

CANADA / JUDGMENT

R. v. Wiwchar

2025 BCSC 1029

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2025 BCSC 1029 R. v. Wiwchar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wiwchar,

2025 BCSC 1029

Date: 20250605

Docket: 27393-A; 27393-2, 27393-225

Registry: Vancouver

Rex

v.

Dean Michael Wiwchar

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Inherent Jurisdiction

Before: The Honourable Madam Justice Ker

Ruling on Voir Dire #8 Application #225

Re Challenges to Sufficiency of ITOs

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The accused, appearing in person:

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Place and Dates of Trial:

Vancouver, B.C.

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June 5, 2025

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Introduction

- [1] This ruling addresses Notice of Application #225, an application by the accused, Dean Michael Wiwchar, to challenge the sufficiency of several Informations to Obtain ("ITO"s) prepared and affirmed by Detective/Constable Lisa Wu ("Det./Cst. Wu") of the Vancouver Police Department ("VPD"). These ITOs were prepared to support applications for judicial authorizations for either production orders or general warrants and assistance orders in respect of two locations that Mr. Wiwchar had been observed to attend: the West Georgia St. branch of the Bank of Montreal ("BMO") and the Edgewater Casino ("Edgewater").
- [2] The applications for these various judicial authorizations were made in the nascent stages of the VPD's investigation of the January 17, 2012 shooting of Sandip Duhre at the Sheraton Wall Center Hotel in Downtown Vancouver. The VPD investigation into Mr. Duhre's homicide was a complex affair and was assigned project status. The name of the investigation was "Project Reality".
- [3] Mr. Duhre was shot ten times in the right side of his head while he was seated in Café One, the restaurant area of the hotel. One of the servers in the restaurant, Candice Sharpe-Terreault, had been waiting on Mr. Duhre's table and understood from Mr. Duhre that another person would be joining him for part of the meal he was having with his friend, Reuben Vivar. At 8:43 p.m., Ms. Sharpe-Terreault was returning to Mr. Duhre's table with a drink for Mr. Vivar. She was approximately ten feet behind an unknown male who was later identified as the shooter.
- [4] Ms. Sharpe-Terreault saw Mr. Duhre start to rise to greet the unknown male and heard him say, "nice to meet you". The unknown male that Ms. Sharpe-Terreault had been following towards the table pulled out a gun and shot Mr. Duhre.

- [5] I pause to note Ms. Sharpe-Terreault did not know Mr. Duhre or Mr. Vivar and certainly does not appear to have named them in the statements that are referenced in the ITOs. However, for readability of these reasons, it is easier to assign the names to the two individuals seated at the table in the restaurant.
- [6] On the strength of Ms. Sharpe-Terreault's description of the shooting and based on the context of the surrounding events, it is clear that the shooting of Mr. Duhre bears the hallmarks of a planned execution that occurred in a busy public place. The shooting occurred in the context of the then-ongoing gang wars that have plagued the Lower Mainland since the mid-2000s.
- [7] The investigative theory for Mr. Duhre's killing is that he was lured to the Wall Center to meet with a private investigator ("PI"). The shooter was the PI he was to meet, and when the shooter arrived, he executed Mr. Duhre. The investigative theory is that this was a "paid hit", and it is alleged that Mr. Wiwchar was the shooter.
- [8] On this application, Mr. Wiwchar challenges four ITOs in support of production orders, general warrants, and assistance orders for BMO, Edgewater, and a third location--a Public Storage facility in Surrey, British Columbia. They are as follows:
1. An ITO affirmed by Det./Cst. Wu on March 28, 2012, in support of a production order to obtain documents or data from the West Georgia BMO. More specifically, bank account information with respect to Mr. Wiwchar between January 1 and March 27, 2012, and safety deposit box information in that same location. I shall refer to this ITO as the "BMO Production Order ITO".
 2. An ITO affirmed by Det./Cst. Wu on March 29, 2012 in support of two applications for general warrants and assistance orders: one for the Edgewater video observations and one for the BMO safety deposit box. I shall refer to this ITO as the "Edgewater and BMO General Warrant ITO". Justice K. Walker denied the application for the general warrant for the BMO safety deposit box, but allowed the general warrant and assistance order for the Edgewater video in relation to this facet of the casino observations.
 3. An ITO affirmed by Det./Cst. Wu on April 5, 2012 in support of a general warrant and assistance order to search Mr. Wiwchar's safety deposit box at the West Georgia St. BMO. I shall refer to this as the "BMO General Warrant ITO". As noted, this was Det./Cst. Wu's second application for a general warrant to look in Mr. Wiwchar's safety deposit box. This time, Walker P.C.J. issued the general warrant and assistance order. This ITO contained more details with respect to the investigation than the previous ITOs.
 4. An ITO affirmed by Det./Cst. Wu on April 11, 2012 in support of a general warrant to search a storage location at the Surrey Public Storage locker facility where Mr. Wiwchar was observed by members of the VPD surveillance team who were tracking him. On March 26, 2012, at approximately 10:15 p.m., he was observed trying to gain access to the storage units at Public Storage in Surrey. I shall refer to this as the "Public Storage General Warrant ITO".

