funded French language school facilities. As the majority noted (para. 43), a remedy under s. 24(1) is available where there is some government action, beyond the enactment of an unconstitutional statute or provision, that infringes a person's Charter rights.
- [107] The provincial Crown contends that the excision of information obtained in breach of the Charter from an ITO "appears to check all the boxes set out in *Doucet-Boudreau* with respect to s. 24(1) remedies." Those boxes, contends the Crown, are as follows:
- i. s. 24(1) may be invoked "where there is some government action that infringes a person's Charter rights" (*Doucet-Boudreau*, para. 43);
 - ii. s. 24(1) remedies should "meaningfully vindicate[s] the rights and freedoms of the claimants" (para. 55);
 - iii. s. 24(1) remedies must be "relevant to the circumstances of the claimant and must address the circumstances in which the right was infringed" (para. 55); and
 - iv. s. 24(1) remedies may need to be "novel and creative" to ensure the "vindication of fundamental rights and freedoms enshrined in the Charter" (para. 59).
- [108] The provincial Crown contends that excision meets all of these criteria. With respect, I must disagree.
- [109] First, it is not clear that excision necessarily provides meaningful vindication of a breach of Charter rights. Excision simply removes the impugned material from consideration by the reviewing judge in the overall Garofoli review. Even with the information excised, the authorization may still be upheld if there is sufficient information before the reviewing judge that satisfies that judge that the authorization could have issued. Thus, excision of information obtained in breach of an accused's Charter rights does not necessarily result in any net gain for the accused such that their breached rights are "vindicated".
- [110] Second, and for similar reasons, excision hardly seems to be a remedy that is "relevant to the circumstances of the claimant" and "must address the circumstances in which the right was infringed". All that excision accomplishes is the removal of information from the reviewing judge's consideration of the validity of the authorization. This does not address the circumstances in which the right was infringed.

- [111] The provincial Crown also asserts that excision is a Charter remedy under s. 24(1) as the decisions in *R. v. Chow*, 2002 BCSC 1936 and *R. v. Huyhn*, 2008 ABQB 464 describe it as a Charter remedy. Respectfully, this submission is unpersuasive.
- [112] In *Chow*, Mr. Justice Wilson dealt with a procedural question on challenges by seven accused to a subsequent wiretap authorization. There the accused argued that what may be used on the granting of an authorization is a separate independent inquiry, not connected with any Charter remedy. The Crown contended that the issue could not be resolved independently of the Charter (para. 4). Justice Wilson went on to note the Crown's position that the analysis of the contents of an authorization (essentially a Garofoli review) is something decided entirely within the context of the Charter.
- [113] After reviewing the Court of Appeal's decision in *R. v. Spinelli* (1995), 101 C.C.C. (3d) 385, leave to appeal to the S.C.C. refused 105 C.C.C. (3d) vi, Wilson J. went on to state:
- [17] I think the remedy must be found in the Charter. In order to assert a Charter remedy, a person's rights must be engaged
- [Emphasis added.]
- [114] The *voir dire* in *Chow* that resulted in the aforementioned ruling was but one of a series of *voir dire*s on successive authorizations. Justice Wilson was dealing with what should be excised from a December authorization that had been issued and based on an earlier October authorization. The totality of the October authorization had foundered on a prior *voir dire* as there was no evidence of investigative necessity and so that authorization could not have been granted. In challenging the December authorization, the accused sought to have all intercepts from the October authorization excised from the December authorization. The Crown consented to the excision of the intercepted communications between three particular accused but argued the remainder ought not to be excised. Excised from the December authorization was all information directly or indirectly connected with interceptions of three of the seven accused in the October authorization. The decision is silent as to whether this information was excised as against all seven accused or just the three accused.
- [115] The comments of Wilson J. as to whether excision was a Charter remedy were exceedingly brief, contain no analysis and are seemingly qualified.
- [116] In *Huyhn*, one accused sought to have information pertaining to the search of the other accused's home excised from an ITO for a production order with respect to safety deposit boxes jointly held by the two accused. The accused, Ms. Phan, had standing to challenge the production order as the safety deposit box was jointly registered in her name and the co-accused's name, Ms. Huynh. However, Ms. Phan had no standing in respect of the illegal search of Ms. Huynh's home. The information illegally obtained from the search of Ms. Huynh's home was included in the ITO filed in support of the application for the production order. Ms. Phan sought to rely upon her standing to challenge the production order as a

means to have unconstitutionally obtained information gathered in breach of her co-accused's s. 8 Charter rights excised from the ITO for the production order (paras. 5 and 12).

[117] Mr. Justice Macklin engaged in an exhaustive review of the authorities placed before him and concluded as follows:

[47] I have no hesitation in finding that Ms. Phan's s. 8 privacy rights were engaged in the search of the safety deposit box that she owned jointly with Ms. Huynh. As such, she does have standing to argue that the ITO was insufficient or inadequate to allow for the production order (or a warrant) to issue. However, Ms. Phan cannot establish that her s. 8 Charter rights have been breached by relying on the breach of Ms. Huynh's Charter rights and the Charter remedy granted to her of excising information from the ITO. A Charter remedy is personal to the individual whose Charter rights have been breached.

[48] The information and evidence obtained from the search of Ms. Huynh's home was obtained in violation of her s. 8 Charter rights. No violation of Ms. Phan's s. 8 rights has been alleged in relation to the search of the home or the seizure of any of the items contained in the home. Accordingly, there is no basis for excising information relating to the information or evidence obtained from the illegal search of Ms. Huynh's house from the ITO as it relates to the production order for the search of Ms. Phan's safety deposit box.

[118] The reference to excision as a Charter remedy was simply a conclusory statement with no analysis as Macklin J. was not called upon to address the issue. While the remaining reasoning in Huynh is persuasive, the comment that excision is a Charter remedy, as in the case of Chow, is not determinative of the character or nature of excision.

[119] Furthermore, as noted previously under the assessment of whether excision is a s. 24(2) remedy, Code J. in Jaser (para. 28) opines that excision is not a Charter remedy.

[120] In my view, for the foregoing reasons, excision is not a s. 24(1) Charter remedy.

4. Excision is not necessarily a common law remedy

[121] Having determined that excision is not a Charter remedy, the question becomes, then, whether excision is a common law remedy informed by Charter values, as the defence contends.

[122] While excision might seem to lie closer to the common law because it arises out of the common law Grant trilogy, in my view, that does not make it a common law remedy informed by Charter values.

[123] How excision is employed depends on what is to be excised. In that respect, I agree with the federal Crown that the type of information to be excised from the affidavit or ITO informs whether it is excised as against one accused or all accused. Again, it is a matter of context. Erroneous information relating to third parties is excised as against all accused (e.g. Bisson) but information arising from a breach of a third party's Charter rights is not excised against any accused unless their personal Charter right has been breached (e.g. Huynh).

Accordingly, in light of its varied applications in different contexts, excision is not a remedy in the juridical sense but rather an instrument or device employed in the first stages of a Garofoli review; a review process, I would note, that has its end goal the finding of a s. 8 Charter breach if the authorization is quashed and the search becomes warrantless. The remedy for a s. 8 Charter violation is exclusion of evidence under s. 24(2) of the Charter, if the balancing of the various factors mandate that it should be excluded.

- [124] For example, in *Hockley*, Madam Justice Humphries distinguished between excision of information that related to breaches of a third party's Charter rights and excision of erroneous and misleading information about third parties. In this respect, if excision were a "remedy" then it would appear to be both a Charter remedy and a common law remedy informed by Charter values. However, no analysis of this specific issue was undertaken in *Hockley*.
- [125] In *Hockley*, the police were conducting surveillance of the accused's home, a suspected drug house. Vehicle traffic consistent with customers attending to purchase drugs from the residence was observed over several different days. On one day, the police observed a vehicle parked at the residence and also noted a hand-to-hand transaction to occur outside the residence. When the vehicle left the residence, a uniformed officer pulled it over, ostensibly to check whether the driver had a licence. The vehicle was searched and cash, score sheets, a scale and marijuana were found. The accused was not in the stopped vehicle. The observations of the police, including the facts surrounding the vehicle stop, were included in the ITO sworn in support of an application for a search warrant that was issued and executed upon the accused's residence. A Garofoli review was conducted in relation to the search warrant. The accused sought to have the information related to the vehicle search excised from the ITO because the Charter rights of the occupants of the vehicle (not the accused) had been violated. The defence argued that the reason for excising this information rested upon the premise that the state could not benefit from unlawful conduct whether it involved a breach of the accused's rights or those of others (para. 17).
- [126] In her ruling in *Hockley*, Humphries J. rejected the defence submission about excising information obtained in violation of another person's Charter rights. She relied on *Chang* as well as *Edwards* in concluding that as the accused before her had no standing to challenge the legality of the vehicle search, it was inappropriate to analyze and pronounce upon it (paras. 18-19).
- [127] Although Humphries J. did not excise information related to the vehicle search said to be obtained in violation of a third party's Charter rights, she did excise information from the ITO related to the vehicle stop of the third parties that was found to be misleading or erroneous (paras. 20-24). Thus, *Hockley* provides an example of the distinction between erroneous or misleading information about third parties, which will be excised from the ITO, and information arising from the breach of a third party's Charter rights, which will not be excised vis-à-vis the accused before the court.

