
CANADA / JUDGMENT

R. v. McKay

2016 BCCA 391

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 391 R. v. McKay

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McKay,

2016 BCCA 391

Date: 20160930

Docket: CA43232

Between:

Regina

Appellant

And

Cameron Tyler Lewis McKay

Respondent

And

Attorney General of British Columbia

Intervenor

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated August 27, 2015 (R. v. McKay, 2015 BCSC 1510, Victoria Registry 160966).

Counsel for the Appellant:

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Counsel for the Respondent:

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Counsel for Intervenor:

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Place and Date of Hearing:

Vancouver, British Columbia

June 22, 2016

Place and Date of Judgment:

Vancouver, British Columbia

September 30, 2016

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fenlon

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Summary:

Appeal from a trial judge's order requiring Crown disclosure of documents containing intelligence from confidential police informers, edited to protect informer privilege. The disclosure order was made in the context of a pending Garofoli application challenging the admissibility of cocaine obtained on the search of the respondent's home. Held: appeal allowed. The trial judge erred in concluding source handler notes and source debrief reports not read and relied upon by the officer who swore the information to obtain the search warrant were relevant to the application. A Garofoli application considers only what the affiant knew or ought to have known at the time he or she swore the affidavit in support of the authorization or warrant. Informer-related materials not read and relied upon by the affiant are therefore prima facie irrelevant and producible only where the defence establishes likely relevance to an issue on the application and the materials are not privileged. The trial judge also erred by taking an overly narrow view of the scope of informer privilege. Once the Crown establishes that a document was created to record information that could tend to reveal the informer's identity and the document is not disclosed or relied upon to obtain an order, there is no prima facie right to obtain an edited version of the document.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] The issue on this appeal is the scope of the disclosure the Crown must make to enable an accused person to make full answer and defence, where the defence rests entirely upon a challenge to the admissibility of evidence obtained pursuant to a search warrant founded upon information provided by a confidential informer.

- [2] On September 19, 2013, the respondent was charged with possession of cocaine for the purpose of trafficking. The charge arose from the seizure from his townhouse of approximately one kilogram of cocaine and drug trafficking paraphernalia during a search conducted by officers acting under a search warrant issued by a judicial justice, pursuant to the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [3] Months before trial, the respondent's counsel informed the judge the only issue at trial would be the admissibility of the seized evidence, in particular whether it had been obtained in breach of s. 8 and should be excluded pursuant to s. 24(2) of the Charter. The respondent intended to challenge the sufficiency of the grounds to support the warrant and would seek to cross-examine the officer who swore the information to obtain the search warrant ("ITO"). On June 2, 2015, several weeks before the anticipated trial, his counsel applied for disclosure of materials relating to information provided to the police by informers.
- [4] The trial judge, for reasons indexed at 2015 BCSC 1510, granted the defence application in part. He required the Crown to disclose documents containing the intelligence from the informers, edited, if necessary, to protect informer privilege. The Crown declined to comply with the disclosure order and the judge granted the respondent's application for a judicial stay of proceedings. This is the Crown's appeal from the disclosure order and the consequential stay.

Judicial History

The Record

- [5] The investigation leading to the disclosure order was described in the evidence before the trial judge. Cst. Lee of the Victoria Police Department Strike Force swore an ITO in support of a tracking warrant for devices linked to various individuals under investigation for dial-a-dope drug trafficking in the Greater Victoria area. On September 18, 2013, she obtained the tracking warrant.
- [6] The next day, Cst. Lee obtained a search warrant for Mr. McKay's townhouse unit. She also drafted and swore the ITO in support of the search warrant. Cst. Lee deposed she had grounds to believe Mr. McKay and others were involved in dial-a-dope drug trafficking; he was the registered owner of a townhouse unit on Grafton Street in Esquimalt; and there would be drugs and evidence of trafficking located there. The grounds to support this belief included:
- a) information from two informers;
 - b) observations of eleven separate street encounters involving the respondent and others, alleged to be consistent with dial-a-dope trafficking; and
 - c) background information about the respondent and others allegedly involved in dial-a-dope trafficking activities.

- [7] Of particular interest to defence counsel on the disclosure application were two types of documents: Source Handler Notes ("SHNs") and Source Debrief Reports ("SDRs").
- [8] SHNs were described in detail on the record. They are the primary record of the dealings between an informer and his or her police handler. They are not created for specific investigations. Each instance in which an informer provides criminal intelligence to a handler is referred to as a debriefing. The handler is expected to document all debriefings in a notebook used only for that informer. The handler should record as much of the information imparted as possible. The SHNs in question contain details that directly identify the informer, including dates, places, and often particular words or phrases used by the informer. They must be stored in secure locations within police facilities. When a handler notebook is full or the informer is no longer active, the notebook is sent to the source handling unit for storage.
- [9] The handler is expected to record the intelligence received at each debriefing in an SDR. That information may relate to a variety of activities and individuals and is not limited to a particular suspect, criminal transaction or investigation. The source handler uses SHNs as the basis for SDRs, but dilutes and reduces the information from the SHNs "to its most generic form" in order to protect the identity of the informer. Completed and vetted SDRs are reviewed for accuracy and to ensure they do not reveal the identity of the informer by the Royal Canadian Mounted Police's ("RCMP") Human Source Unit or the Victoria Police Department's Analysis and Intelligence Section. SDRs are a conduit between the handler, who is responsible for obtaining intelligence information, and investigators in the field, but SDRs are not drafted with the intention that investigators will rely upon them as primary sources of information. Although normally written in terms that do not include details identifying the informer, the content of an SDR may allow those familiar with the subject matter to determine the informer's identity.
- [10] The documents sought by the defence in this case included:
- a) all source handler notes pertaining to the two informers;
 - b) all source debriefing reports related to the informers;
 - c) all notes made by Cst. Lee in anticipation of obtaining the search warrant, all notes and reports created by her following conversations with the handlers of the two informers.
- [11] Crown counsel advised the Court there were SHNs for each informer and a total of 32 SDRs pertaining to the informers. The relevant content of one SDR, which had been expressly relied upon in the ITO, was disclosed to defence counsel. The Crown advised defence counsel and the Court that Cst. Lee made no notes in preparing the ITO and made no notes of her conversations with the handlers.
- [12] The respondent tendered a number of exhibits on the application, including:
- a) the ITO sworn by Cst. Lee in support of the tracking warrant;

- b) the ITO sworn by Cst. Lee in support of the search warrant for the respondent's townhouse; and
 - c) a one-page supplementary "will say" statement of Cst. Lee summarizing her evidence with respect to three points:
 - i. that she drafted the ITO for the search warrant as a "living" document and did not create any other notes or reports in preparing the ITO;
 - ii. that she obtained the informer information by directly speaking with the handlers of the informers, and she did not see or rely on any SHNs; and,
 - iii. that she obtained the details in paras. 34(a) through (g) of the ITO from an SDR.
- [13] The Crown tendered affidavits from Staff Sgt. Cater and Sgt. Hollingsworth. Staff Sgt. Cater is the officer in charge of RCMP E Division Human Source Unit. That unit serves as the central repository for all information relating to confidential informers for the RCMP in B.C. He oversees administration of informer files, provides guidance to police officers relating to informer issues and controls access to SDRs. Sgt. Hollingsworth is the supervisor of the Victoria Police Department's Analysis and Intelligence Section. He is responsible for oversight of confidential informer files and reporting procedures, as well as reviewing SDRs to ensure they do not identify informers.
- [14] These affidavits describe how source handling units create and maintain records of information provided by informers. Both the Analysis and Intelligence Section and the Human Source Unit exert strict control over the dissemination of informer-related materials. Access to SDRs is controlled; they are generally only accessible within law enforcement agencies on a "need to know" basis. SDRs are scanned and uploaded to police databases, after which the originals are stored in secure locations maintained by the governing human source unit. Access to the databases is restricted to analysts and officers with appropriate security clearance.
- [15] The Victoria Police Department stores SDRs in three places: a hard copy is locked within a secure office, an electronic version is kept in a password-protected location on the department network, and another electronic version is sent to the Vancouver Police Department for inclusion in the restricted-access Central Repository for Municipal Sources Database. Victoria Police officers can only access SDRs by making a request to the Analysis and Intelligence Section, which conducts searches of the electronic resources for SDRs that may assist with specific investigations. The trial judge summarized the process for the distribution of the SDRs when pertinent information is found as follows (at para. 27):
- (a) If the SDR is classified as "special handling," the source handler and Human Source Coordinator determine what information, if any, will be provided to the requesting officer;

- (b) Otherwise, if the [Analysis and Intelligence Section] determines that all of the information in an SDR pertains to the investigation, the AIS will provide a copy of the SDR to the requesting officer; or
 - (c) If the AIS determines that some of the information in an SDR pertains to the investigation but some does not, the AIS will provide the requesting officer with a copy of the SDR vetted so as to remove irrelevant information.
- [16] Within the RCMP Human Source Unit, hard copies of informer-related materials are kept in a secure "classified environment". Human Source Unit members and staff must possess "Top Secret" clearance, rather than the lesser "Secret" clearance held by most RCMP members. The Human Source Unit stores SDRs in electronic form in the National Criminal Databank, a restricted access electronic database. Initially, only the Human Source Unit and a "select few others" have access to a given SDR, pending quality assurance approval and sensitivity classification. If the Human Source Unit classifies an SDR as particularly sensitive, requiring "special handling," it is stored in a folder available only to those with pre-approved access. Otherwise, following Human Source Unit approval, the SDR is placed in the "Human Source Analyst Folder," a searchable, restricted access database available to RCMP analysts. RCMP officers and members of other Canadian police forces can only access SDRs maintained by the Human Source Unit by making an inquiry with that unit. On request, the Human Source Unit analysts search for SDRs that may assist with investigations. Analysts can conduct searches limited to a particular individual or by subject matter. Where a search reveals information pertinent to a particular investigation, the analyst will provide to the requesting officer "the relevant paragraphs" from the SDRs. The Human Source Unit vets and removes other information.
- [17] Where an inquiry to the Analysis and Intelligence Section or Human Source Unit results in the provision of some portion of an SDR to the requesting officer, that officer is expected to directly contact and obtain further information from the source handler. The contents of SDRs are subject to the "third party rule", meaning that other law enforcement officials are not permitted to use or disseminate the contents without the approval of the handler. Because the information in SDRs is often diluted and obscured, they are not intended to be relied upon as primary sources of information in support of an ITO or affidavit to obtain a warrant or other form of judicial authorization. Further, it is not expected that SDRs will be made available for disclosure in criminal proceedings.
- [18] RCMP practice is that SDRs are not distributed within the police community because of the risk of revealing the identity of confidential informers. Instead, the Human Source Unit prepares a further diluted version of information in SDRs, a dissemination form, for this purpose. Dissemination forms contain "only the specific information that is required for a particular law enforcement purpose." As with SDRs, officers dealing with dissemination reports must contact the source handler if they require further information.

- [19] Both Staff Sgt. Cater and Sgt. Hollingsworth expressed concern about the feasibility of editing SHNs and SDRs as an effective means of protecting the identity of informers. SHNs contain names, dates and locations of meetings, and many other details which could identify the informer. Even with identifying features redacted, the substantive content of both SHNs and SDRs can often be used by those who are familiar with the matters described to identify the informer.
- [20] Both officers also referred to the "mosaic effect": a person reading a collection of vetted materials may be able to piece together what may appear to be innocuous or unrelated bits of information from multiple sources to identify the informer directly or narrow the pool of individuals who could be an informer. This may occur even though the release of a single vetted SDR or SHN may not identify the informer. Both officers deposed it is difficult to predict which details in a collection of SHNs or SDRs might serve to identify an informer, particularly when SHNs and SDRs are combined with other materials vetted and disclosed in a single investigation or prosecution. The nature of information that could identify an informer can change over time.
- [21] The trial judge accepted, "without hesitation", the police evidence with respect to the importance of confidential information in combating criminal activity and the necessity to protect confidential informers from being identified. He also "completely accepted" the officers' evidence as to the difficulty of editing SHNs and SDRs to protect privilege.