- [9] In order to conduct these serial challenges as efficiently as possible, the voir dire addressed the ITOs sequentially.
- [10] On February 12 and 14, 2025, and March 7, 2025, I provided the results of the challenges to the March 28, 2012 BMO Production Order ITO, the April 5, 2012 BMO General Warrant ITO and the April 11, 2025 Public Storage General Warrant ITO. In these reasons, I will explain why the contested excisions and additions were made to these three ITOs, as well as why the first two ITOs remain sufficient to support the issuance of the orders that were sought and granted. I will also provide my reasons addressing the challenge to the April 11, 2012 Public Storage General Warrant ITO, but only in respect of the first part of the analysis: the excisions and additions stage of the challenge. The sufficiency of this third challenged ITO has yet to be dealt with in light of a late breaking issue that arose during the voir dire.
- [11] After I provided the result for the March 28, 2012 BMO Production Order ITO challenge, and once Mr. Wiwchar received a general explanation and some advice from amicus curiae as to why the challenges to the March 29, 2012 ITOs were frivolous, Mr. Wiwchar wisely withdrew his challenge to these ITOs. The Crown is not tendering any evidence garnered from one ITO. The applications supported by the second ITOs--the Edgewater and BMO General Warrant ITOs--had mixed results, as I noted above. The general warrant for BMO was denied. The general warrant for Edgewater was allowed, but the Crown is not relying upon the videos from that authorization.
- [12] As a result, these reasons address only three ITOs: the March 28, 2012 BMO Production Order ITO, the April 5, 2012 BMO General Warrant ITO, and the April 11, 2012 Public Storage General Warrant ITO.
- [13] In this ruling I will outline the position of the parties and the relevant factual background. I will then provide a review of the legal principles governing challenges to the sufficiency of ITOs sworn in support of applications for the various judicial authorizations. Finally I will address the issues raised for each of the three ITOs that are challenged in this application.

General Position of the Parties

Mr. Wiwchar

- [14] Mr. Wiwchar sought certain excisions from the three remaining ITOs being challenged and also sought "amplification" of those ITOs in the form of adding materials into the ITOs. His general thesis was that with the excisions and the additional information, particularly excisions related to text messages, the "corrected" ITOs contain insufficient information to support the issuance of the production order and the two general warrants.

The Crown

- [15] The Crown agreed to some of the excisions and some of the additions to correct the ITOs, however, it did not agree to all of the excisions or additions that Mr. Wiwchar sought. The Crown's position is that once the corrected ITOs are reviewed in context, according to the long-standing principles from the case law, it is abundantly clear that the ITOs are still sufficient to support the judicial authorizations that were issued.
- [16] More specifically, the Crown contends that even once all amplifications, additions, and excisions are made to each of the three ITOs in issue, they each still provide reliable evidence that might reasonably be believed, on the basis of which the authorizations could have issued: *R. v. Araujo*, 2000 SCC 65 at para. 54. The Crown asserts that each of the three challenged ITOs satisfy this test.

Amicus Curiae

- [17] Amicus curiae asserts that some of the contested excisions should be made and supports some of the additions that Mr. Wiwchar seeks. Amicus curiae also argued that a few of the excisions need not be made, which caused Mr. Wiwchar to change his position and agree with amicus curiae.
- [18] In the end, however, once each corrected ITO is examined, amicus curiae acknowledges that it is likely that each ITO contains sufficient reliable evidence that might reasonably be believed, on the basis of which the authorizations could have issued.

Overview

- [19] Before addressing the legal principles and conducting the analysis for each ITO, it is necessary to outline the factual background to the investigation and also to provide a brief overview of the activities of each of the three impugned ITOs.
- [20] I will then outline the governing legal principles. Thereafter, I will apply the principles to the contested excisions and additions for each of the challenged ITOs and explain why they were or were not made. I will then review whether the March 28 and April 5, 2021 "corrected" ITOs are viable, that is, sufficient.
- [21] As noted earlier, I have already provided the results of the challenges to the three ITOs in issue on this application. I do not propose to outline or review the agreed excisions and additions to these ITOs. Those have been dealt with and require no further explanation.

[22] Insofar as the Public Storage General Warrant ITO of April 11, 2012 is concerned, I will only address the first stage of the challenge to the sufficiency of that ITO: the excisions and additions to the ITO. The second stage of the challenge--the assessment of sufficiency--will need to occur at a later date in light of the late breaking discovery of an issue relating to para. 187(b) and how the VPD obtained the information about Mr. Wiwchar's rental of a storage locker at the Surrey Public Storage facility.