- [128] Another decision that tangentially addresses the character of excision - Charter remedy or otherwise - is *Jaser*. At issue were various terrorism-related offences arising from a plan to de-rail a passenger train. This ruling in *Jaser* addressed a number of pre-trial motions relating to challenges to the validity of the Crown's wiretap evidence.
- [129] In the context of a contested O'Connor motion, counsel for Mr. *Jaser* sought production of two CSIS affidavits that supported an order from the Federal Court that authorized the interception of the conversations of the two accused under the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23 (the "CSIS Act"). These authorizations intercepted conversations that were concerning to CSIS and they disclosed them to the RCMP, pursuant to the provisions of the CSIS Act, to facilitate a criminal investigation. The RCMP used the fruits of the CSIS intercepts to obtain a Criminal Code wiretap authorization. That authorization depended substantially on the fruits of the earlier CSIS wiretap authorizations. Counsel for Mr. *Jaser* sought disclosure of the CSIS authorizations in order to challenge their validity and thereby endeavour to undermine the Criminal Code authorization.
- [130] In resisting the disclosure of the CSIS affidavits, counsel for the federal Crown argued that the *Grant* trilogy had been misapplied and should be limited or reconsidered. While Code J. was not unsympathetic to the Crown's call for reconsideration, he noted that it had to be done in another forum (paras. 24 and 33). Nevertheless, Code J. set out the doctrinal issues raised by the Crown and the criticisms levied at the *Grant* trilogy. In so doing, Code J. also provided a succinct review of the dubious doctrinal origins of the automatic excision rule (paras. 24-33). Included in this review, Code J. made the following observation:
- [28] Another criticism of the rule of automatic excision is that its doctrinal source is unclear. It does not appear to be a s. 24(1) or s. 24(2) Charter remedy, as it is rigid and categorical and it can lack proportionality, given the absence of any of the contextual and flexible balancing that is now well established under both of these remedial Charter provisions. See: *R. v. Grant* (2009), 245 C.C.C. (3d) 1 (S.C.C.); *Ward v. Vancouver*, [2010] 2 S.C.R. 28; *R. v. Zhao*, 2014 ONSC 1985. It also does not appear to be a common law remedy as it is not based on trial fairness, reliability, or abuse of process considerations, nor on the balancing of probative worth and prejudicial effect, which are the traditional bases for common law exclusionary rules. All of these common law exclusionary rules involve flexible contextual tests. See: *R. v. Harrer* (1995), 101 C.C.C. (3d) 193 (S.C.C.); *R. v. Buhay* (2003), 174 C.C.C. (3d) 97 at para. 40 (S.C.C.); *R. v. Hart*, 2014 SCC 52.
- [Emphasis added.]
- [131] Justice Code went on to refer to the article on excision by Professor Luther, noting that author's conclusion that the excision power lacked any clear doctrinal coherence (para. 29).
- [132] While *Jaser* contains erudite observations by Code J. on the vagaries of the doctrinal origins of excision, those comments do not resolve the enigma of the jurisprudential character of excision as he was not specifically ruling on that issue. They do, however, serve to reinforce

the conclusion that excision is not a remedy at all. So too do the comments of MacDonnell J. in *Lam* (para. 56). Rather, as noted earlier, excision is a mechanism or procedure employed in the course of a Garofoli hearing which ultimately seeks to have the authorization quashed, the search pursuant to the quashed authorization determined to be in breach of s. 8 of the Charter and the evidence excluded pursuant to s. 24(2).

- [133] In the end, the doctrinal vagaries of the excision rule and the inconclusive nature of some of these decisions do not do much to assist in determining the exact nature or character of excision.
- [134] I have already noted that excision is more appropriately categorized as a mechanism or procedure employed in a variety of circumstances depending on the context in which it is employed. Where conclusory statements, erroneous information, misleading statements or privileged information is excised, all accused who have a privacy interest in the intercepted communications are entitled to have the information excised from the affidavit or ITO and disregarded in the review process as it is information that was improperly included in the ITO as against all individuals covered by the authorization. Its application in this fashion is to protect the integrity of the prior authorization process. It is information that should not have been before the issuing justice at all: see for example *Bisson*, *Booth* and *Hockley*.
- [135] Where, however, excision relates to the breach of an individual's Charter right, it does not follow that an individual whose rights have not been breached has suffered any wrong doing or harm. Indeed, arguably there is no unlawful conduct vis-à-vis that individual. This is, in part, because Charter rights are personal to the accused. To complicate matters further, at the time the impugned information was included in the ITO, it likely had not been determined to have derived from a Charter breach.[23] However, between execution of the investigative step and the later assessment of the sufficiency of the ITO, the effluxion of time and evolutionary developments in the jurisprudence may result in the investigative step being ruled unconstitutional. One example of the evolution of the jurisprudence lies in the treatment of text messages by the courts pre- and post-*Marakah*. [24] Another example is the evolution in thinking about the notions of privacy in materials stored on work place computers.[25] More germane to the circumstances of the case at bar was the uncertainty behind the privacy interests engaged by CCTV surveillance footage of common areas and accompanying key fob records for strata properties.[26]
- [136] As in most aspects of the criminal law and Charter litigation, context underpins the application of any analytical framework for determining a contested issue. In that sense, then, it cannot be said that excision is either a Charter remedy or a common law remedy informed by Charter values. Indeed, I am not certain that characterizing excision as any sort of remedy is appropriate. Rather, in my view, excision is more properly characterized as a mechanism or procedure utilized in the initial steps of the Garofoli review hearing. The scope of its application is contingent upon the context in which it is employed. Remedy comes at the end of the Garofoli hearing after amplification and excision - either the authorization could have issued and it stands or it could not and it falls. If the authorization

is quashed and the search found to constitute a s. 8 breach of the Charter, the analysis moves to the remedial phase and an assessment under s. 24(2) of the Charter is conducted.

F. How have the first level appellate courts of Canada addressed the issue of excision of information obtained in violation of a third party's Charter rights?

[137] The primary appellate cases said to address this issue are *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.) and *R. v. Vickerson*, 2018 BCCA 39.

[138] Summarily, these decisions do not permit an accused to challenge searches of third parties not charged on their indictment. Thus, an accused cannot litigate breaches of the Charter rights of third parties as they have no standing - e.g. they cannot establish a reasonable expectation of privacy in the search of another's property or communications. However, the cases do not directly address the issue of excision of information found to have been obtained in violation of the Charter rights of someone other than the accused, most likely because the Courts' conclusions with respect to standing preclude ever proceeding to this stage. Nevertheless, the import of these decisions is that they do not support the defence "excision for all" approach as they limit an accused to challenging (and then later excising) information that has been unconstitutionally obtained in respect of their own Charter rights.

[139] Although the federal Crown contends that the Saskatchewan Court of Appeal's decision in *R. v. Spencer*, 2011 SKCA 144 at paras. 23-27 concluded that the Edwards standing principles apply to excision, I do not read the case in that manner. *Spencer* establishes that an accused, while not listed as the subscriber for internet services, nevertheless has a privacy interest in that information where he uses the internet services in his home that he shares with the subscriber. The Supreme Court of Canada approved the reasoning as to the subscriber information directly engaging the privacy interests of the accused: *R. v. Spencer*, 2014 SCC 43, para. 51.

1. *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.)

[140] Counsel for the accused contend that the Ontario Court of Appeal's decision in *Chang* is of no assistance to the Crown's position on this hearing and that it is not dispositive of excision in the context of breaches of co-accused's Charter rights.

[141] Counsel for the provincial Crown contends that the Court addressed the third party excision issue in *Chang* and rejected it because it limited the application of the Grant trilogy to cases where a single accused sought to excise information obtained in violation of their own rights.

[142] The federal Crown provided a more nuanced summary of *Chang*.

[143] The appellants in *Chang* were convicted of immigration-related offences. They asserted the trial judge erred in admitting evidence of intercepted communications obtained pursuant to two wiretap authorizations issued in Ontario. They submitted that those authorizations

were unlawful because the evidence that supported the application for the first one was itself unconstitutionally obtained. The supporting evidence consisted of communications of third parties in Ontario that had earlier been intercepted pursuant to a wiretap authorization issued in Quebec. The appellants argued that the trial judge erred in refusing to allow them to challenge the Quebec authorization. However, neither of the appellants had been personally intercepted pursuant to the Quebec authorization. The Ontario Court of Appeal concluded that neither appellant had standing to challenge the sufficiency of the wiretap application material that had been placed before the Quebec justice. In reaching that conclusion, O'Connor A.C.J.O and Armstrong J.A. observed that they had not been cited any cases in which a reviewing court excised information from an affidavit in support of a wiretap authorization where the impugned information was obtained as a result of the breach of a third party's rights.

[144] Significantly, Chang limited the reach of the Grant trilogy when the Court noted (para 35):

The aforementioned trilogy of cases asserts that information obtained as a result of unlawful activity by the police should be excised by a reviewing court in determining the validity of a search warrant. However, each of those cases involved the breach of the applicant's own Charter rights and the court excised the information on that basis. The trilogy is distinguishable from the case at bar in that the alleged unlawful evidence obtained as a result of the Quebec Immigration Authorization was not obtained as a result of a violation of the rights of either of the appellants.

[Emphasis added.]

[145] Although the Court in Chang did not have to explicitly address excision of information obtained in breach of a third party's Charter rights, it made it fairly clear that where an accused seeks to excise information from an ITO in respect of police conduct that amounts to a breach of Charter rights, the breach must be in relation to the accused's rights, not someone else's rights: Brounsuzian, para. 75; R. v Merritt, 2017 ONSC 80, para. 168.

2. R. v. Vickerson, 2018 BCCA 39

[146] Counsel for the accused contend that our Court of Appeal's decision in Vickerson does not deal with excision and creates no rule against third party excision. Rather, they assert, Vickerson is about standing and the exclusion of evidence seized from a third party, not excision of information found to have been unconstitutionally obtained from a co-accused.

[147] The provincial and federal Crowns contend that Vickerson is dispositive of the third party excision issue. They contend it makes no difference whether the defence seeks to establish a breach of a third party's rights or to rely upon an established breach of a co-accused's rights to have information excised from the ITO as against themselves. The result must be the same. The accused must establish that it is their Charter right, a right personal to them, that has been breached in order to have the information excised from ITO.