The Issues and the Parties' Position on the Disclosure Application

- [22] The judge viewed the disclosure application as giving rise to three issues:
- (a) were the SHNs and SDRs documents in the possession of a third party, the police, rather than the Crown and thus subject to third-party disclosure obligations;
 - (b) if so, did the defence show that the materials were likely relevant to the issues before the Court; if not, did the Crown demonstrate that the material were clearly irrelevant; and
 - (c) did informer privilege apply to prevent disclosure of the SHNs and SDRs?
- [23] The respondent's counsel relied on *R. v. Bernath*, 2015 BCSC 632; *R. v. Edwardsen*, 2015 BCSC 705; *R. v. Whitton*, 2015 BCSC 859; and *R. v. Gallant*, 2010 NBQB 187; as well as *R. v. Pires*; *R. v. Lising*, 2005 SCC 66; and *R. v. McNeil*, 2009 SCC 3. He argued that the Crown's disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, exist in relation to evidence collected at all stages of the investigation and prosecution. The Crown must disclose all material evidence in its possession except that which is clearly irrelevant. Even materials irrelevant to a review of the validity of a warrant must be disclosed if the material sought might be useful to the accused in meeting the Crown's case, advancing a defence, or otherwise making a decision that might affect the conduct of the defence. The respondent submitted privilege only applies to any details in the documents sought that could tend to identify the informer and there was no reason why the SHNs and the SDRs could not be edited, just as the ITO must be, to permit its production.

[24] In response, the appellant submitted this Court's decision in *R. v. Barzal* (1993), 84 C.C.C. (3d) 289, [1993] B.C.J. No. 1812 (C.A.), limited the Crown's disclosure obligation to material filed in support of the application for an authorization for the warrant, and that obligation does not extend to material which is irrelevant to a challenge to the warrant. SHNs and SDRs are generally not part of the investigative file or the fruits of the investigation and are only subject to disclosure if the defence can demonstrate their likely relevance. The Crown argued that approach has been approved in *R. v. Vanalstine* (August 16, 2011), Vancouver VA25228 (B.C.S.C.); *R. v. Terezakis*, 2005 BCSC 850; *R. v. Basi*, 2010 BCSC 26; *R. v. Daponte*, 2013 ONSC 4720; *R. v. Ahmed*, 2012 ONSC 4893, [2012] O.J. No. 6643; and *R. v. Ali*, 2013 ONSC 2629. The Crown also submitted the difficulty of editing SHNs and SDRs to protect the identities of informers precludes disclosure without imperiling informers and argued that privilege could properly be asserted to prevent disclosure of all of the material sought by the defence.

The Judgment and Order

[25] The judge began his consideration of the first issue by reviewing the decisions in *Bernath*, *Edwardsen* and his own ruling in *Whitton*. In each of these cases, trial judges had concluded that the Crown's first-party disclosure obligations under *Stinchcombe* should be met in the context of a challenge to a search warrant under *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

[26] Referring to the Supreme Court of Canada's decision in *McNeil*, the judge considered what material in the hands of the police must be included under those first party disclosure obligations. He held:

[57] the police, while legally distinct and independent from the prosecuting Crown, are not treated as a third party when fulfilling their necessary, corollary duty to provide the prosecuting Crown with all materials pertaining to the investigation of the accused: *McNeil*, at para. 14. When supplying the Crown with the "fruits of the investigation," the police are on the same, first-party footing as the prosecuting Crown.

[27] He then turned to the argument that where the issue before the trial judge is limited to the validity of an order for the issuance of a warrant, the Crown is only required to disclose the material that was before the authorizing judge. He answered this question by referring to *Pires* and *Lising*, and in particular, the words of *Charron J.* at para. 26:

under the principles established in *Stinchcombe*, the defence is entitled to all material in the possession or control of the Crown that is potentially relevant to the case, whether favourable to the accused or not. The defence can therefore compare the contents of the investigative file received from the Crown to the authorization's supporting material to ascertain whether anything throws doubt on the reasonable believability of the latter. Further, the disclosure material may also provide the defence with possible third-party avenues of inquiry.

[Emphasis added by the trial judge.]

- [28] The judge held that the comparison between the investigative file and the material supporting the authorization would be "meaningless or impossible" if he accepted the Crown's invitation to depart from the conclusions reached in Bernath and Edwardsen.
- [29] Further, the judge held, even if SHNs and SDRs do not assist the accused in challenging a warrant they must be disclosed under Stinchcombe if they constitute the fruits of the investigation and might be relevant to other issues on the trial.
- [30] The judge then addressed the question upon which this appeal turns: what informer-related materials are part of the "investigative file" or the "fruits of the investigation"? He rejected the Crown's submission that the information sought by the defence was "mere background" and did not relate to the investigation of the accused. He reasoned:
- [64] The Crown [contends] that the evidence now before the court clearly establishes SHNs and SDRs as the product of the general intelligence-gathering function of the police, unrelated to the specific investigation of Mr. McKay or his activities.
- [65] I accept that argument, as far as it goes. The evidence of Sgt. Hollingsworth and Staff Sgt. Cater does establish that informant-related materials are usually created in the course of general intelligence-gathering activities by police. However, the officers' evidence also clearly describes the process through which such materials cease to be mere background intelligence, becoming instead information particularized to the investigation of a particular accused, offence, or activity. In my view, the evidence of Sgt. Hollingsworth and Staff Sgt. Cater strengthens, rather than undermines, the conclusion that such materials are subject to first-party disclosure.
- [31] The judge also rejected the suggestion, principally founded upon Edwardsen, that the distinction between the investigative file and background information is irrelevant to this inquiry. At para. 68 he noted: "[it] seems clear that the difficulty with such a broad approach is that it provides no mechanism through which materials cease to be merely background intelligence collected by police and instead become fruits of the investigation."
- [32] He acknowledged support in the case law for the proposition that background material collected by the police becomes part of the investigative file if it is relied on by the affiant who swears the ITO. He regarded Bernath as one such case. At para. 69, he rejected that approach as too narrow, "because it would fail to capture materials that are relevant to issues beyond the scope of a Garofoli review." The trial judge was here considering Stinchcombe disclosure generally, not simply in relation to the Garofoli challenge, despite the fact that the only issue in the case was the validity of the search warrant.

- [33] In the judge's view, the affidavits of Sgt. Hollingsworth and Staff Sgt. Cater described a process through which information from the confidential informers became part of the investigative file. When an investigating officer makes an inquiry for informer information concerning a particular individual or subject, intelligence analysts are able to provide the relevant portions of SDRs to the requesting officer. The judge reached the following conclusion regarding that exchange of information:
- [72] upon consideration of all of the authorities, coupled with the evidence presented on this application, I am persuaded that the information in the SDRs obtained through the inquiry process that relates to the specific accused, offence or activity becomes part of the investigative file. This is because the inquiry process itself puts the police on notice that the SDRs likely contain information pertinent to the investigation, otherwise the intelligence analysts would not have provided those SDRs to the requesting officer. The police analysts have, in essence, made a preliminary determination of relevance as regards the scope of inquiry defined by the requesting officer. The information reflected in the SDRs is no longer nonspecific background intelligence, but rather is investigative information particularized to the accused, an offence, or activity.
- [34] The Crown was therefore obliged to disclose material relating to the police dealings with the informers beyond that referred to or relied upon by the affiant in seeking the warrant. That reasoning was extended to the SHNs relied upon to create the SDRs. They became part of the investigative file because if the diluted information in the SDR was relevant, all the more so is "the comprehensive, foundational, initial rendering of information contained in the corresponding SHNs." The judge concluded, at para. 76, that those portions of SHNs which relate to the SDR information provided in response to an officer's specific inquiry become fruits of the investigation. Portions of the SHNs cease to be "nonspecific background intelligence" when they are relied upon to produce SDRs and must be produced.
- [35] This approach, in the opinion of the trial judge, appropriately delineated the boundary between the investigative file and background information. The accused's entitlement to disclosure goes "no further than the extent of the information considered relevant to a police officer's investigative inquiry" (para. 80) and material "concerning only general information unrelated to a particular accused and investigation will fall outside the scope of first-party disclosure" (para. 81).
- [36] At para. 85 he concluded: "even where an SHN, SDR, or dissemination report is clearly irrelevant to a Garofoli review, the material must still be disclosed where it is not clearly irrelevant to other potential issues in the proceeding."
- [37] Finally, the judge dismissed the Crown's argument that blanket privilege could be claimed in relation to a class of documents including SHNs and SDRs. In doing so he followed the approach taken in *Edwardsen*, holding that informer privilege does not protect the contents of documents which do not or could not tend to reveal the identity of a confidential informer; privilege could be protected by redacting details that could identify the informer.

He distinguished the present case from *R. v. Leipert*, [1997] 1 S.C.R. 281, where the Supreme Court upheld a Crown assertion of blanket privilege. He considered the Supreme Court had done so only because the anonymity of the tipster in that case made it impossible to determine whether any of the information might or might not reveal the informer's identity.

[38] The judge summarized his conclusions as follows:

[106] Even if informant-related materials cannot assist the accused in challenging a warrant or on an application to cross-examine an affiant, those materials must nevertheless be disclosed pursuant to *Stinchcombe* if they constitute fruits of the investigation and are not clearly irrelevant to other issues on the trial .

[107] In this regard, the evidence of Sgt. Hollingsworth and Staff Sgt. Cater describes the process through which confidential informant information usually ceases to be nonspecific, background intelligence routinely collected by police, instead becoming information particularized to an accused, offence, or activity under investigation. This mechanism of particularization is the conduit through which informant-related materials become fruits of the investigation subject to first-party disclosure.

[108] The Crown must still review the materials and may withhold disclosure if they are clearly irrelevant to the proceeding. Further, disclosure of relevant informant-related materials may nevertheless be refused on the grounds of informer privilege where applicable.

Grounds of Appeal

[39] The Crown says the trial judge erred:

- a) by failing to require the respondent to establish the relevance of the SDRs and SHNs; and
- b) by holding that presumptive disclosure of SDRs and SHNs, subject to editing or redaction of specific details, is consistent with the informer privilege rule.

Discussion

Standard of Review

[40] The standard of review from the disclosure order is not in dispute. I adopt Ottenbreit J.A.'s description of the appropriate standard in *R. v. Anderson*, 2013 SKCA 92, at para. 52:

The question of whether the Crown has met its disclosure obligations is subject to a correctness standard of review overall. The trial judge is called on to determine whether the performance of the Crown in the particular case has met the legal standard as set forth by the governing disclosure cases (*R. v. Black*, 2011 ABCA 349, [2012] 3 W.W.R. 637, para. 14).

Jurisprudence

[41] The disclosure order in this case was made in relation to a pending Garofoli application to challenge the admissibility of the cocaine obtained on the search of the respondent's home. However, the judge's conclusions were founded in part upon the Crown's general duty to make disclosure of material relevant to the allegations against the accused. For this reason, to determine whether the judge applied the appropriate tests, we must examine both the scope of the Crown's disclosure obligations in relation to a Garofoli application, and its general obligations considered in *Stinchcombe*.

Garofoli and Stinchcombe

[42] The first leg upon which a disclosure order in these circumstances stands is *Garofoli*, the Supreme Court's seminal consideration of the procedures available for challenging a wiretap authorization to ensure conformity with the minimum constitutional requirements demanded by s. 8 of the Charter. At 1451-1452, Sopinka J., writing for the majority, describes the permissible scope of a challenge to an order authorizing a search warrant or a wiretap authorization, so as to give substance to s. 8 Charter rights. Where the admissibility of evidence is challenged at trial on the basis that it was obtained pursuant to an order that ought not to have been made, the reviewing judge should determine whether the relevant statutory pre-conditions for the authorization have been met. The reviewing judge does not conduct a hearing *de novo*; the reviewing judge can only interfere if there was no basis for the issuing judge to be satisfied that the pre-conditions for granting the authorization existed.