Factual Background

- [23] Project Reality involved multiple avenues of inquiry and investigation. Interviews were conducted of various eyewitnesses to the shooting. CCTV surveillance video for the areas around the hotel and adjacent businesses was recovered and reviewed, as well as internal hotel CCTV footage.
- [24] It emerged fairly early on in the video reviews that two males, essentially spotters, appeared to be sitting at the bar area of the Café One. One spotter--alleged to be Rabih Alkhalil--appeared to make eye contact with the shooter as he entered the restaurant.
- [25] Examination of video surveillance footage from the adjacent businesses at the corner of Burrard and Helmcken St., as well as video footage in the laneway areas behind the Nelson Square businesses at Nelson and Hornby St., captured two suspicious vehicles with occupants engaged in what appeared to be preliminary information gathering steps. The getaway vehicle that the shooter was believed to be in was in the laneway behind the Nelson Square businesses.
- [26] Painstaking investigative steps led the members of the VPD to determine that the getaway vehicle was a grey 2001 Mazda MPV minivan. ICBC provided BC license plate information for the plate linked to the vehicle, which produced what the Crown described as a suspicious "hot potato" series of ownership changes for the vehicle. Between August 2009 and January 30, 2012, the vehicle changed ownership seven times. A month before the shooting Mr. Wiwchar was stopped while driving the vehicle, which at the time was owned by Maly Morn, an individual known to the police. When stopped, Mr. Wiwchar was neatly dressed and advised officers he was going to visit his girlfriend.
- [27] Other individuals involved in the vehicle's ownership history included Philip Ley, Mr. Wiwchar's co-accused on a firearms trial heard by Justice Bowden in 2015, and Arash Younis, a person known to the police and alleged to have strong gang connections. Mr. Younis visited Maly Morn in hospital in 2007 when Mr. Morn was recovering from gunshot injuries. Another owner, Thomas Tran, had several drug and weapon files on the PRIME database.
- [28] It would be fair to say that the identification of the suspected getaway vehicle and its dubious provenance, connected as it seemed to be to a number of individuals known to the VPD, was an important investigative development for Project Reality.

- [29] In the BMO Production Order ITO, the affiant provides a brief summary of the investigation that assists in understanding how Mr. Wiwchar started to arrive on the radar of the investigation:
9. On January 17, 2012 at approximately 8:00 p.m. the victim Sandip Duhre was expecting to meet a male known only as "PI" at the Cafe One restaurant located inside the Sheraton Vancouver Wall Centre, North Tower, 1088 Burrard Street in the City of Vancouver ("Hotel").
 10. The victim Sandip Duhre's friend RUBEN accompanied him to the meeting.
 11. The victim Sandip Duhre was supposed to get information from "PI".
 12. RUBEN and the victim Sandip Duhre became nervous when "PI" kept delaying the meeting.
 13. An unknown male showed up at the Cafe One restaurant at approximately 8:45 p.m. and shot the victim Sandip Duhre as he (Sandip Duhre) said, "Nice to meet you" and held out his hand (presumably to shake the unknown male's hand).
 14. Numerous witnesses at the Cafe One restaurant and the bar witnessed the shooting and/or saw the male suspect.
 15. During the processing of the Crime Scene, 2 BlackBerrys were found - a white one that was on the table and a black one on Sandip Duhre's belt.
 16. The victim Sandip Duhre's fiance provided his friend RUBEN's telephone number.
 17. RUBEN was initially reluctant to speak to police but eventually attended the police station with his lawyer for an interview and provided information about why the victim Sandip Duhre was at the Sheraton Vancouver Wall Centre.
 18. A video canvass was completed and the evidence gathered showed images of the Suspect and 3 unidentified persons of interest who were subsequently believed to be assisting the Suspect.
 19. One of the persons of interest was identified and believed to be James Riach. The other 2 persons of interest are still unidentified.
 20. A vehicle that James Riach and the 2 unidentified persons of interest were observed getting out of was subsequently located and seized. This vehicle was determined to be linked to an associate of James Riach.
 21. A second vehicle in which the Suspect was observed on video getting in and out of before and after the murder of Sandip Singh Duhre has been identified and subsequently seized. This vehicle has been processed for forensics and is awaiting lab results.
 22. A Suspect has been identified as Dean Wiwchar born August 1, 1985.
 23. Dean Wiwchar has been observed with a substantial amount of cash at the casino (approximately \$30,000).