[148] With respect, I cannot agree with either position.

- [149] Vickerson is not an excision case per se and so is not dispositive of the issue raised in this application. Nor is it an exclusion case as the defence contends. However, the fact that the Court of Appeal found that the appellant should not have been permitted to challenge the arrest of a third party is indicative of the approach the Court would likely take on the issue of excision of unconstitutionally obtained evidence from an ITO where the breached rights were not personal to the accused.
- [150] In Vickerson, the appellant was convicted of four counts of possession for the purpose of trafficking in different controlled substances. A search warrant had been issued for the appellant's home. The ITO included information obtained from surveillance, an informer and the warrantless arrest of a third party - Mr. Schnarr - after he exited Mr. Vickerson's home. He was searched at the police station and baggies of cocaine were found in his pants. His cellphone was seized and searched without warrant. Text messages, calls and call logs for communications between the appellant and Mr. Schnarr were discovered. The interactions and search of Mr. Schnarr and his cellphone were included in the ITO filed in support of the application for a search warrant for Mr. Vickerson's home. Mr. Schnarr was not a co-accused on the Vickerson indictment.
- [151] At trial, Mr. Vickerson's counsel sought to have the information pertaining to the arrest and attendant search of Mr. Schnarr excised from the ITO, alleging that they were contrary to the Charter. The trial judge permitted Mr. Vickerson's counsel to challenge the arrest and search of Mr. Schnarr but concluded that both were lawful. No Charter breach having been established, the information was not excised from the ITO (paras. 32-33).
- [152] The trial judge ruled in the alternative that if the search of Mr. Schnarr was unlawful, the accused did not have standing to raise those Charter breaches and so the information would not be excisable from the ITO (para. 33).
- [153] The information with respect to the search of the cellphone was excised, as Mr. Vickerson's privacy rights had been breached in that search (paras. 32 and 45).
- [154] On appeal, Madam Justice Bennett, writing for the Court, concluded that the trial judge had misapplied the parameters of what *R. v. Pelucco*, 2015 BCCA 370 decided in concluding Mr. Vickerson had a reasonable expectation of privacy in his sent text messages and cellphone calls. However, as the trial judge had excised from the ITO the information obtained from the search of the cellphone the Court of Appeal did not have to determine the issue as the decision at trial was in the appellant's favour and did not assist him in his appeal (paras. 50-59).
- [155] In so far as the trial judge had failed to excise from the ITO information about the arrest and search of Mr. Schnarr, Bennett J.A. concluded that the appellant had no standing to challenge the search and seizure in relation to Mr. Schnarr, save for the contents of the cellphone search. The heart of the decision in Vickerson on this point states:

[47] Here, Mr. Vickerson was not present when Mr. Schnarr's vehicle was stopped and searched, he was not in possession or control of the property (the vehicle), he had no ownership in the property, there was no evidence that Mr. Vickerson had any attachment to the property at all, and Mr. Vickerson did not testify on the voir dire. Therefore, there was no direct or indirect evidence of any subjective expectation of privacy. In short, there is nothing to support that Mr. Vickerson had a reasonable expectation of privacy with respect to the search of the vehicle, the arrest and search of Mr. Schnarr, or the seizure of the drugs and the mobile phone. Clearly, the trial judge was correct in concluding that Mr. Vickerson had no standing to challenge the search and seizure in relation to Mr. Schnarr, apart from the contents of the mobile phone.

[48] Mr. Vickerson argues that he should have been able to challenge all aspects of the searches on a voir dire because he had "partial standing" based on the search of Mr. Schnarr's mobile phone. Either one has standing or not. The standing analysis is founded on a reasonable expectation of privacy in the thing searched or seized. Standing to challenge the contents of a mobile phone does not translate into standing to challenge searches or seizures where there is no expectation of privacy.

[Emphasis added.]

[156] Notably, at para. 46, Bennett J.A. referred to a passage in *R. v. Craig*, 2016 BCCA 154 at paras. 65-67, another decision she authored also addressing standing. In that passage there is reference to Mr. Justice Cory's affirmation in *Edwards* of a principle from an American decision - *Alderman v. United States*, 394 U.S. 165, at pp. 171-172 (1969). Justice Bennett wrote in *Craig*:

[66] He affirmed the principle found in *Alderman v. United States*, 394 U.S. 165 at pp. 171-172 (1969), that:

. . . [the] suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. [Emphasis added in *Craig*.]

[157] The above passage from *Craig*, citing *Edwards*, resonates in the context of the application currently before the Court. Here, the co-accused whose rights have not been breached are merely those aggrieved by inclusion of damaging information in the affidavit in support of the authorization.

[158] In my view, Vickerson can be said, at its highest, to implicitly address the parameters of excision from an ITO of unconstitutionally obtained evidence that relates to breaches of third party Charter rights. Vickerson decides that an accused cannot challenge events relating to police dealings with third parties and searches of items in which the accused has no personal interest. The corollary to this is that excision will not be available to excise information obtained in breach of Charter rights not personal to the accused.

[159] The accused in the current application are in similar circumstances to the appellant in *Vickerson*. In *Vickerson*, the appellant had standing to challenge the validity of the search warrant issued in respect of his home. Here the accused have standing to challenge the validity of the authorization - P5 - because their private conversations were intercepted. However, as in *Vickerson*, some of the accused do not have standing to challenge the circumstances of certain searches that made their way into the affidavit in support of the authorization as they have no privacy interest in the place searched; e.g. the seven accused on the two Kang indictments are in no way connected and have nothing to do with the strata properties at Brighthouse Way and Pacific Rim Estates where warrantless seizures were made in respect of CCTV surveillance footage and fob access records.[27] The rights of these seven accused were not violated in the searches and seizures conducted at these two locations. Rather they, as well as Craig Latimer on the Latimer Indictment and Pashminder Bopari on the fourth indictment, are merely persons aggrieved by inclusion of damaging information in the affidavit in support of the authorization.

3. *R. v. Shayesteh* (1996), 111 C.C.C. (3d) 225 (Ont. C.A.)

[160] Counsel for Mr. Bopari argues that the decision of Madam Justice Charron (as she then was) in *R. v. Shayesteh* (1996), 111 C.C.C. (3d) 225 (Ont. C.A.) supports the defence position that excision of information obtained in breach of a co-accused's rights ought to be excised from the ITO as against all accused.

[161] In *Shayesteh*, the appellant, although not a target, was intercepted in conversations captured by a prior authorization directed at others. As a result of being intercepted, the appellant became a named target in a subsequent authorization. The Crown argued on appeal that the appellant only had standing to assert a violation of his own Charter rights and therefore could only demand excision of information derived from interceptions which constituted a violation of his rights (para. 39). It is important to understand that the Crown in *Shayesteh* appeared to be limiting the appellant's ability to challenge the authorizations that named him as a target. It is in that context that Charron J.A. wrote:

[40] In my view, the cases of *Edwards* and *Pugliese* can easily be distinguished, and this argument must fail in this case. The appellants in both *Edwards* and *Pugliese* were unable to establish that they had an expectation of privacy with respect to the impugned search and consequently they could not argue that their rights had been violated. In this case however, since the appellant's own telephone calls were intercepted as a result of the targeting of Daryoosh in the second and third authorizations, he clearly had an expectation of privacy with respect to those communications. This expectation of privacy is sufficient to give him standing to dispute the legality of those interceptions. The fact that a consideration of the legality of these interceptions in effect entails a consideration of Daryoosh's s. 8 rights, because the statutory requirements are identical to the constitutional requirements of s.8, does not affect the appellant's standing to bring his application.

- [162] In my view, all that Shayesteh establishes is that an accused whose communications are intercepted by means of an authorization targeting others has standing to challenge the validity of the authorization given their reasonable expectation of privacy in the communications. Shayesteh does not go so far as to say that breaches of a third party's Charter rights in relation to a prior authorization must be excised from the subsequent authorization where the accused is named as a target. Thus, Shayesteh is simply a case about standing, not excision.
- [163] Indeed, Macklin J. noted as much when he wrote in Huynh (paras. 41-43) that Shayesteh simply confirms the comment in Edwards that an accused who can establish an independent privacy interest in the evidence obtained as a result of a search has standing to challenge the validity of the search.
- [164] In my view, the defence submission that excision for all applied in a principled and flexible manner to the circumstances of this case is but a variation of seeking excision of information obtained in breach of a third party's Charter rights. The proposed approach is, with respect, simply an effort to enter through the backdoor because entry through the front door has been foreclosed by the jurisprudence.

G. Is the decision in Sanghera #2 an example of excision for all?

- [165] Counsel for Mr. Pereira forcefully argued that the decision in Sanghera #2 is an example of this Court applying the excision for all approach.[28]
- [166] Sanghera #1 and Sanghera #2, penned by Holmes J., concerned the trial of five accused on a 14-count indictment relating to the unlawful possession, transfer and sale of firearms and related devices. The investigation of the accused came about as part of a larger project investigation formed by a VPD task force - Project Rebellion - that investigated groups involved in drug trafficking and violence in the "South Slope" area in the southeast of Vancouver. The two Sanghera decisions relied upon by the defence in this case relate to steps in a Garofoli review of a wiretap authorization issued during the currency of Project Rebellion. In Sanghera #2, the defence sought substantial excisions from the ITO sworn in support of a wiretap authorization.
- [167] The only unconstitutionally obtained evidence that was excised in Sanghera #2 was information about telephone numbers for the cellphones belonging to two of the accused. That information was obtained as a result of a search of the personal effects of the two accused while they were detained in jail. Those searches were determined not to be incidental to arrest and therefore contrary to s. 8 of the Charter. Although only two accused suffered breaches of the Charter rights, the Crown consented to excision from the ITO of the information as against all of the accused (para. 37(1)).
- [168] A concession by the Crown allowing for material about the breach of some accused's Charter rights to be excised from an ITO as against all accused does not make the decision authority for excision for all. Justice Holmes simply did not have to decide the question at

issue in this case. Accordingly, Sanghera #2 is not authority for the proposition that excision for all must occur once a breach of some accused's Charter rights has been established and information arising therefrom has been included in the ITO. Rather, it is simply an example of a pragmatic approach adopted by the Crown in that case. Thus, in my view, all Sanghera #2 demonstrates is that the exercise of Crown discretion and a concession for purposes of efficiency can remove offending information from the ITO for all accused.