[43] A challenge on such grounds cannot be effective without the disclosure of the material before the issuing judge. Such disclosure is now mandated, in the context of wiretap authorizations by s. 187(1.4) of the Criminal Code, R.S.C. 1985, c. C-46. This material must be edited where necessary, and may be supplemented, where it is appropriate to do so, by cross-examination of the affiant. The Court in *Garofoli*, at 1457-1462, reviewed in detail the care that must be taken in editing the materials in the packet opened for examination. Editing should attempt to balance the right of the accused to make a full answer and defence with the protection of the identity of informers and the efficiency of investigative techniques. Cross-examination of the affiant should be permitted when the accused establishes it is likely to be useful to the challenge to the authorization. At 1465, Sopinka J. reasoned:

Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.

When permitted, the cross-examination should be limited by the trial judge to questions that are directed to establish that there was no basis upon which the authorization could have been granted. The discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised. While leave to cross-examine is not the general rule, it is justified in these circumstances in order to prevent an abuse of what is essentially a ruling on the admissibility of evidence.

[Emphasis added.]

[44] The other leg upon which the judge's disclosure order stands is the decision in *Stinchcombe*, where the Supreme Court addressed the then-unsettled law with respect to the Crown's obligations to make disclosure to the defence. It did so in light of the fact that the right of an accused to make full answer and defence had "acquired new vigour by virtue of its inclusion in s. 7 of the Charter as one of the principles of fundamental justice" (at p. 336).

[45] Sopinka J., again writing for the Court, held that all relevant information, inculpatory and exculpatory, that which the Crown intends to introduce into evidence as well as that which it does not intend to use, in the possession of the Crown must be disclosed by the Crown. This obligation is subject to the discretion of the Crown, which permits it to exclude from disclosure only material that is "clearly irrelevant" and that which must be withheld "to enforce the privilege relating to informers". The exercise of that discretion is reviewable and, "[i]nasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule" (at p. 340).

[46] It must be borne in mind that the Court in *Stinchcombe* was considering the Crown's disclosure obligations in relation to the evidence going to the weight of the Crown's case against the accused at trial.

[47] The Court also addressed two arguments that have reappeared occasionally since: first, that the Crown should not have to bear a too-onerous burden of disclosure; and second, that liberal disclosure might imperil the safety of informers. At 334, the Court rejected the first objection for two reasons: it was not supported by the material on the record; and, there was evidence that the full and early disclosure of the information in the possession of the Crown would produce efficiencies in the criminal justice system in the form of the resolution of many charges by withdrawal or guilty plea.

[48] The Court dealt with the second objection by clearly restating the primacy of privilege. At p. 335 it stated:

Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979), and any rules with respect to disclosure would be subject to this and other rules of privilege.

[Emphasis added.]

[49] The judgment in *Stinchcombe* left a number of questions open for further consideration, including those addressed by the trial judge in the case at bar:

- a) what material in the hands of the police may be said to be in the possession of the Crown;
- b) of that material, what may be said to be relevant to a *Garofoli* application; and
- c) how is the scope of informer privilege to be circumscribed?

[50] As the trial judge noted in this case, subsequent jurisprudence, *McNeil* in particular, suggests, at least insofar as evidence going to the case at trial is concerned, the first question is largely settled by reference to relevance. The police have an obligation to disclose all relevant material pertaining to its investigation of the accused to Crown counsel (the "fruits of the investigation" or the "investigative file"). Therefore, it may be assumed that all relevant evidence in the possession of the investigating police will be provided to or obtained by the prosecutor. It is not open to Crown counsel to explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it: see *McNeil* at paras. 14, 20-24.

[51] The present case turns on the second and third questions: the scope of material relevant to a *Garofoli* application and the restrictions on production necessitated by informer privilege. The question of relevance is relatively simple in relation to the *Stinchcombe* obligation to disclose material that strengthens or weakens the prosecution's case at trial. It is much less clear in relation to information with respect to how the investigation was conducted, sought on a *Garofoli* application, challenging the validity of a search warrant or wiretap authorization.

Barzal

[52] This Court addressed that question in *Barzal*, where the Crown's case depended on the admissibility of evidence obtained by a wiretap, which was authorized on the basis of information provided by confidential informers. The accused obtained an order for disclosure of the police investigation files, including unedited informer debriefing notes, for the purpose of testing the reliability of the informers on a challenge of the validity of the wiretap authorizations. The files had not been part of the material that formed the basis for the granting of the authorizations. The Crown refused to make the disclosure ordered, declined to call any evidence, and the charges were dismissed.

[53] On appeal, the Crown argued that relevance of the materials sought by the defence should be considered in light of the limited task of the reviewing judge. If the Crown could support the authorizations on the basis of the material presented to the issuing judge, the authorizations would be confirmed and the background information would be irrelevant. If the authorizations could not be supported by the affidavits, including the appendices, edited in accordance with the procedure described in *Garofoli*, that would put an end to the issue

of the admissibility of the intercepted communications and no further enquiry would be necessary or appropriate.

[54] The Court held:

43 On a review of an authorization the trial judge is endeavouring to determine whether in the totality of the circumstances the authorizing judge could have concluded that the informants were sufficiently reliable to support a finding of reasonable and probable grounds. Subject to the existence of fraud, non-disclosure, or misleading evidence, none of which were alleged here, the indicia of reliability must be in the material before the authorizing judge. Otherwise the authorization cannot stand. It is reliability in this context which is relevant in respect to the validity of an authorization, not reliability at large.

44 In this case the accused wanted access to the debriefing notes in order to test the reliability of the informers. A detailed inquiry into police files is not required for that purpose. Sufficient reliability is established, or is not established, by reference to the material filed in support of an application for an authorization. The right to make full answer and defence in this context is a right to the disclosure of material which had been before the authorizing judge. It is not a right to embark on a fishing expedition of all the material in the possession of the police. Such an enquiry could be endless, including access to police files, cross examination of police officers, cross examination of informants (which is not permitted; *Garofoli* at p. 1465), and consideration of the details of each case in which the informer had been involved.

[Emphasis added.]

[55] In the result, the trial judge was found to have erred in failing to consider the relevance of the material sought by the defence in the context of a challenge to the validity of the wiretap authorizations:

52 Although the trial judge purported to order disclosure on the basis that the material was relevant to the challenges which the accused wished to make to the authorizations and search warrants, the order went far beyond what is required by the authorities.

[56] The judge made a second error, by failing to engage in the editing described in *Garofoli* and *R. v. Scott*, [1990] 3 S.C.R. 979, to protect the identity and safety of the police informers.

[57] Some subsequent cases have treated *Barzal* as authority for the later proposition concerning editing but not the former, concerning the restrictive analysis of what material is relevant in relation to a *Garofoli* challenge. Clearly, in my view, it is authority for both propositions.

Leipert

[58] In *R. v. Leipert*, [1997] 1 S.C.R. 281, the Court considered whether the accused was entitled to receive the details of an anonymous telephone tip to Crime Stoppers. The accused argued, relying on *Stinchcombe*, the Crown is under a general duty to disclose all information within its control that is not clearly irrelevant or privileged, including information from

informers referred to in ITOs. The accused claimed the information in the tip sheet was not clearly irrelevant and the document could be edited to protect privilege. The decision of the trial judge, requiring disclosure was set aside by this Court. Southin J.A. held the material sought was irrelevant to the issue before the judge: whether there were grounds upon which the warrant might properly have been issued. McEachern C.J.B.C. held the material sought was privileged and privilege trumped the accused's right to documents that might be necessary for his full answer and defence. Cumming J.A. concurred with both judgments.

[59] The Crown, seeking to uphold this Court's decision before the Supreme Court, argued that editing a privileged document was improper and risky. It noted seemingly innocuous details contained in the tip sheet might be sufficient to identify the informer. McLachlin J. (as she was then) wrote:

8 The trial judge was faced with two apparently conflicting rules. The first was the rule requiring disclosure to the defence of all information not clearly irrelevant or privileged. The second was the rule of informer privilege. The trial judge attempted to accommodate both rules by editing the tip sheet to remove information that could reveal the tipster's identity and ordering production of the balance of the tip sheet. I share the view of McEachern C.J.B.C. in the Court of Appeal that the trial judge's approach gave insufficient weight to both the importance of maintaining informer privilege and the danger of ordering disclosure of tip sheets containing details which, despite editing, may enable an accused person to identify the informant.

[60] The Supreme Court dismissed the appeal, accepting the Crown was not in a position to determine whether any part of the information could reveal the informer's identity and was justified in claiming privilege for all of the information provided by the informer. The trial judge had erred by editing the tip sheet in an attempt to protect the informer's identity. When it is impossible to determine which details might reveal the identity of the informer, a trial judge should not try to turn a privileged document into an unprivileged document by editing it.

[61] McLachlin J., at 335, rejected the argument the Charter had introduced another exception to the informer privilege rule based on full disclosure in aid of the Charter guarantee of the right to make full answer and defence:

24 This argument rests on a right to disclosure broader than any which this Court has enunciated. In *Stinchcombe*, supra, the right to disclosure of Crown documents was expressly made subject to two conditions: relevance (to be interpreted generously as including all that is not clearly irrelevant) and privilege. The right to disclosure was not to trump privilege. Any doubt about its application to informer privilege was expressly negated.

[62] When addressing the propriety of editing documents, the Court drew a distinction between classes of documents. It did not begin with the proposition that all relevant documents, whether privileged or not, should be produced, in edited form, if necessary, to preserve confidentiality. First, the Court observed:

28 Informer privilege is of great importance. Once established, the privilege cannot be diminished by or "balanced off against" other concerns relating to the administration of justice. The police and the court have no discretion to diminish it and are bound to uphold it. The only exception to the privilege is found where there is a basis to conclude that the information may be necessary to establish the innocence of the accused. The scope of the rule extends not only to the name of the informer, but to any details which might reveal the informer's identity. It is virtually impossible for the court to know what details may reveal the identity of an anonymous informer. The same considerations apply on challenges to search warrants or wiretap authorizations.

29 These considerations suggest that anonymous tip sheets should not be edited with a view to disclosing them to the defence unless the accused can bring himself within the innocence at stake exception. To do so runs the risk that the court will deprive the informer of the privilege which belongs to him or her absolutely, subject only to the "innocence at stake" exception...

[Emphasis added.]

[63] Turning to cases where judicial editing is called for, the Court distinguished between editing an affidavit filed in support of an authorization and documents containing the details of the tip. It reasoned:

30 In *Garofoli*, supra, Sopinka J. stated at p. 1458: "Editing . . . is essential in cases in which confidential information is included in the affidavit filed in support of an authorization." He added, "In determining what to edit, the judge will have regard for the rule against disclosure of police informants." A similar conclusion was reached per Cory J. in *Hunter*, supra.

31 These cases are distinguishable from the case at bar on two grounds. First, the informants in those cases were not anonymous, enabling the court to make judgments on what details might or might not reveal the identity of the informers. Second, the defence was seeking to review the affidavit or "Information to Obtain" filed in support of the application for the authorization, as distinguished from background documents and information. In the case at bar, the appellant had disclosure of the "Information to Obtain". He knew the entire basis for the authorization. He wanted more -- the details of the information given by the tipster. Those details, recorded by the police officer who received the call, were contained in a separate document. In *Hunter*, *Garofoli* and *Scott*, the combination of the known informant and the fact that what was at issue was the very document upon which the Crown relied to sustain the warrant or authorization, supported the approval for editing. The case here is quite different.

[Emphasis added.]

[64] The defence application in *Leipert* was therefore dismissed both because the Court could not determine what editing might be necessary to protect an anonymous informer, and, because the defence was seeking disclosure of "background" information, rather than "the very document upon which the Crown relied to sustain the warrant or authorization". In my view, *Leipert* suggests (at para. 32) that once a background document is considered to be privileged, editing should not be resorted to unless the judge "can be certain that what

remains of an informant document after editing will not reveal the informer's identity" or innocence is at stake. The Court did not address the views of Southin and Cumming JJ.A., that the background material the defence sought was clearly irrelevant.