24. Dean Wiwchar has been seen going into the Bank of Montreal at #1 00 - 401 West Georgia Street, Vancouver with a briefcase and he did not go to see a bank teller.
- [30] As the investigation advanced and Project Reality's information database grew with each investigative step, Detective St. Amant, the lead investigator, designated Mr. Wiwchar as a person of interest on March 2, 2012.
- [31] Members of the VPD Strike Force Surveillance Team started to follow Mr. Wiwchar to monitor his activities, and by March 24, 2012, he was subjected to 24-hour surveillance.
- [32] Germane to the ITOs challenged on this application is the fact that on the night of March 25 and into the early morning hours of March 26, 2012, Mr. Wiwchar was observed gambling at the Edgewater Casino. Between 12:56 a.m. and 2:30 a.m. on March 26, Mr. Wiwchar was observed to lose \$11,000 in bets at the baccarat table and to then gather a large stack of \$100 and \$50 bills out of his girlfriend's purse. The surveillance report estimated it to be about \$30,000, although Mr. Wiwchar disagrees with this guesstimate.
- [33] The accuracy of the estimation is largely immaterial, which I address more fully later in these reasons. What is important is the fact that Mr. Wiwchar was observed to be handling a large amount of cash at the casino and losing a significant sum of money.
- [34] Later, on March 26, 2012, at around 2:00 p.m., surveillance followed Mr. Wiwchar to the West Georgia St. BMO branch. He exited a Toyota Rav4 vehicle and retrieved a black laptop-sized briefcase from the rear of the vehicle. He took the briefcase into BMO and was inside--not at any ATM or any teller--for approximately 8 to 10 minutes. Police believed he was attending at a safety deposit box. He returned to the Toyota Rav4 with the briefcase. When he left the vehicle at around 2:45 p.m., he did not take the briefcase with him.
- [35] Later, in the evening of March 26, 2012, Mr. Wiwchar and his girlfriend were observed at 8:49 p.m. to attend an address in Surrey affiliated to the new owner of the Mazda MPV minivan--Ibrahim Ibrahim. And at 10:15 p.m., Mr. Wiwchar was observed to attend a Public Storage facility on 64th Avenue in Surrey. He appeared to enter an access code but was unable to gain access to the facility.
- [36] Based on the state of Project Reality's investigation, combined with the surveillance observations of Mr. Wiwchar losing a large amount of money at the Edgewater Casino; his attendance at West Georgia St. BMO branch; and, the absence of sightings of him at the ATM areas, all the teller wickets, and offices of the lobby area of the bank, investigators formed the opinion that Mr. Wiwchar likely had a safety deposit box at the BMO branch.
- [37] As a result, on March 28, 2012, Det./Cst. Wu affirmed an ITO in support of the application for the BMO production order seeking records associated to Mr. Wiwchar in relation to that BMO branch.

- [38] The production order was granted on March 28, 2012, and executed later that day. The BMO account records on Mr. Wiwchar's accounts at the West Georgia St. branch were produced to the investigators on March 29, 2012. The records disclosed that Mr. Wiwchar had opened a new account on February 3, 2012 (which had a negative balance) and rented a large safety deposit box on February 2, 2012.
- [39] On April 5, 2012, Project Reality applied for a general warrant to search Mr. Wiwchar's safety deposit box. Again, Det./Cst. Wu affirmed the BMO General Warrant ITO, setting out almost all of the information included in the BMO Production Order ITO, as well as the information gathered through the execution of the Production Order--Mr. Wiwchar's bank records. Further information was included in the April 5 BMO General Warrant ITO that had been obtained and reviewed since the application for the BMO production order. Some of this additional information further linked Mr. Wiwchar to Mr. Duhre's death. The general warrant was granted.
- [40] The general warrant authorized the police to open Mr. Wiwchar's safety deposit box at the BMO on West Georgia street and to examine its contents. When the general warrant was executed, the police observed \$140,000 in cash inside Mr. Wiwchar's safety deposit box.
- [41] On April 11, 2012, Project Reality applied for a general warrant to conduct a covert search of Mr. Wiwchar's storage locker at a Public Storage facility in Surrey, B.C. Once again, Det./Cst. Wu was the affiant for the ITO--the Public Storage General Warrant ITO.
- [42] The Public Storage General Warrant ITO contained largely the same information that the two previous ITOs contained, albeit with some revisions in the form of some deletions, rearrangement, and/or additions of information. It also contained further information that the police had gathered during the course of the investigation, including the fact that they had observed \$140,000 in cash in Mr. Wiwchar's safety deposit box as a result of the execution of the BMO general warrant. The presence of this amount of cash reasonably supports the inference that Mr. Wiwchar obtained it as a result of criminal activity. That it, in fact, may not have been for the killing of Mr. Duhre is but one inference. Another equally plausible and reasonable inference is that the presence of this large amount of cash is consistent with the theory that Mr. Wiwchar was paid for shooting and killing Mr. Duhre.
- [43] In addition to this information, the April 11 Public Storage General Warrant ITO included even more information that the investigators had uncovered since the previous applications on March 28 and April 5, 2012. The Crown fairly summarized this information as follows:
- 1) A surveillance member observed Mr. Wiwchar and an unknown male exit from a business near 3451 No. 3 Road in Richmond on the afternoon of March 28. The following day, that member viewed video and a photo of Philip Ley, and confirmed that the unknown male was Philip Ley. The grey Mazda MPV (the getaway vehicle) had a temporary operators permit attached to it on October 31, 2011. Philip Ley was associated to the temporary operators permit.