[169] Other areas the defence sought to have excised from the ITO were the subject of argument as between the parties in Sanghera #2. The remaining materials that were excised from the ITO included (i) two instances of inaccurate statements about potentially significant matters (paras. 46-54) and (ii) three instances of statements that had no support after Crown redactions to protect the identity of confidential informants were applied to the ITO (paras. 55-60). Neither of these areas engaged the Charter but clearly related to information improperly before the issuing justice. For that reason, the offending information had to be excised as against all accused to protect the integrity of the prior authorization process.

[170] Justice Holmes rejected excision with respect to several other contested areas:

- i. references to the "three guns" evidence (paras. 39-45);
- ii. statements having little weight (paras. 61-69);
- iii. inadequately supported expert opinion (paras. 70-71);
- iv. discrepancies on the face of the affidavit (paras. 72-74);
- v. material omissions about failed or incomplete undercover drug purchases - Holmes J. held that this did not warrant excision of information about successful undercover buys (paras. 75-78); and
- vi. information from a police agent alleged to be unreliable (paras. 79-104).

[171] Once the excisions were made to the affidavit, Holmes J. went on to assess the sufficiency of the affidavit in support of the application for the Part VI authorization and apply the Garofoli test on review. In the result, the authorization was upheld save for one clause which was struck.

[172] While Sanghera #2 demonstrates how excision is employed, it is not authority for the proposition advanced by the defence that excision for all accused should occur when the Charter rights of only some accused are infringed.

H. Trial level decisions supporting the defence approach of "excision for all"

[173] The defence relied upon a number of authorities to argue that excision for all is the appropriate approach to take in this case. These decisions can be dealt with fairly summarily by noting that they are not binding on this Court - they are largely decisions from the Ontario Superior Court of Justice where there clearly is a division of opinion as to the appropriate approach to excision. I will address the Ontario line of authorities in a

separate section below as, when reviewed collectively, the jurisprudential schism in that province merits careful examination. However, in the end, the authorities do not bind this Court.

- [174] There are two decisions from the Provincial Court of British Columbia said to support the defence position and one that supports the position advanced by the Crown. To the extent that they demonstrate a division within the Provincial Court of British Columbia I note again, the decisions of the Provincial Court are not binding upon this Court. Be that as it may, respectfully, I prefer the reasoning in *Chau* (discussed below) to the reasoning in *Guilbride* and *Ali-Kashani*.
- [175] *Guilbride* involved nine accused facing nine counts relating to one all-encompassing conspiracy to import and traffic in cannabis resin, two further conspiracies in relation to different groups of accused, and various substantive offences arising out of the importation into Canada of approximately 12 metric tonnes of cannabis resin from Thailand aboard the vessel "Blue Dawn", and a second "off-load" vessel, the "Ansare II". The R.C.M.P. had a satellite tracker installed in the Blue Dawn when she was docked in Chania, Crete in Greece. A Canadian Armed Forces Aurora aircraft assisted in tracking the voyage of the Blue Dawn as she sailed around the world and back towards the West Coast of Canada. The flight staff observed the Blue Dawn to meet a then-unknown vessel in international waters approximately 650 nautical miles west northwest of Port Hardy, B.C. That vessel, later identified as the Ansare II, travelled to the dock at Fanny Bay, B.C. where some of the accused were intercepted unloading the Ansare II of her cargo - approximately 9.59 metric tonnes of cannabis resin. Four of the nine accused were arrested at that time. Approximately five days later, the Blue Dawn was intercepted in international waters by a U.S. Coast Guard vessel. Two more accused were arrested and handed over to R.C.M.P. officers waiting on board a Canadian Armed Forces vessel. A search of the Blue Dawn located 2.35 metric tonnes of cannabis resin packaged in a manner similar to that found on board the Ansare II (paras. 3-4).
- [176] In the ruling in *Guilbride* that is relied upon by the defence in this application, the Honourable Judge Arnold (as she then was) considered the lawfulness of a covert search of the accused *Guilbride's* residence, referred to as 12 Gatacre, pursuant to a general warrant. Although the Crown did not intend to adduce any evidence from the general warrant search, information from that search was included in subsequent ITOs.
- [177] In *Guilbride*, Arnold P.C.J. succinctly described the issues raised by the application in the following manner:

- [7] The Defence submit that the search of 12 Gatacre was unlawful and unreasonable, and constituted a violation of s. 8 of the Charter, insofar as the general warrant was invalid, and did not sufficiently identify the items subject to search. They seek the remedy of excision, pursuant to s. 24(1) of the Charter, of the information obtained by the RCMP the search of 12 Gatacre, as used in the subsequent ITOs. This is part of their attack on the overall sufficiency of those ITOs and the search warrants they support.
- [8] It is further argued that all of the "E-Paiute" accused in this trial are entitled to benefit from the remedy sought, not just the accused, Guilbride. This is because information obtained from the search of Guilbride's residence was contained in the subsequent ITOs that support search warrants executed at various locations where the privacy interests of the other accused were legitimately engaged. Thus, submits the Defence, "E-Paiute" accused, other than Guilbride, are entitled to any remedy ordered pursuant to a finding that the search pursuant to the general warrant constituted an unreasonable search pursuant to s. 8 of the Charter, within the context of subsequent voir dires. In these voir dires, the court and the Crown have been advised that the sufficiency of the subsequent ITOs, and the search warrants founded upon them, will be challenged as alleged violations of s. 8 of the Charter.
- [9] The Crown submits that the general warrant although invalid on its face, is proper and sufficient in all other respects, insofar as it is based on reasonable grounds, and specifies with sufficient clarity the items to be searched for. Furthermore, the Crown submits that the search was carried out in a reasonable manner. Therefore, the Crown submits that the search, although it may be characterized as warrantless to the extent it was unauthorized by law, ought not to be found unreasonable. However, in the event that I find the search to be unreasonable and a violation of s. 8 of the Charter, then the Crown argues that only the accused Guilbride, who resided at 12 Gatacre, is entitled to the remedy sought, and that there is no basis in law to extend the remedy of excision to other accused.
- [178] Judge Arnold set out the four issues raised by the application as follows (para. 12):
1. Is the defect on the face of the general warrant such as to render the subsequent search of 12 Gatacre both unlawful and unreasonable, or is it a minor technical defect that ought not to render the search unreasonable and a violation of s. 8 of the Charter?
 2. Does the search authorized by the general warrant constitute an unreasonable search within the meaning of s. 8, because the warrant is lacking the necessary specificity as to the nature of the items to be searched for?
 3. If the search is unreasonable and a violation of s. 8 of the Charter, is excision the appropriate remedy under s. 24(1) of the Charter? and,
 4. If the remedy of excision of information arising out of this search is appropriate, is the matter of remedy limited to the accused, Guilbride, or are the four other "E-Paiute" accused entitled to the same remedy, given that the information is used in subsequent search warrants where their privacy interests are engaged?

[179] On the first three issues, Judge Arnold found:

- i. the general warrant authorizing the covert search of 12 Gatacre to be invalid on its face (as conceded by the Crown) and that the search constituted an unreasonable search and a violation of Guilbride's s. 8 Charter right (paras. 27-33);
- ii. the lack of specificity with respect to the items to be searched for pursuant to the invalid general warrant did not compound the s. 8 Charter violation (paras. 34-37); and
- iii. the information obtained in the unlawful search of Guilbride's residence and business as used in subsequent ITOs for other search warrants was to be excised in relation to the accused Guilbride (the Crown not arguing otherwise) (para. 38).

[180] In addressing the excision for all argument advanced by all of the accused in Guilbride, Arnold P.C.J. reviewed the jurisprudence, including Cheung and Chang, and reached the cautious conclusion that the co-accused were not barred from seeking excision of the information obtained from the invalid general warrant, should they be able to demonstrate they had standing to challenge the subsequent warrants that contained the impugned information (paras. 39-57). Of significance, in my view, are the following characteristics that limit the scope of this particular decision to its unusual circumstances:

- i. Judge Arnold was clearly troubled by the invalidity of the general warrant, improperly issued as the wrong legal test had been included (the items to be searched for were described as "could be obtained" rather than the higher statutory standard of "will be obtained") such that the issuing judge would have granted it based on the incorrect legal test (paras. 24, 29, 31-32, 37);
- ii. Judge Arnold agreed in principle that the co-accused ought to be entitled to excision of the information obtained by virtue of the invalid general search warrant, where the error giving rise to invalidity went to the legality of the order itself (para. 55);
- iii. Judge Arnold limited the case to its unique facts (para. 57); and,
- iv. Judge Arnold did not permit excision outright for the other accused in the absence of their demonstrating they had a reasonable expectation of privacy in the places searched under the subsequent warrants (paras. 56-58).