Pires and Lising

[65] In Pires and Lising, the accused had sought to challenge the admissibility of evidence obtained with the aid of a consent wiretap order made pursuant to s. 184.2 of the Criminal Code. The trial judge denied leave to cross-examine the affiant and ultimately found the wiretap evidence to be admissible. This Court upheld the trial judge's ruling. The accused asked the Supreme Court to reconsider the limits on cross-examination described in Garofoli and the constitutionality of those limits in light of amendments to the Criminal Code. The Court found the Garofoli leave requirement to be entirely consistent with Charter principles. It declined to revisit Garofoli and held it would be unwise to permit cross-examination of an affiant as of right.

[66] Charron J., writing for the Court, began with these observations:

3 There is no question that the right to cross-examine is of fundamental significance to the criminal trial process. However, it is neither unlimited nor absolute. The extent to which it becomes a necessary adjunct to the right to make full answer and defence depends on the context. The Garofoli threshold test requires that the defence show a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge. It is grounded in two basic principles of evidence: relevance and materiality. It is also born out of concerns about the proximity of proceedings and, in many cases, the need to protect the identity of informants. The rule does not infringe the right to make full answer and defence. There is no constitutional right to adduce irrelevant or immaterial evidence. Further, the leave requirement strikes an appropriate balance between the entitlement to cross-examination as an aspect of the right to make full answer and defence, and the public interest in the fair, but efficient, use of judicial resources and the timely determination of criminal proceedings.

[Emphasis added.]

[67] In dismissing the appeal, Charron J. wrote:

25 The first contextual factor that is ignored by the appellants' argument has already been mentioned - the right to full disclosure. Under s. 187(1.4) of the Criminal Code, the defence has access to all the documents relating to the authorization. Access is granted on the simple assertion that the admissibility of the evidence is challenged and that access to the material is required in preparation for trial: *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at p. 1517. The material includes the affidavit filed in support of the application for an authorization. Subject to any necessary editing for the protection of informants, the affidavit will usually provide a comprehensive account of the investigation leading up to the wiretap application, an articulation of the grounds relied upon in support of the application, and information relevant to

the reasonable believability of material gathered from informants. The affidavit filed in this case will be reviewed in detail later in these reasons.

26 In addition, under the principles established in *Stinchcombe*, the defence is entitled to all material in the possession or control of the Crown that is potentially relevant to the case, whether favourable to the accused or not. The defence can therefore compare the contents of the investigative file received from the Crown to the authorization's supporting material to ascertain whether anything throws doubt on the reasonable believability of the latter. Further, the disclosure material may also provide the defence with possible third-party avenues of inquiry.

27 Hence, the defence does not arrive empty-handed at the evidentiary hearing. More importantly, if no basis can be shown for questioning the validity of the authorization on the strength of the disclosed material, it is generally unlikely that cross-examination of the affiant will provide further material information. I say it is unlikely because of the narrow focus of the inquiry on this evidentiary hearing

[68] The Court went on to note the importance of distinguishing between the right to test evidence introduced at the trial on the merits and the right to lead or challenge evidence at a threshold hearing to determine the admissibility of that evidence. At trial, an accused is entitled to cross-examine witnesses "without significant or unwarranted restraint." On the other hand, the issue at a *Garofoli* hearing is simply whether there was any basis upon which the authorizing or issuing judge could have concluded that the applicable statutory pre-conditions existed. The right to cross-examine must be determined in relation to this limited enquiry:

31 It is in this narrower context that the right to cross-examine, as an adjunct to the right to make full answer and defence, must be considered. There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. The *Garofoli* threshold test is nothing more than a means of ensuring that, when a s. 8 challenge is initiated, the proceedings remain focussed and on track. Even on the trial proper, the right to cross-examine is not unlimited. In *Lyttle*, the Court reiterated the principle that counsel are "bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value" (para. 44 (emphasis added)). The *Garofoli* threshold test is all about relevancy. If the proposed cross-examination is not relevant to a material issue, within the narrow scope of the review on admissibility, there is no reason to permit it.

[69] The Court discussed the rationale for the limitation on cross-examination of affiants in the following terms:

33 When properly applied, the only thing that the leave requirement precludes the defence from eliciting through cross-examination is evidence that is unlikely to assist either the reviewing judge or the defence on the determination of admissibility. Why then, the appellants ask, is cross-examination not simply allowed as of right with proper limitations on its scope instead? The answer lies in the recognition, through the lens of judicial experience, of two important

countervailing interests - the concern over the prolixity of proceedings and, in many cases, the need to protect informants.

- [70] The Court noted that cross-examination poses a risk in relation to informers. Citing from the dissenting judgment of McLachlin J. in *Garofoli*, Charron J. at para. 36, described attempts to limit cross-examination as "notoriously fallible".
- [71] What Pires and Lising says concerning the Crown's obligation to make disclosure lies in the eye of the beholder. Those who seek disclosure at the broad end of the spectrum read it as a decision that addresses the constitutionality of limitations on cross-examination. They observe that it distinguishes between the risk of revealing the identity of informers posed by cross-examination (which is great) and that posed by the production of edited written materials (which entails less risk and is necessary for appropriate decision-making in relation to the permissible scope of cross-examination). Others, including the Crown in the present case, regard it as a description of the limited inquiry on a hearing into the threshold admissibility of evidence. They read Pires and Lising as being consistent with *Barzal*, and as a description of the limited relevance of material going only to the reasons the police initiated the investigation.
- [72] Subsequent to the trial judgment in this case, the Supreme Court of Canada in *World Bank Group v. Wallace*, 2016 SCC 15, addressed an application for disclosure of third-party records in relation to a challenge to the validity of wiretap authorizations. Much of what is said in *World Bank Group* is intended to be applicable to disclosure applications generally, and in relation to proposed challenges to warrants and wiretap authorizations in particular. In order to appreciate the significance of the *World Bank Group* decision, it is necessary to first understand the divergent approaches to disclosure applications in recent jurisprudence.

Divergent Approaches to Disclosure

- [73] Before reviewing the approaches to disclosure that have developed in the trial courts, it is important to recall that in *McNeil*, the Supreme Court held that *Stinchcombe* requires the Crown to make disclosure of the "fruits of the investigation" or the "investigative file." The Court accepted that not all information within the possession or control of the police is part of the investigative file and police files should not be treated as presumptively relevant and producible: paras. 22-25.
- [74] Divergent views have developed in relation to what constitutes the investigative file. Some trial courts have narrowly described the Crown's disclosure obligations and refused to order production of SHNs and SDRs, including courts in British Columbia (*Terezakis*; *Basi*); Ontario (*Ahmed*; *Ali*; *Daponte*); and Nova Scotia (*R. v. Way*, 2014 NSSC 18).

- [75] In Terezakis, Holmes J. considered defence applications for disclosure of police notes and reports of their dealings with a confidential informer who provided the police with information referred to in an ITO used to obtain a wiretap authorization. The defence submitted that the informer might have been acting as a police agent. Holmes J., considering the application in light of the suggestion that the information sought might be used to challenge the authorization, held:
- [24] The principles in Stinchcombe must be applied with a view to context. In Stinchcombe, the discussion took place in the context of a trial where the cross-examination of Crown witnesses -- or, indeed, the very approach taken by the defence in a trial -- may be assisted by information in the possession of the Crown. It was in such a context that the Supreme Court of Canada spoke of information as being subject to disclosure unless it is clearly irrelevant.
- [76] After referring to this Court's decision in Barzal, she continued:
- [28] On the basis of the reasoning in Barzal, I do not consider that in the present context the potential relevance of the material sought requires its disclosure.
- [29] The fundamental principle from Stinchcombe is that material should be disclosed if there is a reasonable possibility that withholding it will impair the right of the accused to make full answer and defence. There is not at this point a basis for concluding that such a reasonable possibility exists.
- [77] In Basi, MacKenzie J. (as she was then) dismissed a defence application to obtain SDRs that had been relied upon by the affiant of an ITO, which was used to obtain a wiretap authorization. In doing so, she relied upon Barzal in support of the proposition that it is the information that was before the authorizing judge that is relevant to and must be disclosed on a challenge to the validity of a wiretap authorization.
- [78] MacKenzie J. also addressed the risks to the informers if the information requested by the defence was disclosed, even in an edited form:
- [45] It would be entirely speculative, and thus dangerous, for the Court to be determining what information in the reports could reveal the identity of a confidential informant. In my view, the Court is entitled to rely on the affidavit evidence and the Crown's submissions on the issue of informant privilege. I accept the Crown's submissions and the evidence of Sgt. Hartwig that disclosure of the reports, even in a heavily vetted format, could identify the three informants. I would add that there is no suggestion that the "innocence at stake" exception to informant privilege is engaged here.
- [79] Further, relying on Pires and Lising, she concluded, at para. 47, it would not be an efficient use of judicial resources to accede to the defence's request to review the documents the Crown refused to disclose.

[80] In Ahmed, MacDonnell J. considered an application for production of handler notes in relation to 28 confidential informers who had provided information used to obtain a wiretap authorization. Defence counsel, relying on Pires and Lising, submitted that disclosure should be defined "with equal scope and vigour in the context of a Garofoli application" and "the Crown must bear the onus of demonstrating that the requested material will be of no use to the defence in preparation for and in conducting the Garofoli hearing. ..."

[81] MacDonnell J. rejected that argument, holding at para. 17(iii):

In the context of a Garofoli review, an accused has a right to disclosure of all relevant information in the possession of the Crown. However, relevance is a context-sensitive concept, and what will be relevant on a Garofoli review must be determined in light of the nature and scope of the review, which is focused on the adequacy of the material that was before the judge who granted the authorization. An accused is entitled to disclosure of that material as of right, but to obtain disclosure of other material, the accused is obliged to show a basis to believe that disclosure of the material may assist in showing that the authorization should not have been granted.

[82] If the disclosure request goes beyond what was before the authorizing judge or part of the investigative file disclosed pursuant to the Crown's Stinchcombe obligations, the accused must show some basis for believing that there is a reasonable possibility such material would be useful on the Garofoli application:

[30] In Pires, the aspect of full answer and defence that was in issue was the right to cross-examine; in this case it is the right to disclosure. Like the appellants in Pires, the applicants fail to acknowledge any distinction between what full answer and defence requires for the purpose of an evidentiary hearing and what it requires for the purpose of a trial on the merits. On a challenge to a wiretap authorization, the material that was before the authorizing judge will clearly be relevant and the accused is statutorily entitled to it. The accused is also entitled to all the information in the possession of the Crown that is potentially relevant to the trial itself - i.e., to the investigative file. However, what the confidential sources told their handlers falls outside of the investigative file. Were the Crown not intending to adduce intercepted private communications, what the confidential sources said to the police that moved them to seek an authorization would be *prima facie* irrelevant. Once a disclosure request reaches beyond what was before the authorizing judge and the investigative file, any presumption of relevance is significantly attenuated.

[31] That is not to say that an accused cannot obtain disclosure of such material for the purposes of a Garofoli application. However, consistent with the approach to cross-examination of wiretap affiants affirmed in Pires, the accused must establish some basis for believing that there is a reasonable possibility that disclosure will be of assistance on the application.

[Emphasis added.]

[83] MacDonnell J. adopted the policy reasons supporting this approach from the following passage from the Report of the Review of Large and Complex Criminal Case Procedures (2008):

Because these requests for materials outside the investigative file are at the outer margins of even the "low" Stinchcombe relevance standard, we believe that there is an onus on the defence to particularize and explain the relevance of such requests. The Crown must provide comprehensive disclosure of the investigative file...because the investigative file is presumptively relevant, The materials beyond that file are not presumptively relevant unless the defense establishes a link.

[84] In *Ali*, Trotter J. relied on Ahmed to dismiss an application for disclosure of the handler's notes relating to an informer. There, as in the case at bar, the affiant who swore the ITO referred to information provided by the informer with respect to the presence of drugs at the location to be searched. Trotter J. held:

[9] During submissions, it was asserted that access to the handler's notes will assist in cross-examining the affiant by uncovering yet unknown inaccuracies or omissions in the ITO. In *R. v. Ahmed*, MacDonnell J. characterized a similar assertion as "purely a fishing expedition." The same expression could be used in this case. On behalf of the Applicant, Ms. Thompson argues that this case should be distinguished from *Ahmed* because the affiant is also the handler of the confidential source. With respect, this is a distinction without a difference for legal purposes.