- 2) On the evening of March 28, 2012, Mr. Wiwchar and an unknown male walked into London Drugs inside Guildford Mall at 152nd Street and 104th Avenue in Surrey, and purchased three 2.8 litre bottles of bleach as well as several Lysol cleaning wipes. They then drove to 133rd Street and 108 Avenue. Mr. Wiwchar used a key fob to gain access to the front door of 13380 108th Avenue in Surrey.
- 3) Mr. Wiwchar engaged in several obvious counter-surveillance techniques, including allowing a surveillance vehicle to drive past him before pulling up behind the surveillance vehicle and following it, pursuing a surveillance vehicle, looking intently at every person on a Skytrain platform and a Skytrain car, driving fast then slowing down to well below the speed limit and driving very slowly on side streets.
- 4) Mr. Wiwchar went to various locations in Richmond and Vancouver with Philip Ley on the afternoon and evening of March 29, 2012;
- 5) Mr. Wiwchar gambled extensively at the Edgewater casino on the evening of April 4;
- 6) On the morning of April 7, 2012, Mr. Wiwchar and Ley attended near the World Gym Fitness Centre at 7130 120th Street, Surrey, in a Dodge Caravan minivan and looked intently across the street at the World Gym parking lot. This carried on from 7:40 a.m. to 9:14 a.m., with Mr. Wiwchar and Ley taking turns looking furtively towards the World Gym. They then parked near 13380 108th Avenue in Surrey and walked into that building. They re-attended at the World Gym parking lot on the morning of April 10 and engaged in similar behaviour.
- 7) Mr. Wiwchar opened a safety deposit box at the BMO on West Georgia Street in Vancouver on February 2, 2012 (just over two weeks after the Duhre homicide). He accessed the safety deposit box on February 3 (twice), and March 26, 2012. The police conducted a covert search of the safety deposit box (#76) on April 5, 2012 and located \$140,000 in cash. Wiwchar had a chequing account at the BMO but it had a balance owing of \$5.95.
- 8) Mr. Wiwchar had no apparent legitimate source of income.
- 9) On March 26, 2012, at 10:15 p.m., Mr. Wiwchar and Juanita Hyslop drove to 17555 64th Avenue, Surrey (the Public Storage facility). Mr. Wiwchar attempted to enter a code into an access panel for the storage units but did not appear to gain access;
- 10) On March 5, 2012 Detective Dungey attended at the Public Storage Locker located at 17555 64th Avenue, Surrey, and determined that Mr. Wiwchar rented a locker with number 3116. He had rented the locker since January 29, 2012 (less than two weeks after the Duhre homicide).
- [44] One further piece of information in the Public Storage General Warrant ITO was that Mr. Wiwchar had been observed attending the West Georgia St. BMO on March 30, 2012. He entered the bank at around 4:00 p.m. and was observed to be carrying a thin black file folder. He exited the bank about 20 minutes later still carrying the black folder in his hands.

[45] The Public Storage general warrant was issued by the Honourable Judge Senniw. The warrant permitted the police to examine and photograph the contents of the storage locker, and to seize various enumerated items that the police were looking for, such as firearms, distinctive clothing, and the like.

[46] I turn now to a review of the legal principles that inform this application.

Governing Legal Principles

[47] Before authorizing the issuance of a production order or a general warrant, the authorizing judicial official must ensure that the ITO meets the statutory pre-requisites.

[48] In March 2012, the statutory pre-requisites for the issuance of a production order were contained in s. 487.012(3) of the Criminal Code, R.S.C., 1985, c. C-46 [Code] (as it was in 2012):

Conditions for issuance of order

- (3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that
- a) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;
 - b) the documents or data will afford evidence respecting the commission of the offence; and
 - c) the person who is subject to the order has possession or control of the documents or data.

[49] The statutory pre-requisites for the issuance of a general warrant are contained in s. 487.01 of the Code. These conditions remain the same today as they were in 2012:

Information for general warrant

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

- (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
- (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

[50] While the statutory pre-requisites for the issuance of these two investigative tools differ, the test for reviewing the sufficiency of an ITO sworn in support of an application for either of these two types of authorizations remains the same. The test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452, 1990 CanLII 52; *Araujo* at para. 54; *R. v. Morelli*, 2010 SCC 8 at para. 40. The review of the sufficiency of an ITO in the context of a challenge to a judicial authorization is commonly referred to as a Garofoli review.

[51] The starting point for a Garofoli review is that the authorization is presumed to be valid: *R. v. Sadikov*, 2014 ONCA 72 at para. 83. The accused bears the burden of persuading the reviewing judge that the authorization could not have issued. The standard of proof is on a balance of probabilities.

[52] There are several basic principles that inform Garofoli reviews of judicial authorizations. In *Search and Seizure* (Toronto: Emond Criminal Law Series, 2021), the authors provide a helpful summary of the principles that apply to a Garofoli review at page 578:

The following principles apply to a Garofoli review:

1. The primary question is whether the issuing judge could have granted the warrant based on the ITO.
2. The ITO should be reviewed with regard to the totality of the information presented and not be parsed or deconstructed paragraph by paragraph.
3. The affiant should not be held to a standard of perfection in drafting.
4. The affiant should show, not tell. The reader (i.e., the issuing judge) must independently come to share the affiant's belief that an offence has been committed and that the warrant will afford evidence of the offence. Unsourced or poorly sourced conclusory statements fail to achieve this goal and are frequently identified by reviewing judges as the main deficiency in an ITO.
5. The issuing judge is permitted to draw reasonable inferences, and the reviewing judge should apply a deferential standard of review. It is sufficient if the grounds set out in the ITO logically and reasonably support the inferences drawn by the issuing judge in granting the warrant.
6. The affiant does not need to negate every possible competing inference.
7. The obligation on the affiant to provide full, frank, and fair disclosure in the ITO is tied to the ex parte nature of the application for the warrant. The affiant must have disclosed all material facts and must not have misled the issuing judge by misstatement or omission.