[181] As noted by Graesser J. in Nguyen, *infra*, Judge Arnold's comments on the standing of the co-accused to seek excision was dicta. Moreover, Graesser J. confined Guilbride to its unique circumstances and declined to follow it, in part because Macklin J. had reached a different conclusion in Huynh: Nguyen, paras. 284-298.[29] Similarly, in Nicholson, Madam Justice Brown limited Guilbride to its unique features (para. 17). Although not bound by the decision in Guilbride, I would confine it to its very unusual circumstances and decline to follow it in this case.

[182] In *Ali-Kashani*, the Honourable Judge St. Pierre found that two accused could excise from an ITO information relating to an established Charter breach of a former co-accused. I decline to follow this decision for the following reasons. First, it relies extensively on the now disapproved decision in *R. v. Brown*, 2014 BCSC 1872 which was subsequently confined to its facts in *Vickerson* as well as in *Holmes*. Second, it appears to conflate concerns about breaches of Charter rights with the fair and complete disclosure required by the prior authorization process - matters that are distinct concerns as set out below. Third, the decision pre-dates the Court of Appeal's decision in *Vickerson*.

I. The Ontario jurisprudential schism

[183] The jurisprudential battleground on the scope of excision appears to be in Ontario. The trial authorities are divided as to its scope in respect of Charter breaches.

1. The authorities applying the "excision for all" approach

[184] Several decisions from Ontario were relied upon by the defence to support their contention that where unconstitutionally obtained information is included in an ITO, all co-accused are entitled to benefit from excision largely on the stated basis of trial fairness. The three main decisions relied upon by the defence are *Guindon*, *Hamid* and *Mediati*. To a lesser extent the decisions in *R. v. Battista*, 2011 ONSC 771, *R. v. Hoang*, 2018 ONSC 6124 and *Hibbert* are also said to support the defence position.

[185] In *Battista*, four accused were charged with a variety of conspiracy, drug trafficking and criminal organization offences. The accused collectively challenged the validity of a wiretap authorization on a *Garofoli* review. Part of the information they sought excised from the ITO was said to be illegally obtained (para. 6). The impugned evidence related to a police officer's attendance at a residence to serve a summons on the resident. The residence looked unoccupied and upon checking with a neighbour, the officer was advised of suspicious activities. The officer gained entry to the residence to check for evidence of squatters or a break and enter. Upon looking in a large box, the officer located several kilograms of cocaine. The search of a knapsack located four handguns (para. 48).

[186] The search of the unoccupied residence was warrantless and *prima facie* unreasonable. Even if the officer reasonably believed he had authority to enter the home he had no authority to search the box and the knapsack. Nevertheless, the information was included in the affidavit in support of a wiretap authorization. Madam Justice Parfett acceded to the defence argument and excised the information from the affidavit. Respectfully, the decision contains no analysis as to why it was appropriate to excise the information apart from the fact that it was an "obviously unlawful" search (para. 52). The extent of the reasoning proffered to permit the accused to have this information excised was as follows:

[50] The Crown argues that it is immaterial whether the seizure from the Edenvale residence was illegal. This Court has already ruled that *Farrell*[30] did not have any privacy interest in that premises, and none of the other accused have suggested that they had any better claim to a

privacy interest in that property. In the circumstances, the Crown contends that the principle enunciated in *R. v. Edwards* applies, and that these accused cannot claim a violation of rights in the absence of a privacy interest. Defence counters that these accused possess an interest in their private communications, and therefore they have standing to assert that the search was unlawful in the context of the application to exclude the wiretap evidence. I agree.

- [187] A later decision of the same court - *R. v. Serre*, *infra*. (para. 36) - limited Battista by reference to the egregious conduct engaged in by the police in that case. For the same reasons as advanced by Justice Aitken in *Serre*, I would not follow this decision. It is devoid of analysis as to how the accused could have the information excised in the absence of a privacy interest. More significantly, the egregious nature of the unlawful police conduct appears to have motivated Parfett J. to reach the conclusion she did.
- [188] In *Guindon*, Madam Justice Bird, in brief reasons, addressed the issue of excision of information relating to a vehicle stop from an affidavit in support of a wiretap authorization. Only one of the five accused had been involved in the vehicle stop. In an earlier ruling, Bird J. had found that the accused Gonder, a passenger in the vehicle, as well as the other occupants, had been the subject of unlawful arrest and search. Justice Bird excluded the evidence obtained in the search of Gonder pursuant to s. 24(2) of the Charter. The information about the results of the arrest and vehicle search had been included in the affidavit. Justice Bird excised this information from the affidavit as against all five accused on the basis of the principle from the Grant trilogy that the state cannot benefit from the illegal acts of the police and that all erroneous information ought to be excised from the ITO (paras. 6-8).
- [189] In permitting excision for all, Bird J. distinguished *Chang* and declined to follow a number of decisions that reached the contrary conclusion about the scope of excision (paras. 9-15). The conclusion of Bird J. in *Guindon* was that failure to excise the information as against all accused would permit the state to benefit from the illegal conduct of the police and so excision for all was ordered (para. 20).
- [190] *Guindon* failed to recognize that the Grant trilogy involved cases of single, not multiple, accused, as has been noted in many decisions including *Chang*. Moreover, and respectfully, it appears to misconstrue the import of *Chang* by suggesting it supported the argument advanced by the accused that they could rely upon a Charter breach in relation to a third party in respect of excision (para. 12).
- [191] In *Mediati*, Madam Justice MacKay followed *Guindon* and excised information found by another judge of the same level of court (the Ontario Court of Justice) to have been obtained in breach of third party's Charter rights from the ITO for a search warrant. Justice MacKay, without considering that the Grant trilogy only dealt with single accused, extended the ambit of the trilogy to the circumstances before her. To the extent that *Mediati* follows and applies *Guindon* and improperly extends the ambit of the Grant trilogy, contrary to the

Ontario Court of Appeal's decision in *Chang* circumscribing the scope of the trilogy, I decline to follow it or adopt the reasoning contained therein.

[192] In *Hoang*, five accused were charged with a variety of drug-related offences. In brief reasons that contain no analysis of standing in respect of excision of information obtained in breach of co-accused's Charter rights, Mr. Justice Gray stated:

[121] I do not accept, as submitted by the Crown, that the standing issue is as narrow as the Crown would have it. If it is held that evidence acquired as a result of the warrantless entry at Warwick, the warrantless covert camera at Warwick, and the search warrant at Warwick are to be excised, then, to the extent that any of that material is referred to and relied on in subsequent ITOs, any party affected by subsequent ITOs is entitled to rely on the excision.

[122] The standing rule means that only Thanh Van Nguyen has the standing to attack the warrantless entry, the covert camera, and the search warrant on constitutional grounds. However, if reliance on the material is excised once Thanh Van Nguyen has exercised his right to challenge it, the standing rule does not preclude another party from relying on the excision.

[123] Looked at in another way, if Thanh Van Nguyen were to fail in his constitutional challenge, the standing rule would preclude any of the other accused from raising the same constitutional challenge that Thanh Van Nguyen raised and lost. However, if he succeeds, other parties can rely on his success.

[193] The decision contains no analysis of the excision debate that was well underway in Ontario at the time the decision was released. While an example of excision for all, it is not binding on this Court and I decline to apply it here.

[194] In *Hibbert*, Madam Justice Dennison, seemingly of her own motion, applied the *Guindon* approach and excised information from an ITO in relation to the two accused who were on trial before her for firearm and drug-related offences:

[33] As a result of my finding that the officer stopped Mr. Hibbert for the sole purpose of conducting a criminal investigation, Mr. Hibbert and his passengers were arbitrarily detained and their s. 9 Charter rights were violated.

[34] The information contained in paragraph 20 of the ITO is therefore excised, as it was obtained in matter that violated Mr. Hibbert's s. 9 Charter rights. Although not explicitly raised in submissions, while Ms. Williams' Charter rights were not violated, I find that it would be unfair and inappropriate to allow the paragraph to remain in considering whether the warrant was sufficient with respect to the Newhaven address: see *R. v. Guindon*, 2015 ONSC 4317.

[195] In light of the competing lines of authority in the Ontario jurisprudence and the absence of any analysis of the excision issue, the decision, respectfully, is of no assistance in determining the issue before me.

- [196] The decision in *Hamid* followed *Guindon* and relied upon the principle from the *Grant* trilogy that the state cannot benefit from the unlawful conduct of the police to permit excision for all three accused in respect of a wiretap authorization. In *Hamid*, three accused were charged with conspiracy to import and importing cocaine. Madam Justice Petersen appeared to accept the proposition referred to by Code J. in *Jaser* that excision is not a Charter remedy and concluded on that basis that standing to challenge the authorization was not required (paras. 28 and 45).
- [197] In *Hamid*, Petersen J. went on to reason that since standing is not required to excise erroneous information from an ITO, it made little sense to require a showing of standing in respect of information obtained in breach of another's Charter rights (paras. 46-47). Moreover, given the principle from the *Grant* trilogy that the state ought not to benefit from the unlawful conduct of the police, it mattered not whose rights were violated as the court could not condone such conduct (para. 49). Justice Petersen went on to distinguish *Chang* and apply *Guidon* to permit excision for all, notwithstanding that the accused *Hamid's* Charter rights were not engaged or breached in the prior authorization, the information from which then was included in the authorization targeting him. I decline to follow the reasoning in *Hamid* for the reasons given on declining to follow *Guindon*.
2. The authorities applying the "excision for one" approach
- [198] The Crowns point to the decisions in *R. v. Serre*, 2011 ONSC 3749, *R. v. Abdullahi*, 2014 ONSC 6036, *Merritt* and *Brounsuzian* as cases where excision for one is applied and endorsed as the correct approach.
- [199] In *Serre*, the accused was on trial for charges that stemmed from an investigation into an organization believed to be obtaining Canadian immigration status for foreign nationals in return for compensation and through the assistance of a Canadian immigration officer believed to be corrupt. Counsel for Ms. *Serre* sought excision of various paragraphs in the ITO in support of a wiretap authorization on the basis that they pertained to breaches of her Charter rights as well as breaches of the Charter rights of numerous third parties. After conducting a thorough review of the jurisprudence, including the decision in *Battista*, Madam Justice Aitken distinguished *Battista*, applied *Chang*, *Edwards* and *Shayesteh* and declined to excise information from the ITO that was said to have been obtained in breach of third parties' Charter rights (paras. 27-39).
- [200] In *Abdullahi*, five accused were on trial for the murder of a member of a street gang known as the *Dixon City Bloods*. It was believed that the deceased had been killed as part of an internecine struggle within the gang. A number of search warrants, a dial number recorder warrant and a tracking warrant were obtained. The materials garnered from these authorizations and other investigative information were included in three ITOs sworn in support of a wiretap authorization which was issued and followed by a subsequent wiretap authorization. In a series of pretrial motions the accused challenged the sufficiency of the warrants and authorizations. One of the accused, *Hussein*, sought to have information

about other individuals excised from the ITO because information about them had been gained in violation of their Charter rights. Mr. Justice Clark rejected the argument and, in applying para. 35 of *Chang*, concluded that the accused had no reasonable expectation of privacy in the information gathered and could not seek to excise information in support of a wiretap authorization where the information was obtained as a result of the breach of a third party's Charter rights (paras. 130-134).