[85] In *Daponte*, Rady J. relied on Barzal, Ahmed, and Ali to dismiss a defence application for files relating to confidential informers relied upon by the police affiant to obtain a search warrant. He did so principally on the ground that the informer files themselves were not before the authorizing judge, and thus the defence was required to do more than merely request the material and should explain the relevance of its request. At para. 25, he endorsed the view expressed by Trotter J. in *Ali* that a "request for the handler's notes and the confidential informant file does not involve a straightforward application of the principles in *R. v. Stinchcombe*. ..."

[86] In *R. v. Burgher*, 2014 ONSC 3239, Campbell J., at para. 70, concluded his review of the case law by noting that courts "have consistently rejected disclosure requests for more detailed information about confidential informants, their history of corroborated reliability, and their general treatment and handling by the police". In particular, he observed that courts have declined to order production of:

- (3) Confidential Informant Details: such as: (1) the number of times the confidential informant has provided information to the police; (2) information that only the accused would know about the confidential informant; (3) the unique number the police have assigned to the confidential informant; (4) whether search warrants had been obtained in the past based upon information provided by the confidential informant; and (5) whether the police informant is in custody or at large:
- (4) Police File on Confidential Informant: in connection with the confidential informant even where the file has been redacted
- (5) Police Notes and Reports: made by the police "handlers" of information they received from their confidential informants :

[Citations removed.]

- [87] In Way, after a comprehensive review of the case law, Arnold J. concluded at para. 69 there should be a modest relevancy threshold for disclosure of "background material" such as SHNs and SDRs in a case where evidence has been seized pursuant to a search warrant.
- [88] Ontario courts have taken a more restricted view of relevance, consistently holding that the Crown's disclosure obligations are as limited as the defence right to cross-examine an affiant on a challenge to a warrant or wiretap. For example, in *R. v. Blake*, 2015 ONSC 6008, Quigley J. refused to require disclosure based on speculation about the accuracy of the information in the ITO:
- [27] I find that a broad "as of right" disclosure request for source documents which appears to have as its sole purpose providing the defence with the opportunity to allegedly check the "correctness" of what an affiant has written in an Information to Obtain a search warrant, is prima facie overly broad and does not satisfy the "likely relevance" onus.
- [89] The limited definition of the investigative file relied on in the cases summarized above has been rejected in other cases, notably, in British Columbia (*Bernath*; *Edwardsen*; and *Whitton*); Alberta (*R. v. Croft*, 2013 ABQB 705); and New Brunswick (*R. v. Steeves*, 2004 NBQB 39, [2004] N.B.J. No. 549; *R. v. Perron*, 2010 NBQB 2; and *Gallant*). It is important to recognize that even in these cases there is a spectrum of disclosure, from the very broad order made in *Edwardsen*, to more limited orders that are founded upon the affiant's reliance on or consideration of the informer-related materials.
- [90] In reviewing these cases it is also important to distinguish, where possible, between disclosure orders based on the view that the material sought may be of assistance in addressing the case advanced against the accused at trial (and therefore producible under *Stinchcombe*) and material that could only be useful in relation to the challenge to the validity of the warrant or authorization at issue. The Supreme Court of Canada, in *World Bank Group* at para. 131, suggested that where trial judges have made broader orders for the production of SHNs and SDRs they have often done so because the material sought was thought to fall within the *Stinchcombe* disclosure requirements, and not because the

material would be useful in addressing the narrow issues on a Garofoli application.

- [91] In Bernath, Ballance J., after a careful and thorough review of the authorities, ordered the Crown to disclose both SHNs and SDRs, subject to editing to protect informer privilege. The application turned on the question of whether the material sought was part of the "fruits of the police investigation". She observed that to attempt to arrive at a more particularized definition of the phrase than "the material relating to or pertaining to the accused's case in the possession or control of the prosecuting entity" was unwise. However, she concluded:
- [78] I cannot conceive of how it can be said that the handler notes and source debriefing reports concerning a particular accused and relied upon by the affiant to assist in informing himself or herself to satisfy the requisite belief of the existence of reasonable and probable grounds to support the issuance of a search warrant, could legitimately be characterized as being outside the fruits of the investigation or the investigative file.
- [79] It seems to me that the imposition of a narrow reading of the meaning of fruits of the investigation or investigative file that may be emerging from the Ontario authorities is at odds with the expansive approach to disclosure established by Stinchcombe and could pose the risk of whittling down Stinchcombe's essential edicts.
- [80] In my opinion, the notes of [the source handlers] and source debriefing reports constitute the fruits of the investigation into Mr. Bernath. It is also my view that these materials are not clearly irrelevant, but rather, I find there is a reasonable possibility that such material may assist or be useful to Mr. Bernath in meeting the case against him, advancing his defence, or making a decision that may affect the conduct of his defence. I find disclosure of the sought-after notes and debriefing reports are justified on that basis subject, of course, to editing to protect informant privilege.
- [92] It should be noted that in Bernath the affiant had personally reviewed the material sought by defence counsel before swearing the ITO. The trial judge considered the fact the affiant was a handler to be significant and rejected the contrary view expressed by Trotter J. in Ali. Her consideration of Ali suggests that her judgment hinges, at least in part, on the fact the authorizing judge had considered the handler's own evidence.
- [93] Further, defence counsel argued that the material considered by the authorizing judge on its face gave rise to some concern that one of the informers might have been an agent provocateur. At para. 81, Ballance J. observed that the evidence on this point was far more compelling than it was before Holmes J. in Terezakis. On the basis of these allegations she concluded that disclosure of the material requested would also be sanctioned even under the test enunciated in Barzal.
- [94] Thus, Barzal was not an obstacle to the disclosure application in Bernath, insofar as there was some evidence before Ballance J. that one informer was an agent provocateur and the affiant had dealt directly with the informers and attested to their reliability. As MacDonnell J. noted in Ahmed, at paras. 30-31, there is no absolute bar to obtaining background

information. The presumption of relevance of information in the hands of the police, beyond the investigative file and what was before the authorizing judge, is "attenuated" and some basis must be established for requiring its production.

- [95] Bernath may be read as a rejection of a very narrow approach to disclosure that holds it is simply not open to an accused to establish a right to disclosure of the records of the police's dealing with an informer, even where there is some basis to argue the evidence sought affects the weight of the Crown's case and even where the handler is the affiant. Bernath has also been read as authority for much broader propositions. In particular, it was read in *Edwardsen*, as a decision that further extended the Crown's disclosure obligations and as authority for the views that: (1) this Court in *Barzal* did not restrict the scope of relevance in the context of a *Garofoli* application; and (2) SHNs and SDRs are disclosable unless the Crown shows they are clearly irrelevant.
- [96] In *Edwardsen*, the trial judge held, at para. 44, that the distinction between material in the investigative file and information in the hands of the police "amounts to little more than an arbitrary categorization, as it has little or nothing to do with the actual relevance of the information in question". He found, at para. 48, that there was "no merit in the 'investigative file' approach."
- [97] At para. 59, he reached the following conclusion on the applicability of *Stinchcombe* in the context of a *Garofoli* application:

In my opinion the analyses in *Gallant* and *Bernath* are correct. *Stinchcombe* governs the Crown's disclosure obligations in the criminal law context, whether in respect of the ultimate issues at trial or a Charter application. It requires disclosure of all materials that are not "clearly irrelevant," and places the onus for justifying non-disclosure on the Crown. The Crown's contention that the materials should not be disclosed because they fall outside of the "investigative file" cannot be accepted, because the touchstone for disclosure is relevance, not any arbitrary categorization of materials. In any event, it cannot be convincingly argued that the materials at issue in this case do not "pertain" to the investigation of the accused and so they must fall within the investigative file in any event. Finally, *Garofoli* provides no justification for a shifted burden. *Stinchcombe* is dispositive on this issue.

- [98] The judge did not draw the distinction identified in the jurisprudence between the fruits of the investigation, which must be disclosed with the exception of material the Crown can establish is clearly irrelevant, and police materials outside the investigative file, which the accused can obtain by meeting a "low" or minimal relevance standard. He ordered records of the dealings between the police and confidential informers to be disclosed because they might potentially be relevant, both in relation to the evidentiary hearing and the trial proper:
- [33] In my opinion there are several ways in which the source handler notes, source debriefing reports and other materials sought by the accused could be relevant on the facts of this case. For example, as argued by Mr. Westlake, the materials sought could permit the accused to

advance the argument that the affiant had misled the authorizing justice, where for instance, information attributed to an informant in the ITO was not reflected in or was contradicted by the source handler notes, source debriefing reports or Cst. Etele's own notes of conversations with police informant handlers. Such material would be relevant to the Garofoli inquiry (Pires, at para. 26).

- [35] Beyond impugning the validity of the warrant, evidence tending to show that the police misled the authorizing justice would also be relevant to establishing abuse of process, or to show the absence of bona fide conduct in relation to the test under s. 24(2) of the Charter (see, for instance, *R. v. Grant*, [2009] S.C.C. 32, at paras. 72-75). That is so, regardless of whether the source of the misleading information was the affiant, as opposed to the officers informing the affiant. In my view the Crown cannot withhold disclosure of materials that are relevant in this regard merely because those issues may not arise on the Garofoli hearing.
- [99] In *R. v. McKenzie*, 2016 ONSC 242, Campbell J. discussed the rejection in *Edwardsen* of the concept of the investigative file. At para. 26, he observed that this broad approach to disclosure "has already been persuasively rejected by other courts" and is inconsistent with binding authority from the Supreme Court and provincial appellate courts.
- [100] The judge in *Edwardsen* placed some weight upon the view that the restrictions on cross-examination at a Garofoli hearing are only constitutional because the accused has already obtained full disclosure of all relevant material. This led the judge to conclude the rationale for giving trial judges discretion to limit cross-examination does not apply to disclosure generally:
- [56] As the accused has no right to adduce irrelevant evidence, the restrictions on cross-examination do not impair the right of the accused to full disclosure or the right to make full answer and defence. However, to apply similar measures to disclosure premised on the need to control the prolixity of proceedings clearly interferes with the accused's Charter rights as defined in *Stinchcombe*. That includes the right to disclosure of all material that is not clearly irrelevant. To import a measure intended to govern a non-right so as to limit a protected Charter right is not justifiable.
- [101] In my opinion, the judge in *Edwardsen* misread *Pires* and *Lising* to suggest that the Supreme Court assumed that "background" information would routinely be produced by the Crown so as to permit an accused to challenge a warrant or authorization as an abuse of process. First, the issue did not arise in *Pires* and *Lising*. The issue in *Pires* and *Lising* was whether limits to defence challenges to orders authorizing the interception of communications (and, by implication, searches conducted with a warrant) presumed to be valid, are consistent with the Charter. Second, *Pires* and *Lising* did not suggest the use of one standard of relevance in relation to the right of cross-examination and another in relation to disclosure. Third, there is no indication the Court intended to expand the disclosure obligations described in *Stinchcombe*. Four years after *Pires* was decided, the Court in *McNeil* at para. 22, described the Crown's *Stinchcombe* disclosure obligation as

extending to only the "fruits of the investigation" and not to all materials in the hands of the police.