8. The ITO should have specifically addressed any and all statutory criteria or at least provided sufficient information on which the issuing judge could have concluded that the criteria were met. For example, an ITO for a telewarrant must speak to the statutory criterion that an in-person application was "impracticable", and a supporting affidavit for a wiretap must speak to the statutory criterion of "investigative necessity".
9. For the purpose of the Garofoli review, the ITO is often redacted to protect sensitive information. The ITO may also be subject to excision, amplification, or addition. These concepts are discussed below.

[53] And as the authors note at page 588 under the heading "Standard of Review", the Garofoli review follows these basic principles:

1. The scope of review is narrow. It is not a de novo hearing of the ex parte application for the warrant.
2. The reviewing judge does not substitute their view for that of the issuing judge.
3. The question is whether the issuing judge could have granted the warrant, not whether the reviewing judge would have granted it.
4. The standard is whether there is sufficient credible and reliable evidence to have permitted the issuing judge to conclude that there were reasonable and probable grounds to believe that the statutory criteria for issuance were met, for example, that an offence has been committed and that evidence of the offence will be found at the specified time and place of the search.

[54] In *Sadikov*, Justice Watt, writing for the Court, elaborated on the Garofoli framework:

[87] Warrant review requires a contextual analysis. Inaccuracies in the ITO, on their own, are not a sufficient basis on which to ground a finding of bad faith or an intent to mislead, much less to provide a basis on which to set aside the warrant: *Araujo*, at para. 54. The existence of fraud, non-disclosure, misleading evidence, and new evidence are all relevant but are neither a prerequisite to, nor dispositive of, the review: *Garofoli*, at p. 1452; and *Ebanks*, at para. 20.

[88] It is no part of the reviewing judge's mandate to determine whether she would issue the warrant on the basis of the amplified record. Nor is it the reviewing judge's role to draw inferences, or to prefer one inference over another. The inquiry begins and ends with an assessment of whether the amplified record contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued: *Morelli*, at para. 40.

- [55] In *R. v. Latimer*, 2020 BCSC 2173, I had occasion to summarize the legal principles that govern the review of the validity of judicial authorizations, be they a search warrant, production order, general warrant, or wiretap authorization. Those principles remain apposite to the circumstances of this application:
- [24] The parties do not disagree on the legal principles which govern the review of the validity of a prior authorization, be it a wiretap, a search warrant, or a production order. *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452, sets out the test to determine whether the production order was properly issued. See also: *R. v. Nero*, 2016 ONCA 160 at para. 69.
- [25] The test applied by the reviewing judge is whether the ITO contains sufficient reliable evidence that might reasonably be believed, on the basis of which the authorizing justice of the peace could have concluded that the statutory conditions precedent required to be established had been met: *Garofoli* at 1452; *R. v. Araujo*, 2000 SCC 65 at paras. 51, 54; *R. v. Morelli*, 2010 SCC 8 at para. 40; *Nero* at paras. 66, 70; *R. v. Vu*, 2013 SCC 60 at para. 16 [*Vu* (SCC)].
- [26] The applicant bears the onus of establishing that the ITO affidavit on which the production order issued is insufficient: *R. v. Campbell*, 2011 SCC 32 at para. 14.
- [27] It is critical to recall that in conducting a review of the ITO, that the reviewing judge not do so on a piecemeal dissection of individual items of evidence devoid of their context in a search for alternative exculpatory inferences: *Nero* at para. 68; *R. v. Liu*, 2014 BCCA 166 at para. 39. Rather, the information is to be examined in its totality - it is a contextual review of the record conducted in a practical, non-technical, and common sense perspective: *Nero* at para. 68; *Liu* at para. 39; *Araujo* at para. 54.
- [28] Deconstruction, parsing, dissection, or microscopic analysis of the paragraphs or averments in the ITO is to be eschewed. All the grounds must be assessed together as a whole: *R. v. Saunders*, 2003 NLCA 63 at paras. 9, 11, 12, 15, aff'd 2004 SCC 70; *Araujo* at para. 54; *R. v. Whitaker*, 2008 BCCA 174 at para. 41, leave ref'd [2008] S.C.C.A. No. 296.
- [29] The evidence in an ITO cannot be isolated or parsed one item at a time because each piece of evidence colours other pieces of evidence. Thus, a fuller, more complete picture emerges when all the evidence is considered together: *Whitaker* at para. 41, citing *R. v. Lam*, 2002 BCCA 99 at para. 10.
- [30] Insofar as the reasonable grounds standard is concerned, it is well-known and not as high as the civil standard of proof on a balance of probabilities: *Whitaker* at para. 39. Rather, the standard is one of reasonable belief, a standard lower than the balance of probabilities: *R. v. Glendinning*, 2019 BCCA 365 at para. 7.