- [201] In *Merritt*, two accused were on trial for two counts of first degree murder and one accused was separately charged with one count of second degree murder. A challenge with respect to the production order for the deceased's cellphone records rested on the assertion that it was made without jurisdiction as it was handled like a telewarrant (paras. 146-151). The accused Ms. Merritt also asserted that she had a reasonable expectation of privacy in the deceased's cellphone records as she regularly communicated with the deceased about their children (para. 151).
- [202] Applying the *Edwards* standing framework to the circumstances before him, Mr. Justice Dawson found that Ms. Merritt had no objectively reasonable expectation of privacy in the cellphone records (paras. 152-158).
- [203] In addressing the issue of the breach of a third party's Charter rights, Dawson J. engaged in a comprehensive analysis of the jurisprudence, noted the division of opinion in his court as evidenced by the decisions in *Serre* and *Guindon*, and proceeded to explain *Chang* and apply para. 35 of the decision to conclude that an accused cannot rely upon a breach of a third party's Charter rights to have information obtained as a result of any such alleged breach excised from an ITO as the accused does not have standing to assert the rights of a third party (paras. 159-172).
- [204] In *Brounsuzian*, the accused challenged the sufficiency of the ITO in support of a search warrant for an address on Adelaide St. in Toronto, Ontario. As part of the challenge he sought to excise from the ITO information obtained from an unlawful search at another address that pertained to a co-accused. The Crown conceded that the search of the location related to the co-accused was unlawful. Counsel for Mr. Brounsuzian relied upon the decisions in *Guindon* and *R. v. Marakah*, 2017 SCC 59, to support his position that the information obtained in breach of the co-accused's Charter rights ought to be excised.
- [205] Mr. Justice Brown rejected the argument advanced by the defence in *Brounsuzian*, writing:
- [75] I do not agree with the defendant's position on this point. I acknowledge that there are cases from the Ontario Superior Court of Justice that have differing views on this issue. However, I am of the view that the controlling case on this matter is the Ontario Court of Appeal decision in *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (C.A.) at paras. 33-42. See also *R. v. Ritchie*, 2016 ONSC 1092 at para. 53, overturned on other grounds at *R. v. Ritchie*, 2018 ONCA 918; *R. v. Dieckmann*, 2013 ONSC 747 at para. 31 and *R. v. Vickerson*, 2018 BCCA 39 at para. 48. A defendant must demonstrate a violation of his or her own Charter rights in order to obtain a remedy under the Charter. A defendant is only entitled to excision from an ITO of evidence

unconstitutionally obtained in violation of his or her own personal rights. If a defendant's own s. 8 Charter rights were not engaged in that he or she did not have a reasonable expectation of privacy, the defendant is not entitled to excision from the ITO of evidence obtained pursuant to the search. There is no remedy for the violation of someone else's reasonable expectation of privacy.

[Emphasis added.]

3. Conclusion on the Ontario jurisprudence

[206] The foregoing review establishes a clear divergence in how the Ontario courts approach the issue of excision. None of the decisions are binding on this Court. In my view, the Ontario jurisprudence is best left to Ontario to sort out. Respectfully, I decline to follow the Ontario authorities that apply excision for all. I find the line of reasoning in *Serre*, *Abdullahi*, *Merritt* and *Brounsuzian* to be persuasive and I adopt the reasoning of *Brown J.* in *Brounsuzian*.

J. Trial level decisions supporting the Crown approach of "excision for one"

[207] In addition to the decisions addressed above, the provincial and federal Crowns referred to a number of cases in support of their position that an accused cannot seek excision of information from an ITO where that information was obtained in breach of a third party's Charter rights. These decisions reject the "excision for all" approach advanced by the defence in this case.

[208] I do not propose to review all of the cases cited by both Crowns. Those outlined below are the most germane to the issue and are a representative sample of the authorities provided.

1. The Alberta authorities

[209] In my view, the decision of *Macklin J.* in *Huynh* is one of the clearest examples of the use of excision where there is more than one accused and more than one breach of Charter rights. In *Huynh*, *Macklin J.* considered whether one accused could rely upon the breach of a co-accused's rights in order to have information pertaining to an illegal search of the co-accused's home excised from the ITO in support of a production order for the safety deposit box held by the accused. *Huynh* makes it clear that excision of unconstitutionally obtained evidence from an ITO is tied to whether the accused's own Charter rights have been violated in respect of the impugned information. *Huynh* contains a compelling and considered analysis of the issue and concludes that an accused cannot seek excision of unconstitutionally obtained evidence from an ITO where the information relates to the breach of a co-accused's Charter rights. Thus, *Huynh* supports excision for one.

[210] A similar conclusion was reached in *R. v. Nguyen*, 2008 ABQB 721, where Mr. Justice Graesser followed *Huynh* and concluded that two accused had no standing to object to the inclusion in an ITO of unconstitutionally obtained information in respect of a third co-accused (paras. 279-282, 296-298).

- [211] The decision of Mr. Justice Burrows in Croft contains the clearest distillation of the problem raised by the issue before this Court. Much like the circumstances in this case, Burrows J. was called upon to make what can be described as "a ruling on excision" that was to cover three different indictments all related to drug offences. The accused Mr. Croft was the common denominator in all three indictments, including two where he was co-accused with others. Justice Burrows was called upon to determine whether information contained in affidavits in support of applications for wiretap authorizations ought to be excised during the Garofoli review (para. 4). The arguments advanced in Croft were the same as those advanced in the current application, albeit the distinguishing feature is that the accused there were seeking excision of information obtained in breach of the Charter rights of third parties (paras 10-13).
- [212] In a succinct but comprehensive ruling, Burrows J. rejected the excision for all approach, distinguished many of the same cases relied upon by the defence in this current application and observed that it would be completely inconsistent with the individual and personal nature of Charter rights to permit an accused to rely upon the infringement or denial of another person's Charter rights, mainly because the accused would have no way to seek remedial relief in respect of the breach of another's Charter rights (para. 20).
- [213] As an accused could not seek in their own trial the exclusion of evidence obtained in breach of another's Charter rights, it was illogical that they could do so for the purposes of excision (para. 21). The element of symmetry in the approach to the exclusion of evidence and excision is evident. While distinct processes, the foundational pillar or organizing principle is the same - Charter rights are personal to the accused.
- [214] In Croft, Burrows J. went on to dismiss the ex parte nature of such applications as a reason to excise information unconstitutionally obtained through the breach of a third party's Charter rights, stating:
- [22] It does not, in my view, constitute such justification that the application for the authorization is made ex parte. This feature of the process certainly and indisputably requires that the applicant provide full and frank disclosure of all the relevant information he has - both that which supports the application and that which would support not granting the authorization. Arguably, full and frank disclosure would include the fact that the information put forward was obtained in violation of the Charter rights of a third party, if that were known to the applicant (which is extremely unlikely since such violation would not at that point have been alleged, much less determined).
- [Emphasis added.]
- [215] This last point echoes the observations of Sopinka J. in Plant at para. 35, that sometimes the law evolves between the time of the use of an investigative technique and the courts later ruling upon its constitutionality.

[216] While the Alberta authorities are also not binding upon this Court, they contain thorough and comprehensive analyses of the issues raised here and I find them to be highly persuasive. They also accord with the analyses found in *Serre*, *Abdullahi*, *Merritt* and *Brounsuzian*.

2. The British Columbia authorities

[217] In *Nicholson*, the accused unsuccessfully asserted a privacy interest in text messages to which he was not a party but which led to an authorization being obtained against him. He sought to challenge a production order that related to cellphone records for his work partner. From the text messages, the VPD learned of communications between three other individuals that led to the accused, a former officer with the Abbotsford Police Department. The accused sought to have the production orders issued in respect of cellphones belonging to third parties declared invalid and the use of the evidence obtained through the production orders found to be a breach of s. 8 of the Charter. From there the accused intended to seek excision of the offending material from a subsequent wiretap authorization that had him as the principal target.