- [102] Further, in *World Bank Group* the Supreme Court considered an application for third-party records pursuant to *R. v. O'Connor*, [1995] 4 S.C.R. 411, in the context of a Garofoli challenge to an order permitting the interception of communications. The Court observed that the issue on a Garofoli application is narrow: whether the affiant had a reasonable belief in the existence of the requisite statutory grounds. As I will discuss in greater detail later, the Court limited the Crown's disclosure obligations and held that the same "narrow test" that applies on an application to cross-examination also applies when the accused seeks the production of third-party records in the context of a Garofoli application: see para. 119.
- [103] For that reason, I agree with the view expressed by Holmes J. in *Terezakis* that it was in the context of the case to be tendered against an accused at trial that the Court in *Stinchcombe* spoke of the Crown's obligation to disclose all information that is not clearly irrelevant. I also agree with the view expressed in *Ahmed* that relevance is a context-sensitive concept, and what will be relevant on a Garofoli review must be determined in light of the nature and scope of the review.
- [104] The judge in *Edwardsen* also held, at para. 43, limitations on the accused's right to full, frank and fair disclosure must be justified by the Crown under s. 1 of the Charter. In my respectful view, that approach is mistaken. The Charter recognizes the principles of fundamental justice, including the right to make full answer and defence. What that entails in the way of disclosure is a practical question that turns upon what issues are before the court. The right does not protect unlimited cross-examination. Nor does it require unlimited disclosure of material in the hands of the police. Turning to an analysis under *R. v. Oakes*, [1986] 1 S.C.R. 103, in order to determine whether an accused challenging a warrant can obtain material in the hands of the police, in addition to the investigative file and the material that was before the authorizing judge, mistakenly assumes, a priori, there is a constitutional right to obtain that material. The court's first task, in the face of an application for disclosure, is to determine what the right to a full answer and defence entails in the circumstances. The question whether an infringement of that right is justified does not arise at that stage.
- [105] The Crown's second objection to production of the source materials in *Edwardsen* was that the documents sought were, by their nature, privileged and for that reason, unlike ITOs that are routinely edited, should be found to be privileged in their entirety. The judge rejected this argument, although he did accept the Crown's assertion that it would be speculative and dangerous for the Court to attempt to determine what details in the source materials would tend to reveal the identities of the informers. The judge reasoned that the Crown had made partial disclosure of the information from the informer in the ITO and that this suggested selected editing was possible and appropriate.

- [106] In *Whitton*, the trial judge, who was also the judge in the present case, followed *Bernath* and *Edwardsen* in ordering disclosure of SHNs and SDRs in the following terms:
- [20] I agree with the conclusions reached by my colleagues in *Bernath* and *Edwardsen*, and with the similar reasoning demonstrated in the Provincial Court decision of *R. v. Roy*, as well as the New Brunswick decision in *Gallant*. *Stinchcombe* applies, in my view, with full force in the *Garofoli* context.
- [21] That must be so because the limitations imposed on cross-examination on a *Garofoli* application are predicated on the assumption that the accused has received full disclosure. To obtain leave to cross-examine an affiant, the accused must establish a basis for the view that the proposed cross-examination will elicit testimony tending to discredit one of the pre-conditions of the authorization.
- [22] The accused must have fulsome [sic] disclosure in order to establish such a basis as illustrated by the Supreme Court of Canada in *Pires* and *Lising*, where Justice Charron dealt with this issue in paragraphs 17, 26 and 27.
- [107] Despite this broad statement of principle, however, the judge was careful to note that the accused sought only discrete material "already contained and referred to" in a specific paragraph in the ITO.
- [108] In his judgment in the present case, the judge summarized his prior decision in *Whitton* and noted again the discrete nature of the material sought:
- [52] I concluded that the materials sought by the defence would be relevant to the proceedings against the accused because they formed the "foundational material" for representations made by the affiant which formed a "critical part" of the ITO, and to hold otherwise would be "illogical" (paras. 23, 29). I further accepted the defence contention that the information could be disclosed in a manner which protects informer privilege through vetting by the affiant, in light of the discrete and limited nature of the material sought (paras. 29-30).
- [109] In relatively brief judgments, judges of the New Brunswick Court of Queen's Bench, relying upon an expansive reading of the disclosure obligation described in *Stinchcombe*, ordered the production of police "tip sheets" in *Steeves* and *Perron* and SHNs in *Gallant*. The analysis in those cases is less thorough than in *Bernath* and the cases that follow *Bernath* in British Columbia.
- [110] For example, in *Gallant*, *LaVigne J.* held that the disclosure of the material sought was compelled by *Stinchcombe* because there was a reasonable possibility of the information being useful to the defendant in making full answer and defence:

- [126] The right to make full answer and defense is crucial to ensuring that the innocent is not convicted. The right to disclosure is violated when the defendant demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defense or otherwise making a decision which could have affected the conduct of the defense such as, for example, whether to call evidence or, whether to challenge a search warrant or a wiretap authorization.
- [111] The Court in Gallant also rejected the Crown's argument that the material sought was covered by a blanket claim of privilege.
- [112] In Croft, Burrows J. considered an application for the production of SHNs. The Crown had already disclosed the SDRs referred to by the affiant. He granted the order sought because the accused had demonstrated a reasonable possibility that something useful would be achieved by the disclosure. In doing so, he rejected the view that SHNs should be routinely produced. At para. 27, he distinguished Gallant on the basis that the trial judge in that case had not considered "the narrow scope of the inquiry on a Garofoli application" or the distinction made in Pires and Lising and applied in Ahmed between the scope of enquiry on a Garofoli application and the wider issues relevant at trial.
- [113] Burrows J. was of the view (at para. 29) that the decision in Pires and Lising contemplates "a wider scope of disclosure in the context of a wiretap authorization review than was contemplated by the BCCA in Barzal", but he rejected the suggestion that Pires and Lising stands as authority for routine disclosure of background material but ordered disclosure of material that the affiant had "consulted."
- [114] I agree with the view expressed by Burrows J. in Croft, that the judgment in Gallant ignores the narrow scope of the inquiry before the court on a s. 8 challenge to the validity of the warrant, where, as I have noted, the principal inquiry is whether there was some basis upon which the authorizing judge could be satisfied that the pre-conditions for the granting of the authorization exist.
- [115] In his relatively recent decision in McKenzie, Campbell J. considered an application for disclosure in redacted form of information with respect to police dealings with a confidential informer. At para. 18, he held that it is important to define the content of the investigative file concerning the accused. That material must be disclosed to the accused, upon request, subject only to issues of privilege, unless the Crown is able to establish it is clearly irrelevant. He then said the following regarding material outside the investigative file:

On the other hand, if the material is not part of the "investigative file" against the accused, then it is presumptively irrelevant and need not be disclosed unless the accused can establish that there is a reasonable possibility that disclosure will be of assistance to the court in relation to a material issue on the application to quash the search warrant or set aside the authorization.

[116] As Campbell J. observed, there are at least four ways to define the investigative file in the context of a challenge to the validity of a search warrant under Garofoli:

a) Only the material expressly referred to by the affiant.

This is the test some say is prescribed by Barzal: only the material before the authorizing judge is relevant to the challenge. In the case at bar, that standard would require disclosure of the one SDR that the affiant referred to in the ITO (which has been produced) and nothing more. Under this definition, the Crown's obligations would not change when the affiant is also the handler: Ali at para. 9.

b) Only the material relied upon by the affiant (whether referred to or not).

This definition was applied, with some subtle variations in Ahmed, Burgher, Bernath, Whitton, and McKenzie, among others.

Regarding this standard, Campbell J., in McKenzie, said the following at para. 32:

[T]he element of reliance must be understood in a practical way. Not everything that may have once been seen or heard by the affiant before completing the ITO is necessarily relied upon by the affiant and, therefore, part of the "investigative file" in relation to the accused. Indeed, as Garton J. aptly noted in *R. v. Arviko*, [2013] O.J. No. 6293, at para. 14 (and further discussed at paras. 3-7, 17-27), all items that may have been "viewed or heard by the affiant are not presumptively relevant and discloseable" by the Crown

By this definition, the fact the affiant is a handler may be relevant: see McKenzie at para. 37 and the cases cited therein.

c) All material available to the investigators, whether relied on by the affiant or not.

Arguably, this is the definition used by the trial judge in the case at bar: see paras. 62-65.

If the investigative file is defined in this manner, all SDRs available to the investigators (whether read or relied upon by the affiant or not) will be producible, as will the SHNs from which the SDRs were drawn (because information from the SHNs is available to the investigators on demand). Broader disclosure is required where the handler is the affiant because more information is available to him or her: see for example, Burgher at paras. 70, 86-87; Daponte at paras. 16, 22-31; Croft at paras. 16-35, 38-40, 49-53.

d) All material in the police's hands referring to the accused and the offence.

This is the definition leading to the broad disclosure ordered in *Edwardsen and Gallant*. It will lead to disclosure of all SHNs and SDRs making reference to the particular accused and the crime with which he or she was charged.

[117] In McKenzie, Campbell J. considered material to be brought into the investigative file when it was relied upon by an affiant to obtain a warrant:

[31] [I]n my view, for purposes of applications to quash search warrants pursuant to Garofoli, the "investigative file" against an accused is properly defined as including all materials accumulated (i.e. gathered or created) by the investigating police agency in its investigation, and relied upon in the search warrant materials targeting the suspect/accused. This was, essentially, how Clark J. defined the term in *R. v. Abdullahi*, 2014 ONSC 3981, 316 C.R.R. (2d) 156, at paras. 5-7, 17, 20. This definition of "investigative file" ensures that the accused is provided with disclosure of, essentially, all of the materials that were relied upon by the affiant in drafting the ITO. In my view, this element of reliance by the affiant upon the information is an important element of the definition of "investigative file" for disclosure purposes in relation to motions to quash search warrants and exclude evidence.

[Emphasis added.]

[118] The judgment in *McKenzie* has been followed in Ontario. In *R. v. McGean et al*, 2016 ONSC 1456, the Crown had disclosed questionnaires and the debriefing notes relied upon by the affiant in preparing the material for omnibus orders. Henderson J. dismissed an application to obtain handler notes made in relation to 22 confidential informers. After considering *Bernath* and *McKenzie*, he held:

[24] Based on my review of the case law I find that in the context of a Garofoli application, where the Crown is in possession of confidential information that has been provided by CIs, the Crown must disclose all of the material that was before the judge who made the authorizing order, plus any part of the investigative file that was referenced in the material that was before the authorizing judge, plus all material that was relied upon by the affiant in preparing the ITO in support of the authorizing order.

[Emphasis added.]

World Bank Group

[119] At the hearing of this appeal, counsel for the Crown and the intervenor, in particular, relied upon the recent decision of the Supreme Court of Canada in *World Bank Group*. As I noted earlier, it has addressed some of the issues canvassed in the jurisprudence. The Court explicitly and narrowly defined the issues on a Garofoli challenge to the validity of a wiretap authorization, holding that the question is not whether the allegations underlying the ITO are ultimately true but whether the affiant had "a reasonable belief in the existence of the requisite statutory grounds": para. 119. A subfacial challenge turns on what affiants knew or ought to have known at the time they swore affidavits: para. 121. The fact that the documents sought by the accused may show errors or omissions in the affidavits does not by itself make those documents relevant. Merely demonstrating that an affidavit contains errors or omissions will not be sufficient to undermine the authorization. The documents sought must also support an inference that the affiant knew or ought to have known of the errors or omissions. "If the documents sought for production are incapable of supporting such an inference, they will be irrelevant on a Garofoli application (*Pires*, at para. 41)":

para. 124.

[120] On an O'Connor application, to obtain disclosure from a third party, in support of a Garofoli challenge, where the applicant bears the burden of establishing relevance, the same "narrow test" must be overcome to obtain disclosure as must be satisfied to obtain leave to cross examine an affiant: paras. 119, 132. As the Court observed, "[b]oth forms of discovery serve similar purposes and engage similar policy concerns": para. 125.

[121] At para. 127, the Court noted that in Pires and Lising it upheld the constitutionality of limiting the right to cross-examine an affiant. It did so for three reasons:

- a) Only a limited range of questioning will be relevant to the test on a Garofoli application;
- b) Cross-examination creates a risk of inadvertently identifying confidential informers; and
- c) Cross-examination can create wasteful and unnecessary delays.

[122] The Court held that the justifications for limiting cross-examination of the affiant apply equally to third-party production applications:

[128] First, the issues on a Garofoli application remain narrow. The relevance of the information sought will be judged in relation to these narrow issues. A finding that some information in [the police officer's] affidavits is false will only be relevant if it tends to support the inference that he knew or ought to have known that it was false.