[31] As Mr. Justice Frankel noted in *R. v. Vu*, 2011 BCCA 536 at para. 39 [*Vu* (BCCA)], rev'd on other grounds 2013 SCC 60, reasonable grounds "is the point at which credibly-based probability replaces suspicion". Deciding whether the standard has been satisfied therefore requires a "practical, non-technical, and common-sense assessment of the totality of the circumstances": *Vu* (BCCA) at para. 39.

[33] Both the authorizing justice and the reviewing judge are entitled to draw reasonable inferences from the contents of the ITO: *Vu* (BCCA) at para. 40. As part of the process, in determining whether the reasonable grounds standard has been satisfied, both the authorizing justice and the reviewing judge are entitled to "put two and two together": Whitaker at para. 42. Moreover, the simple fact that an item of evidence in the ITO may support more than one inference or even a contrary inference to one supportive of a condition precedent is, as Mr. Justice Watt stated in *Nero* at para. 70, "of no moment". The inquiry begins and ends with an assessment of whether the ITO contains reliable evidence that might reasonably be believed on the basis of which the production order could have issued: *Nero* at para. 70; *Morelli* at para. 40.

[56] As this application raises issues of excision and amplification or "additions", it is necessary to outline the principles that guide that process.

[57] As the authors of *Search and Seizure* explain at pages 608-609:

"Excision" refers to the reviewing judge deleting unconstitutionally obtained or erroneous information from the ITO. There may be some disagreement between counsel, as discussed below, as to whether the latter basis for excision requires only that the information was inaccurate or also connotes that the affiant knew or should reasonably have known it was accurate.

"Amplification" refers to the reviewing judge permitting the Crown to correct minor good-faith errors on the part of the affiant.

"Addition" is a related but distinct concept. It refers to the reviewing judge adding to the record on review - effectively adding to the ITO - information that the affiant should have included. The term "addition" is not used in the case law, but we suggest that it is a useful concept because it is fundamentally different from both excision (which involves removing information from the ITO) and amplification (which permits the Crown to correct minor error or technical errors). Addition, by contrast, is the process of supplementing the ITO with information that the defence has tendered or elicited through cross-examination of the affiant and that the affiant should have included in the ITO.

[58] At least one case, *R. v. Beckles*, 2022 ABQB 39, adopts the terminology of "addition" instead of "amplification" where the defence seeks to add information to an ITO. I agree that "addition" appears to be the more appropriate nomenclature to use for the reasons outlined by Justice Labrenz:

- [91] By following this approach, I agree with the authors of *Search and Seizure*, Emond Criminal Law Series, 2021 at p 621-623 that in some circumstances it is appropriate to add information to the ITO that should have been disclosed had the affiant been full, fair, and frank. This process of adding information can occur in tandem with, or in substitution for, the excising of erroneous information. After adding the omitted information, the reviewing judge is in a position to determine whether the authorizing justice could have granted the warrant based upon the revised ITO.
- [92] My approach finds support in many of the reported case authorities beyond the Ontario Court of Appeal's decision in *R v Booth* 2019, ONCA 970 at para 59. See, for example, as follows: *R v Morelli*, 2010 SCC 8 at paras 57-60; *R v Sipes*, 2009 BCSC 612 at para 41; *World Bank Group v Wallace*, 2016 SCC 15; *R v Vigneswaralingam*, 2017 ONCJ 640 at para 113; *R v Dadmand*, 2016 BCSC 720 at paras 48-49; *Re: Church of Scientology and The Queen*, (1987) 31 CCC (3d) 449 (ONCA), leave to appeal to the SCC ref'd, [1987] 1 SCR vii.
- [93] I should add that this particular approach to warrant review cannot be resorted to so as to retroactively authorize a warrant that was not initially supported by reasonable and probable grounds. This type of amplification, sought by the Crown, is only permitted to correct minor good faith errors: *R v Morelli*, 2010 SCC 8 at para 41.
- [94] I think it is also useful to follow the suggestion made by the authors of *Search and Seizure* to refer to the process of adding information to the ITO as "addition" to avoid confusing this type of review process from the more limited type of amplification that may be permitted when requested by the Crown. As for the practical effects of "addition" as requested by an accused, the authors state at pp 622-623:

...In *Morelli*, for example, one of the pieces of information that Fish J effectively added to the ITO was that the webcam said by the affiant to be capable of recording child pornography and storing it on the computer was, in fact, hooked up to a video recorder and not to the computer. It is simpler to add that detail - which was adduced during cross examination of the affiant - than it is to try to excise from the ITO the statements about the webcam, some of which were interwoven with other statements. To put it another way, it may be easier for defence counsel to improve the truthfulness of the ITO by adding material information to the record than by excising alleged misstatements. Depending on how the ITO is drafted and on the nature of the alleged misrepresentations, addition, rather than excision, may appeal to the reviewing judge as the more efficient and effective approach.