[218] The basis for the accused's claims that he should be permitted to challenge the production orders was that "he must be able to challenge the investigative steps used to build the case against him" (para. 5). He further asserted that in order to challenge the predicate investigative steps that led to or were used in the wiretap authorization, his s. 8 privacy rights in respect of his intercepted communications permitted him to challenge an earlier investigative step where it had the effect of interfering with his privacy rights later in the process (para. 6). The arguments advanced in *Nicholson* are a variation of the arguments advanced in the current application - because the end authorization engages the privacy interests of the accused, the predicate investigative steps, even where they do not relate to the accused or their Charter rights, are nevertheless open to challenge as they were used to gather information that was used to inform the ultimate authorization. In effect, the accused in *Nicholson* was arguing that because his privacy interests were engaged by the end point authorization, this imbued him with the ability to challenge earlier investigative steps that did not engage his privacy interests. Madam Justice Brown rejected the argument and found it contrary to the principles established in *Edwards and Chang* (paras. 14-19).

[219] The decision in *Nicholson* parallels the issue raised in this application and reinforces the point that excision for all is not a premise supported in the jurisprudence in this province.

[220] In *R. v. Tetrault*, 2007 BCSC 1624, the accused challenged the legality of his warrantless arrest. Part of the grounds relied upon by the arresting officer came from the arrest of third parties and the evidence found in their vehicle. Madam Justice D. Smith (as she then was) found that the arrest of the accused was based on reasonable grounds (para 38). She rejected the accused's argument that the evidence seized from the arrest of third parties should not be considered when she assessed the reasonableness of the grounds for the arrest of the accused:

- [36] I cannot accede to the defence's argument that the evidence seized from the occupants of the target vehicles should not be considered. Mr. Tetreault has no standing to challenge the lawfulness of the arrest of those individuals and the evidence seized from searches incidental to their arrest. As Smith J.A. observed in *R. v. Hyatt*, 2003 BCCA 27 at ¶45, "Charter rights are personal and cannot be asserted by anyone except the person whose rights are violated".
- [221] The decision in *Tetrault* appears to be a variation on the excision arguments advanced and rejected in *R. v. Flintroy*, 2019 BCSC 35 and *R. v. Latimer*, 2020 BCSC 685. While *Tetrault* tangentially addresses the issue of excision and efforts to rely upon third party Charter rights, the import of the decisions in *Flintroy* and *Latimer* is that excision employed in the review of prior authorizations is not something to be imported into assessing the reasonableness of an officer's grounds for arrest. I do not construe *Tetrault* as authority for the proposition that information in an ITO can only be excised if a Charter right of the accused seeking excision has been breached. At its highest, *Tetrault* is simply a confirmation that Charter rights are personal and cannot be asserted by anyone except the person whose rights are violated. It does not address squarely the excision issue raised in this application.
- [222] In *Chau*, the Honourable Judge A. Tam was faced with the same argument advanced in this current application. There, the accused *Chau* had standing to challenge the validity of the search warrants issued for two residences in which he had a reasonable expectation of privacy. What Mr. *Chau* wanted excised from the ITO in support of the search warrant was information that had been obtained in breach of the s. 8 rights of his co-accused, Mr. *Nguyen*. In an earlier ruling, *Tam P.C.J.* set aside a tracking warrant issued in respect of Mr. *Nguyen*'s telephone number. After executing the tracking warrant, the police were led to the residence related to Mr. *Chau*. The paragraphs in the ITO that Mr. *Chau* sought to have excised were the fruits of the invalid warrant in respect of Mr. *Nguyen*'s telephone number.
- [223] In his decision, *Tam P.C.J.* declined to follow the ruling of *St. Pierre P.C.J.* in *Ali-Kashani*, concluding that the subsequent decisions of the Court of Appeal in *Vickerson* and *Holmes* "clarified the jurisprudential landscape and re-affirmed the *Edwards* approach on this issue" (para. 15).
- [224] Judge *Tam* went on to comment on the puzzling or troubling results that would flow from an "excision for all" approach, noting:
- [16] The conclusion I have reached will also avoid two results that would be puzzling, if not troubling. Firstly, if Mr. *Chau* is permitted to seek excision based on a ruling that Mr. *Nguyen*'s rights were breached, then Mr. *Chau*'s constitutional rights would hang precariously on who ends up being a co-accused in these proceedings. Mr. *Jessop* has earlier conceded that Mr. *Chau* had no standing to attack the tracking warrant as it related to Mr. *Nguyen*'s phone number. And any number of events could have transpired which would have led to Mr. *Nguyen* and Mr. *Chau* not being co-accused at this trial. Some accused abscond.

Some accused pass away. Some accused plead guilty. Sometimes the Crown decides not to proceed against a suspect. Sometimes severance is ordered by the court. Sometimes the Crown decides to proceed separately against two accused. It would be puzzling, or even troubling, that what constitutional rights Mr. Chau is entitled to depend so much upon what Mr. Nguyen and the Crown decide - something over which Mr. Chau exercises no control. That cannot be, in my view, what it means to have these constitutional rights.

- [17] Secondly, since Mr. Chau has no reasonable expectation of privacy in relation to Mr. Nguyen's phone number, Mr. Chau would have no standing to apply pursuant to s. 24(2) for the exclusion of evidence related to the tracking warrant at trial. It would be puzzling, if not troubling, that Mr. Chau stands in a better position to seek the excision of the impugned paragraphs from an ITO than the exclusion of the evidence at trial. What is at stake in the former is the constitutionality of a search. What is at stake in the latter is guilt or innocence.
- [18] To avoid both these strange results, the better view is as enunciated in *Vickerson* and *Holmes*, and applied in *Croft*, *Huynh*, and *Ritchie*. In that scenario, Mr. Chau's constitutional rights do not hinge on who is sitting beside him as a co-accused since the remedies available to him relate directly to whether his rights were violated.
- [19] Mr. Jessop makes the further point that Mr. Chau is not asking to embark upon a *Garofoli* application or seeking leave to cross-examine police officers who may have violated some third party's constitutional rights, as was the case in *R. v. Tran*, 2016 BCPC 159. As in *Ali-Kashani*, a *voir dire* in this case has already been held and a ruling made. Mr. Jessop concedes that if that were the application, the jurisprudence dictates that that should be denied. However, one may ask rhetorically, if an accused may apply to excise the fruits of unconstitutional conduct as against a third party from an ITO, why should a *Garofoli* hearing be denied that accused? Why should that accused not be granted leave to cross-examine those police officers? Surely, an accused's constitutional rights ought to afford him or her the ability to canvass those issues to advance a full answer and defence. When I approach the question from that perspective, I reaffirm my earlier conclusion that Mr. Chau cannot seek to excise the impugned paragraphs. The contrary view is much more dissonant with accepted jurisprudence.
- [225] Respectfully, the reasoning of Tam P.C.J. is inherently sound and consistent with the weight of authority from Alberta, the Ontario line of decisions in *Serre*, *Abdullahi*, *Merritt* and *Brounsuzian* and consistent with the import of the ruling in *Vickerson*. Moreover, it seems strange indeed that although an accused could not seek to have the evidence excluded at trial^[31] (if the Crown intended to tender it) because their rights were not violated, yet they would be able to have the same evidence, not related to a breach of their own rights, excised from the ITO. Like Tam P.C.J., all courts are concerned about letting the state benefit from the unlawful conduct of the police. However, the Supreme Court of Canada's comments in the *Grant* trilogy were made in the context of single accused whose Charter rights had been infringed. The comments may well be of concern in cases involving multiple accused and multiple Charter breaches but at the very least, there needs to be

some personal connection between the accused and the asserted violation of Charter rights sufficient to establish standing.

K. Does a Charter breach constitute a fraud on the Court?

[226] Counsel for Mr. Vagh asserts that limiting excision to only the individual whose Charter rights have been infringed will result in the courts becoming an instrument of fraud. Consequently, counsel contends that Charter breaches against anyone cannot be tolerated in an ITO.

[227] Respectfully, I must disagree with the broad assertion that information obtained from a Charter breach included in an ITO and left unexcised against all will result in the courts becoming an unwitting instrument of fraud. Mr. Vagh fastens on to the term fraud and re-purposes it to fit the constructs of his submission.

[228] Although the provincial Crown's submissions in response to this point were curt and dismissive of the argument advanced by Mr. Vagh, the gist of the provincial Crown's point on this issue is correct. There is a significant difference between fraud - material non-disclosure and misrepresentations in the materials submitted on an ex parte application - and information obtained in breach of Charter rights.

[229] In *Garofoli*, the review process in respect of "the existence of fraud, non-disclosure, misleading evidence and new evidence", relates to how to courts deal with erroneous or misleading information and non-disclosure: *R. v. Araujo*, 2000 SCC 65, paras. 55-59. But as the application of the *Garofoli* test in the jurisprudence establishes, even deliberately misleading information does not automatically vitiate an authorization: *Bisson*; *Araujo*, para. 54; *Pires and Lising*, para. 30. Similar to the spectrum of severity for Charter breaches, erroneous and misleading information exists on a spectrum as well. Indeed, in *Plant*, informer information had been misstated as a result of a good faith error that was corrected on amplification of the record: *Plant*, paras. 29-31; *Araujo*, para. 56.

[230] The review process in *Garofoli* to address erroneous and misleading information is grounded in the long-standing requirement that information provided to the court in an ex parte hearing must be fair and complete. This requirement existed long before the inception of the Charter and does not relate to how the information was obtained but rather how accurately and completely the information was described for the issuing judge. The *Grant* trilogy, where the concept of excision of unconstitutionally obtained information originated, does not equate the inclusion of such information in an ITO as amounting to "fraud." Excision on the basis of misleading or erroneous information and excision of information obtained in breach of an accused's Charter rights both occur in the process of excising material from the ITO but are conducted on separate analytical bases.