[129] Second, production of documents the affiant did not consult risks identifying confidential informants. Although it is easier to vet documents than to vet an affiant's testimony, this Court has recognized that it is "virtually impossible for the court to know what details may reveal the identity of an anonymous informer" (R. v. Leipert, [1997] 1 S.C.R. 281, at para. 28). Lower courts have also recognized that it is difficult and time-consuming for the police to adequately vet original informer notes, which in complex cases can involve many officers and hundreds of reports (Ahmed, at para. 46; R. v. Croft, 2013 ABQB 705, 576 A.R. 333, at para. 32).

[130] Finally, broad third party production requests can derail pre-trial proceedings. The production order in this case could involve hundreds or even thousands of pages. Sweeping disclosure requests are a common cause of delays (P. J. LeSage and M. Code, Report of the Review of Large and Complex Criminal Case Procedures (2008), at pp. 45-55). The same can be said of third party requests. The process of obtaining, reviewing and vetting documents in wiretap cases may require significant resources on the part of police (see, on this point, R. W. Hubbard, P. M. Brauti and S. K. Fenton, Wiretapping and Other Electronic Surveillance: Law and Procedure (loose-leaf), vol. 2, at pp. 8-12 to 8-12.7). In the case of an O'Connor request, the same would apply to third parties. A narrow relevance threshold is therefore needed to prevent "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" production requests (R. v. Chaplin, [1995] 1 S.C.R. 727, at para. 32, quoted by Lamer C.J. and Sopinka J., who were in the majority on this issue, in O'Connor, at

para. 24).

[Emphasis added.]

[123] As I observed earlier, the issue before the Court in *World Bank Group* was how to address third-party production requests in the context of a Garofoli challenge; however, the Court approved of the manner in which these concerns had been addressed in first-party cases (including: *Ahmed*, *Ali*, *Croft*, and *Way*) before stating at para. 131:

. We need not address the boundaries of Stinchcombe disclosure in the Garofoli context, as that issue is not before us. However, it is clear that lower courts consider disclosure and production of documents to be analogous to cross-examination. They have therefore applied the same relevance threshold. Where courts have departed from this proposition, they have done so in cases where the documents being sought were found to come within Stinchcombe disclosure requirements (see *R. v. Bernath*, 2015 BCSC 632, at paras. 78-80 (CanLII); *R. v. Edwardsen*, 2015 BCSC 705, 338 C.R.R. (2d) 191, at paras. 73-74; *R. v. Lemke*, 2015 ABQB 444). It is axiomatic that if in fact the documents in question are in the hands of the authorities and are determined to be subject to Stinchcombe disclosure, they must be produced.

[Emphasis added.]

[124] At para. 132, the Court summarized the legal test the accused must satisfy to obtain third party production in the Garofoli context:

We agree that these two discovery tools - cross-examination of affiants and third party production orders - should be subject to the same relevance threshold. Therefore, to obtain third party production in the Garofoli context, an accused must show a reasonable likelihood that the records sought will be of probative value to the issues on the application. As with cross-examination of an affiant, it must be reasonably likely that the records will be useful.

[Emphasis added.]

[125] At para. 134, the Court expressly rejected the view (which the trial judge in the present case held) that broad disclosure is necessary to give the accused a means of effectively challenging the warrant or authorization in issue. It reasoned:

As in the case of applications to cross-examine the affiant, the accused will already have access to the documents that were before the authorizing judge, including the affidavit in support of the authorization (Criminal Code, s. 187(1.4)); *Pires*, at paras. 25-26). These documents are clearly relevant and the accused is presumptively entitled to them (Criminal Code, s. 187(1.4); *Pires*, at paras. 25-26; *Ahmed*, at para. 30). The accused also has a right to access the rest of the investigative file under Stinchcombe disclosure, subject of course to the exceptions identified in *Stinchcombe* and *McNeil*. This disclosure should be sufficient to enable the accused to show a basis for third party production requests, if such a basis exists. While an accused has a right to production of relevant documents, there is no right to embark on a fishing expedition. The right does not extend to every document relating to the case, regardless of who holds it or where it is.

This is especially so when production is sought in aid of a Garofoli application.

[Emphasis added.]

[126] In *R. v. Lam*, 2016 ABQB 304, Pentelechuk J. heard an application for disclosure of all SHNs and SDRs relating to the information referred to by the affiant in ITOs sworn in support of various search warrants. After referring to the judgment of Campbell J. in *McKenzie*, she summarized the principles articulated in *World Bank Group*:

[30] A significant number of decisions from lower courts suggest that any materials that the affiant relied upon in drafting the ITO form part of the investigative file and are presumptively producible under *Stinchcombe* disclosure obligations: *McKenzie* at para 32.

[31] In contrast, if the documents requested do not form part of the affiant's information and belief or have not been reviewed by the affiant, they are not presumptively producible.

[35] Following the hearing of this application, the Supreme Court issued its decision in *World Bank Group v Wallace*, 2016 SCC 15. The Court, at paras 119-124, [2016] SCJ No 15, reiterated that a Garofoli application to review an authorization does not determine whether the allegations underlying the application are ultimately true (which will be decided at trial) but rather whether the affiant had a reasonable belief in the existence of the requisite statutory grounds at the time the affidavit in support of the authorization was sworn. Cross-examination generally must show not only that some of the information relied upon by the affiant is false but also that the affiant knew or ought to have known that it was false. This narrow test governs an application for disclosure of evidence in support of an application to review an authorization by way of cross-examination. During the review, evidence should be excised if the applicant establishes that the affiant knew or should have known that evidence was false, inaccurate or misleading, or that the affiant knew or should have known and included in the ITO further information in order to make full, fair and frank disclosure. Affiants may not ignore signs that other officers may be misleading them or omitting material information. However, if there is no indication that anything is amiss, they do not need to conduct their own investigation. Therefore, while the *O'Connor* process may be used to obtain records for purposes of such an application, the applicable relevance threshold is narrower than in a typical *O'Connor* application. There must be material supporting an inference the affiant knew or ought to have known of errors or omissions.

[Emphasis added.]

[127] At para. 40 she applied these principles to the defence's request for disclosure of the SHNs and SDRs. She reasoned:

The Applicant argues the documents should be produced in order to verify the contents of the ITOs. The Supreme Court has clearly set out the narrow test for disclosure in these circumstances. It does not extend to verification of the ITO contents unless there is something to support an inference relating to the reasonableness of the affiant's reliance on the information provided to him or her. In the absence of an apparent inconsistency or discrepancy, and where

there is no indication that the affiant reviewed the SHN or SDR or that these documents formed part of his or her information and belief, a request for production of the SHN and SDR becomes a fishing expedition regarding the veracity of every allegation in the affidavit, something the Supreme Court has long sought to prevent: World Bank at para 122.

Application of the Law to the Facts

[128] In the present appeal, as in Barzal, there are two serious issues: first, whether the material the trial judge ordered the Crown to produce was relevant in the context of a challenge to the search warrant; and second, whether the trial judge should have ordered the Crown to produce edited versions of documents he clearly considered to contain information protected by informer privilege.

Relevance

[129] The trial judge ordered the Crown to "review any SHNs, SDRs, or dissemination reports containing the intelligence from Informant A and Informant B obtained by Cst. Lee in relation to the investigation of Mr. McKay" and to "disclose any such materials that are not clearly irrelevant, subject to editing to protect informer privilege": para. 109. The order therefore required the Crown to identify and produce source documents that contained the intelligence obtained by the affiant, without reference to whether the documents were referred to or relied upon in support of the ITO. The trial judge dismissed the Crown's argument that it had made adequate disclosure by producing the only SDR referred to by Cst. Lee.

[130] In my opinion, the trial judge erred in law by concluding that the investigative file included all materials that referenced the confidential information obtained by the affiant (there was no evidence of records of the confidential information other than the SHNs, SDRs and dissemination notes). The trial judge concluded that because police analysts had made a preliminary determination that some confidential information with respect to the accused should be provided to the investigating officers, that information, as well as the source documents from which it was drawn, became part of the investigative file.

[131] With respect, I cannot see how that preliminary selection can be determinative of the relevance of the confidential informer's file. Even the material provided to the investigators did not form part of the fruits of the investigation, as that expression is used in Stinchcombe. Neither the SHNs nor the SDRs (with one exception) were provided to the affiant or referred to in the ITO. Nor were the SHNs or SDRs provided to Crown counsel. The one SDR relied upon by the affiant in preparation of the ITO was disclosed, in edited form, to defence counsel.

[132] The trial judge considered that his order was necessary to give effect to the Stinchcombe disclosure that would have been required even if there had been no warrant issued. In other words, it was his view that the order simply required the Crown to comply with its

broad disclosure obligations in relation to the investigative file. In my opinion, that conclusion is founded upon an overly broad conception of the fruits of the investigation. The confidential information sought by the defence in this case initiated the investigation that produced the evidence contained in the ITO, and, ultimately, the cocaine and drug paraphernalia seized pursuant to the warrant. There is no suggestion the confidential information was the result of an investigation into the activity of the accused, and there is no indication it will be used or relied on by the Crown at the accused's trial or that it could assist the defence.

- [133] Stinchcombe does not, in the first instance, require the police to produce for the Crown or the Crown to obtain all of the police's operational files or background information unrelated to a specific investigation. It does not require the Crown to assess relevance upon the assumption that the bona fides of the police or prosecution will be in issue. To define the Crown's general disclosure obligations by asking what issues might arise in relation to a bare allegation of non-disclosure or misrepresentation in relation to the application for the warrant expands the scope of disclosure far beyond the investigative file or the fruits of the investigation. In my view, that definition clearly exceeds what was contemplated or demanded by Stinchcombe.
- [134] Evidence, with respect to the manner in which the investigation was conducted, only becomes relevant if the Crown is aware of the basis for some concern with respect to disclosure or police conduct in relation to the obtaining of the warrant (where, as in McNeil, there is an expectation that will be disclosed) or where the requesting party can meet the low threshold of establishing a reasonable likelihood that the records sought will be of probative value to the issues on the application. In this regard, I adopt the following passage from the judgment of Campbell J. in McKenzie:
- [44] I agree with the sentiments expressed by Goldstein J. in *R. v. Grant*, 2013 ONSC 7323, [2013] O.J. No. 5508, at paras, 17, 31-32, where, in refusing to review a confidential informant file to determine its potential relevance to the accused's challenge to a search warrant, he refused to undertake the proposed exercise of "random virtue testing of the police by the judiciary" by engaging in such "inquisitorial procedures" that could quickly turn into an "endless series of collateral inquiries that have nothing to do with the main function of the court on a Garofoli application."
- [135] There was no question in this case of the sufficiency of the Crown's disclosure of evidence tending to prove or disprove the material allegations made against the accused. I agree with the view expressed by MacDonnell J. in *Ahmed* (cited at para. 84 above) that if the Crown did not intend to adduce the evidence obtained pursuant to the warrant, "what the confidential sources said to the police that moved them to seek an authorization [in this case a warrant] would be prima facie irrelevant".

- [136] The sole issue for trial when the application for disclosure was heard was the validity of the warrant resulting in the seizure of physical evidence. The question that ought to have been asked in this case was what material was relevant to the Garofoli challenge. In that regard, I agree with the view of Trotter J. in *Ali* that a "request for the handler's notes and the confidential informant file does not involve a straightforward application of the principles in *R. v. Stinchcombe*".
- [137] That view is reflected in *World Bank Group*, where the Court described the specific factors that limit the disclosure that will be required in the Garofoli context:
- a) The relevant issues on a Garofoli application are narrow (para. 128);
 - b) The production of documents not consulted by the affiant risks identifying informers (para. 129); and
 - c) Broad disclosure requests can create unnecessary delays and derail pre-trial proceedings (para. 130).
- [138] In relation to the first factor, the trial judge was correct to find that "relevance defines the contours of the first-party disclosure obligations of the police". But that broad statement must be tempered by careful consideration of what is relevant to a Garofoli challenge. In answering the critical question, whether the accused was seeking relevant material, the objective of disclosure must be borne in mind. As Campbell J. noted in *McKenzie*, at para. 20, there must be "a meaningful procedural mechanism by which [the accused] may attack the issuance of the search warrant, both facially and sub-facially. See *R. v. Crevier*, [2015 ONCA 619] at paras. 52-60; *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 72-73; *R. v. Ahmed*, at paras. 28-30."
- [139] The trial judge, at para. 60, concluded that the comparison between the material supporting an authorization and the contents of the investigative file contemplated by the Supreme Court in *Pires* and *Lising* would be "meaningless, or impossible", if he accepted the Crown's position that the investigative file does not include "background" information. This conclusion does not recognize that in cases such as *Bernath*, defence counsel have made out a case for disclosure of the background material relying upon the material disclosed to the accused pursuant to *Stinchcombe*.
- [140] The judgment in *World Bank Group* appears to resolve the question of whether the mechanism described in *Pires* and *Lising* requires disclosure of material outside the investigative file and the material before the judge so that the defence can make a case for cross-examination of an affiant or support its challenge to the warrant. While the cases relied on by the trial judge suggest it did, the Supreme Court of Canada has now said it does not: *World Bank Group* at para. 134.