[231] I agree with the following aspect of the provincial Crown's written submissions on this point:

111. At the most basic factual level, it is simply not the case that all Charter breaches reach the level of "fraud". A Charter breach can arise from a change in the law, the police may act in good faith, a breach may be technical in nature, etc. See: *Plant* (police acted "in good faith" and "were entitled to rely on the law as it was at the time": para. 35). Since Charter breaches may involve a myriad of points on a spectrum of state conduct, Vagh's insistence that any reliance upon information obtained in breach of the Charter "will necessarily signal an institutional tolerance for some level of fraud" (para. 40) and that failure to excise all breaches would make the court an "unintentional instrument of fraud" (para. 46), are manifestly incorrect.

[232] Although not specifically addressing whether Charter breaches constitute fraud, the decision of *Burrows J. in Croft* at para. 22, as cited above, implicitly contradicts the assertion of Mr. Vagh that by not excising Charter breaches the court will become an unintentional instrument of fraud. As *Burrows J.* noted, the affiant may well be unaware that the information was obtained through the breach of a Charter right of a third party or even the accused: *Croft*, para. 22.

[233] The *Grant* trilogy did not equate Charter breaches with fraud, nor have other cases since then. This argument advanced by Mr. Vagh has an *in terrorem* quality and I do not accede to it.

L. Excision for one or excision for all?

[234] Based on this review of the jurisprudence, which I note is collectively contradictory and often confusing, I am of the view that the weight of the authorities establishes a symmetry in approach between exclusion of evidence obtained by unconstitutional means and excision of information obtained by unconstitutional means. While the underlying purposes are different - the former seeks to exclude evidence from trial and therefore involves a balancing of interests including societal interests and the latter simply seeks to remove information from materials in support of an application for a prior authorization - they both need to be grounded in a common approach or organizing principle. That organizing principle is found in the standing requirements from *Edwards* and related cases.

[235] Having reviewed the disparate decisions addressing the excision for one and the excision for all approaches, I prefer the excision for one approach, based as it is in the foundational principle that Charter rights are personal to the accused. In my view, the reasoning in *Huynh*, *Nguyen*, *Croft* and *Brounsuzian* is the appropriate way of approaching excision of unconstitutionally obtained information included in an affidavit in support of a wiretap authorization. This line of authority is consistent with the decisions in *Nicholson* and *Chau* which are also compelling in their analyses. Moreover, the decisions are all consistent with the implicit result that would have followed in *Vickerson* had the issue of excision been explicitly before the Court.

- [236] In order for an accused to have the fruits of an unconstitutional search excluded at trial, the first step is for the accused to establish standing - a reasonable expectation of privacy in the item or place searched: *Edwards*, *Tetrault*, *Vickerson*, *Brounsuzian* and *Latimer* 488.
- [237] Similarly, in order for an accused to have information, said to have been unconstitutionally obtained, excised from an ITO at a *Garofoli* review into the sufficiency of the authorization, there needs to be a link between the accused and the information sought to be excised. That link is the standing requirement - a reasonable expectation of privacy in the item or place searched that is the subject of the proposed excision: *Klassen*, *Hok*, *Vickerson*, *Chang*, *Huynh*, *Nguyen*, *Croft*, *Nicholson*, *Chau*, *Serre*, *Abdullahi*, *Merritt* and *Brounsuzian*. Standing to challenge the search conducted pursuant to the authorization is an insufficient basis to justify excision of material otherwise unrelated to the accused's personal rights.
- [238] What is less immediately clear, however, is whether this reasoning should hold for Charter breaches established by some accused on the indictment but which do not impact on the Charter rights of other accused. In my view, it must. To conclude otherwise would be to ignore the foundational principle that Charter rights are personal to the accused and that enforcement of Charter rights must be personal to the accused who make the challenge, as established in *Edwards*.
- [239] Moreover, adopting excision for all, regardless of whether an accused's own Charter right has been breached, flies in the face of the jurisprudence that prohibits an accused from litigating the breach of a third party's Charter rights for purposes of excision. The fact that the third party is a co-accused does not detract from the point that it is someone else's rights that are being relied upon and the jurisprudence does not support this. The facts and reasoning in both *Huynh* and *Brounsuzian* undermine the defence excision for all thesis. *Huynh* and *Brounsuzian* unequivocally and convincingly support the contrary view. Excision for one is the approach supported by the weight of the authorities provided and reviewed.
- [240] I adopt the reasoning of the Alberta Court of Queen's Bench decisions in *Huynh*, *Nguyen* and *Croft* as well as the reasoning from the Ontario line of authorities most recently and comprehensively addressed in *Brounsuzian*. Even though all the accused on the indictments before the Court on this application have standing to challenge P5 in a *Garofoli* review as their conversations were intercepted, they cannot seek to have the Court excise information found to have been obtained in breach of a co-accused's Charter rights. They must establish that the impugned information in the affidavit that they seek to have excised relates to a breach of their own Charter rights.
- [241] The only way excision for all could occur in the context of established breaches of a co-accused's Charter rights would be if the Crown conceded or agreed that the information should be excised as against all co-accused as was done in *Sanghera* #2.

V. Conclusion

[242] For the foregoing reasons, I conclude that "excision for one" is the appropriate approach to dealing with the excision of unconstitutionally obtained information from an ITO. Thus, where it is determined that an accused's Charter rights were breached and the information obtained was included in the ITO, then that information is to be excised from the ITO as against only the accused whose Charter rights were breached.

Ker J.

- [1] Both the federal Crown as represented by counsel from the Public Prosecution Service of Canada (the "PPSC") and the provincial Crown as represented by counsel from the British Columbia Prosecution Service (the "BCPS"). The PPSC has conduct of the prosecutions for indictments VA 27787, VA 27787 and VA 27798. The BCPS has conduct of the prosecution of the remaining indictment VA 28709.
- [2] Counts #1-3 on Indictment VA 27786.
- [3] R. v. Latimer, 2020 BCSC 488 - ("Latimer 488"). While Latimer 488 deals with only two places of surveillance, there are many other locations that raise similar issues to those in that ruling.
- [4] R. v. Latimer, 2020 BCSC 685 - ("Latimer 685"). Other accused were also arrested at different times over the course of the Project Territory investigation but determinations have not yet been made on applications challenging the arrests.
- [5] The Pereira arrest was originally the subject of a pre-trial application challenging the validity of his warrantless arrest. The matter was resolved as between counsel and the Court was advised on February 3, 2020 that no voir dire was required.
- [6] Latimer 488 is the first ruling on this issue. Others have raised the issue for other locations but the matter has not yet been litigated.
- [7] Ibid.
- [8] Although not referred to in the materials filed by the defence, the thesis that "excision for all" should govern in these cases appears to have either its genesis or at least support in an article by Professor Glen Luther (Faculty of the College of Law, University of Saskatchewan), "Of Excision, Amplification and Standing: Making Sense of the Law of Evidence in the Context of Challenges to Warranted Searches," (2006) 11 Can Crim Law Rev. 1.
- [9] R. v. Kokesch, [1990] 3 S.C.R. 3, paras. 43 and 58; Grant, paras. 49-50; Plant, para. 26; Wiley, para. 20.
- [10] Submissions Csongor Szucs - Excision, paras. 7, 24, 58; Reply Submissions Csongor Szucs - Excision, para. 40; Memorandum of Argument - Excision filed by Jitesh Vagh, paras. 32-34, 40, 46, 48-50; Submissions in Reply - Excision filed by Jitesh Vagh.

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- [11] Submissions on Excision - Counsel for Braich and Pereira, para. 6; Submissions on Excision - Pashminder Bopari, paras. 1 and 2.
- [12] *Ibid.*, para.6 (Submissions of Braich and Pereira).
- [13] R. Hubbard, et. al., *Wiretapping and Other Electronic Surveillance: Law and Procedure* (Toronto: Thomson Reuters Canada Ltd.) (loose-leaf, updated 2019), §8.1.
- [14] *Wiretapping*, §8.5.2.
- [15] *Ibid.*, §4.9.
- [16] Citing the decision of Watt J. (as he then was) in *R. v. Land* (1990), 55 C.C.C.(3d) 382 (Ont. S.C.) and his paper "Electronic surveillance: double double toil and trouble", National Criminal Law Program, Criminal Procedure and Charter Issues, University of Saskatchewan, July 1992.
- [17] *R. v. Nero*, 2016 ONCA 160.
- [18] From the Oxford English Dictionary online edition: <https://www.oed.com/>
- [19] *Wiretapping*, §8.5.3.
- [20] *R. v. Griffin*, 2009 ABQB 696, paras. 85 and 107 (settlement privilege); *R. v. Lee*, 2001 BCSC 1896, paras. 14-16 (spousal privilege).
- [21] *R. v. Sunner*, 2017 BCSC 2445, para. 31; *R. v. Ferguson*, 2018 BCSC 378, paras. 65-70.
- [22] Leave to appeal to S.C.C. refused June 15, 2017,
- [23] For example, *Plant*, para. 35.; *R. v. Croft*, *infra*, para. 22.
- [24] *R. v. Marakah*, 2017 SCC 59.
- [25] *R. v. Cole*, 2012 SCC 53.
- [26] *R. v. Latimer*, 2020 BCSC 488. See also *R. v. Kim*, 2020 BCSC 1064; *R. v. Pipping*, 2020 BCCA 104, paras. 20-33.
- [27] This was the subject of the *Latimer* 488 ruling.
- [28] *R. v. Sanghera*, 2012 BCSC 385 ("*Sanghera #1*") and *R. v. Sanghera*, 2012 BCSC 1197 ("*Sanghera #2*").
- [29] The decision in *Guilbride* was also not followed by Burrows J. in *R. v. Croft*, 2013 ABQB 716, para. 18.
- [30] One of the co-accused in *Battista*.
- [31] Save perhaps through the application of the principles of *R. v. Laureinte*, 2010 BCCA 72 and consideration of the cumulative effect of numerous Charter breaches in assessing where on the spectrum of good faith vs. bad faith the police conduct lies.

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