- [141] World Bank Group re-emphasized that the relatively narrow focus of a Garofoli application is on what the affiant knew or ought to have known at the time he or she swore the affidavit in support of the authorization or warrant: para. 119. The Court's comments with respect to the relevance of documents in the hands of third parties in that case are also applicable here:
- [124] ... [W]here an accused asserts that third party documents are relevant to a Garofoli application, he or she must show a reasonable likelihood that the records sought will be of probative value to the issues on the application. The fact that the documents may show errors or omissions in the affidavit will not be sufficient to undermine the authorization. They must also support an inference that the affiant knew or ought to have known of the errors or omissions. If the documents sought for production are incapable of supporting such an inference, they will be irrelevant on a Garofoli application (Pires, at para. 41).
- [142] World Bank Group clearly defines as relevant all documents capable of supporting the inference that the affiant knew or ought to have known of errors or omissions in the affidavit relied upon to obtain the warrant. The affiant's notes used to prepare the ITO must be disclosed. SDRs the affiant has read and relied upon must be disclosed. Documents not seen by or provided to the affiant, such as the SHNs here, speak only to whether the informer was truthful or whether the information was accurately described to the affiant. Because such documents do not speak to the affiant's reasonable belief, they are not capable of supporting the challenge to the affidavit.
- [143] In short, the trial judge did not address the relevance of the record of police dealings with the confidential informer in the context of a specific issue. The question that ought to have been asked is: what material should be disclosed so as to permit the accused to make full answer and defence to the charge, including, to the extent he may challenge it, the validity of the warrant and the legality of the seizure. It is entirely appropriate to require the accused, in the circumstances, to meet a minimal relevance threshold before requiring disclosure of background material that usually only goes to an allegation of abuse of process, fraud or misrepresentation by omission or otherwise on the part of the investigating authorities.
- [144] In World Bank Group, the Court clearly stated that the rationale for limiting the scope of cross-examination is equally applicable to limit the Crown's disclosure obligations on a Garofoli application. The suggestion that the onus should be upon the Crown to establish that background information is clearly irrelevant in every case may be met with the answer given at para. 33 in Pires and Lising in relation to cross-examination:

Why then, the appellants ask, is cross-examination not simply allowed as of right with proper limitations on its scope instead? The answer lies in the recognition, through the lens of judicial experience, of two important countervailing interests - the concern over the prolixity of proceedings and, in many cases, the need to protect informants.

[145] The last two factors canvassed in relation to the disclosure application in World Bank Group - risk of exposure of confidential informers and unnecessary delay and frustration of the judicial process - also weigh against an overly broad definition of what materials are relevant in relation to a Garofoli application. Here, the trial judge believed his delineation of the boundaries of first-party disclosure enhanced and did not detract from the efficiency of proceedings, as it required no onerous review of police files, in terms of time and expense; however, in other cases broad disclosure orders may cause delay and impose significant requirements on the Crown and police. I cannot ignore the fact that many of the leading cases have resulted in judicial stays of proceedings where the Crown has opted to protect informers rather than comply with disclosure orders. While recognizing that the Crown will inevitably face that choice in some cases, World Bank Group is a reminder that relevance should be carefully weighed where disclosure poses significant risks to informers and to the integrity of the justice system.

[146] In my view, the trial judge erred in law in this case by ordering the production of material apparently irrelevant to the substantive case and irrelevant to the anticipated challenge to the affidavit evidence.

Privilege

[147] I would not order disclosure of the SHNs or SDRs not relied upon by the affiant. Having said that, I would add that in my opinion the trial judge took an overly narrow view of the scope of informer privilege when he rejected the Crown's argument that the documents sought should be found to be privileged in their entirety. Despite his acceptance of the Crown's assertion that it would be "speculative and dangerous for the Court to attempt to determine which information in the materials does or does not tend to reveal the identity of informants", he noted that some editing had resulted in the partial disclosure that was made in the ITO. He therefore concluded the documents could be safely edited, and required the Crown to make disclosure of edited SHNs, SDRs and dissemination notes.

[148] The judge began with the proposition that informer privilege protects against disclosure of information that could implicitly or explicitly reveal the identity of a confidential informer. He regarded editing as the preferred manner of addressing claims to disclosure of documents recording privileged information. He distinguished the decision in Leipert on the ground that blanket privilege had been recognized in that case only because the anonymity of the tipster made it impossible to determine whether any of the information might or might not reveal the informer's identity. In my view, this narrow reading of Leipert is unnecessary and problematic.

[149] It must be remembered that editing is a dangerous and difficult exercise. There is no presumptive right to an edited version of a privileged document. The distinction, described in Leipert, between material presented to the authorizing judge and other documents recording privileged communications was inadequately dealt with in the cases relied upon by the trial judge. Leipert reminds us that in Garofoli, Sopinka J., at 1458, described editing

as essential "in cases in which confidential information is included in the affidavit filed in support of an authorization" (emphasis added).

- [150] The Court in *Garofoli* reviewed in detail the care necessary in editing these materials so as to maximize accountability and accessibility while protecting the identity of informers. As the Court noted in *Pires* and *Lising* at para. 25, access to the material before the authorizing judge is granted on the simple assertion that the admissibility of the evidence is challenged. Since the accused has a right to see as much of that material as possible, ITOs are drafted knowing they will be reviewed by the authorizing judge and disclosed to the defence. This is one reason why ITOs can be routinely edited without the same level of risk inherent in editing raw informer materials.
- [151] In addressing the request for disclosure of an anonymous tip (that, unlike the ITO, was not before the authorizing judge) the Court in *Leipert* appears to have accepted the Crown's argument that judges should not try to turn privileged documents into unprivileged documents by editing them. It recognized that editing may improperly be used in an attempt to balance the right to make full answer and defence against informer privilege. It rejected any such balancing, holding (at para. 28), that once privilege is established, it cannot be "diminished by or 'balanced off against' other concerns relating to the administration of justice". For that reason, it concluded the documents sought should not be edited with a view towards making partial disclosure. At para. 30, the Court distinguished the cases where editing is appropriate on two grounds:
- a) "the informants in those cases were not anonymous, enabling the court to make judgments on what details might or might not reveal the identity of the informers"; and
 - b) "the defence was seeking to review the affidavit or "Information to Obtain" filed in support of the application for the authorization, as distinguished from background documents and information".
- [152] In *R. v. Omar*, 2007 ONCA 117, the Ontario Court of Appeal considered an appeal from an order requiring disclosure to the defence of edited versions of a confidential informer file maintained by the Toronto Police Service. The file related to prior dealings with a confidential informer, who had apparently assisted the police on 10-20 occasions. Sharpe J.A., for the Court, rejected the Crown's argument that the background information was irrelevant, because the Crown refused to concede that it would not assert the reliability of the informer at trial to justify the actions of the police. However, the case turned on the scope of informer privilege:
- [41] In *Leipert*, *supra*, the Supreme Court of Canada affirmed the decision of McEachern C.J.B.C. [1996] B.C.J. No. 764, 106 C.C.C. (3d) 375 (C.A.)
- [42] Other courts have recognized that even the smallest details may provide an accused person with all he or she needs to identify the informer: see *R. v. Garofoli*, [1990] 2 S.C.R. 1421, [1990] S.C.J. No. 115, 60 C.C.C. (3d) 161, at p. 1460 S.C.R., p. 194 C.C.C.; *R. v. Parmar*, [1987]

O.J. No. 203, 34 C.C.C. (3d) 260 (H.C.J.), at p. 281 C.C.C. In Leipert, *supra*, McLachlin J. quoted a portion of the passage from McEachern C.J.B.C.'s reasons quoted above and observed at para. 16 that "[a] detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords to them."

- [43] I do not agree with the suggestion that because Leipert dealt with anonymous informers it has limited application to the facts of this case. An anonymous informer could be anyone. Given the precise details given to the police by the informer in the present case, the pool of potential informers is very limited. In my view, this called for heightened caution when it came to editing. Leipert does not eliminate the possibility of editing, but holds, at para. 32, that where

it is impossible to determine which details of the information provided by an informer will or will not result in that person's identity being revealed, then none of those details should be disclosed, unless there is a basis to conclude that the innocence at stake exception applies.

- [44] In my view, the trial judge erred in concluding that "the phrase tends to identify the confidential informant means something more than narrows the pool of people who have the same characteristics or 'identifiers'".

[Emphasis added.]

- [153] Omar says background material concerning an informer is relevant if the Crown intends to place any substantial weight upon information provided by the informer at trial. Importantly though, Omar also suggests that a broad definition of the scope of privilege is necessary to ensure informers are protected from unintended disclosure of identifying information.

- [154] Given the fact the Court in Leipert expressly distinguished cases where the defence seeks background information from cases where it seeks the ITO and supporting material, it was an error, in my view, for the trial judge to fail to distinguish between background information and that relied upon in support of the application for a warrant. With respect, the trial judge erred in holding that privilege was afforded to the whole document in Leipert simply because it recorded information from an anonymous informer. I share the view expressed by Sharpe J.A. in Omar, at para. 32, that the application of Leipert is not limited to cases involving anonymous informers.

- [155] Known informers or their police handlers may assist in determining what information will identify them, but, as Sharpe J.A. pointed out in Omar, there may be only a small pool of individuals who could have provided the tip. A seemingly innocuous detail could be all that someone familiar with the matter needs to identify the informer. SHNs are intended to record multiple debriefings and along with SDRs may relate to multiple offences and individuals. Hence, there is some risk posed by a mosaic effect of disclosure. These concerns call for heightened caution when it comes to editing so as not to "unwittingly

deprive informers of the privilege which the law accords to them": Leipert at para. 16.

- [156] What is said in Leipert with respect to an anonymous tip is generally true of the SHNs and SDRs sought by the respondent in this case. They were prepared and kept with a view toward protecting the identity of the informer. The risk posed by editing is great. The SHNs were not disclosed to the investigators or to the Crown or broadly within the police service.
- [157] In my view, where the Crown can establish that a document has been created to record information provided by a confidential informer that could tend to reveal the informer's identity, as it appears to have done to the satisfaction of the judge in this case, and the document is not disclosed or relied upon to obtain an order, there is no *prima facie* right to obtain an edited version of the document. The Crown should not be required to demonstrate that unedited portions are "clearly irrelevant". It is not the norm to so limit privilege and it seems strange to me to seek to routinely edit documents in this context, where the risk of inadequate editing is so great.
- [158] For that reason, even if I had concluded the material sought was relevant to the challenge to the warrant, I would not have ordered the disclosure of edited versions of the SHNs or SDRs that were not relied upon by the affiant or otherwise before the authorizing judge, without examining the documents to address the claim to blanket privilege.
- [159] On a Garofoli application there is no presumption of disclosure of background information other than material referred to in an ITO or affidavit in support of a wiretap authorization. Background material may be producible on a case-specific basis if the defence establishes likely relevance to an issue on the application. Even where the relevance threshold is met, production of SHNs and SDRs may not be consistent with informer privilege.

Conclusion

- [160] In my view, the trial judge erred in concluding that the material sought by defence counsel was relevant to the issues before him. The Crown, in my view, had produced all relevant material prior to the application. I would allow the appeal, set aside the disclosure order and the resultant judicial stay of proceedings and order a new trial.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Madam Justice Fenlon"

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