- [59] In this case, excisions and additions are what this application engages. Once information is excised from an ITO, it is disregarded in determining whether the essential evidentiary pre-requisites have been met: *R. v. Paryniuk*, 2017 ONCA 87 at para. 46.
- [60] And as noted in *Search and Seizure* at page 621:

Addition is the other face of excision: instead of deleting erroneous material from the ITO for the purpose of Garofoli review, the court adds information that the affiant omitted but should have included, usually because the affiant failed to make full, frank, and fair disclosure and left the issuing judge with a misleading impression of true facts. With omitted information thus added, the reviewing judge then turns to the question of whether the issuing judge could have granted the warrant based on the revised ITO

- [61] Addition is described as a defence tool. It permits the reviewing judge to add to the ITO information that might undermine the grounds for the issuance of the impugned order and that the affiant ought to have included in the ITO: *Search and Seizure* at page 622.
- [62] To add to this general review of the legal principles, I note the Crown has succinctly encapsulated the principles of excision in their written reply to Mr. Wiwchar's application:
21. The principles of excision and amplification were described by the Court in *R. v. Thiessen*, 2020 BCCA 85, as follows:
- [48] In conducting a review, the judge excises erroneous or misleading information from the ITO. Where information is excised due to simple error, and not from a deliberate attempt to mislead the authorizing judge, amplification may be in order: *R. v. Araujo*, 2000 SCC 65 at para. 57. If minor errors were made in good faith, the reviewing court may resort to amplification evidence to correct the errors: *Araujo* at paras. 57-59; *R. v. Morelli*, 2010 SCC 8 at paras. 41-43.
22. The type of material information that must be included in an ITO to make full and frank disclosure was recently considered in *R. v. Booth*, 2019 ONCA 970. In that decision, Mr. Justice Paciocco found that "(t)he frame of material information required to achieve full and frank disclosure includes all material information that: (a) could undercut the probability that the alleged offence has been committed; (b) could undercut the probability that there is evidence to be found at the place of the search; and (c) that challenges the reliability and credibility of the information the affiant officer relies upon to establish grounds for the warrant". The Court continued:
- [57] Where full and frank disclosure has not been made, a reviewing court will correct the warrant ITO to achieve full and frank disclosure, and then determine based on that corrected ITO whether the warrant could properly have issued if full and frank disclosure had been made. "What is involved is an analysis [of the corrected ITO] to determine whether there remains sufficient reliable information upon which the search authority could be grounded": *R. v. Paryniuk*, 2017 ONCA 87, 134 O.R. (3d) 321, at para. 45.
- [58] Sometimes erroneous information in an ITO will be corrected by simply removing it. Information that should not have been included in the warrant will always be "excised" in this way: *Morelli*, at para. 45.

- [59] Erroneous information that would have been appropriate for inclusion in the ITO if presented accurately will sometimes be corrected by "amplification" so that it can be considered during the sufficiency review. Amplification entails adding information that should have been disclosed in order to give an accurate picture or replacing mistakenly inaccurate information with accurate information. When material information that would hinder a finding of reasonable and probable grounds has been improperly omitted, the ITO must be amplified to include it. However, amplification relating to information that could advance the warrant application is permissible only if the error in not making full and frank disclosure is: (1) a "minor, technical error"; and (2) made in "good faith": Araujo, at para. 59; Morelli, at para. 41.
- [60] Whether the omission satisfies the first of these two amplification prerequisites - the "minor technical error" requirement - depends on the significance and nature of the error.
- [63] Where the erroneous information cannot be corrected because the error is not a "minor, technical" one, it is obvious that it must be excised in its entirety. This is because the uncorrected, erroneous information simply cannot be permitted to remain in the ITO, thereby providing an inaccurate boost to the case for reasonable and probable grounds.
- [64] The same is true where an officer has not acted in good faith when failing to make full and frank disclosure - the second amplification prerequisite. Given that amplification is confined to "good faith" error correction, it follows that by acting in bad faith, an affiant officer squanders the opportunity to have intentionally misleading information considered in its corrected form by the reviewing judge. The misleading information cannot remain.
- [Emphasis added]
- [63] As Justice Paciocco notes in the above quote from R. v. Booth, 2019 ONCA 970, once the exercise of excision from and/or additions to the ITO is completed and the ITO "corrected", the task for the reviewing judge devolves to an analysis of the corrected ITO to determine whether there remains sufficient reliable information or evidence that could support issuance of the authorization in issue: here, a production order and two general warrants.
- [64] A further point from the jurisprudence bears repeating in light of Mr. Wiwchar's contention that all the criminal records of the individuals named in the ITO who had dealings or ownership of the Mazda MPV minivan ought to have been included in the ITOs.
- [65] In Araujo, Justice LeBel, writing for a unanimous Supreme Court, famously explained what type of affidavit should be provided to an issuing judge:
46. Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an ex parte authorization is full and frank disclosure of material facts: cf. Dalglish v. Jarvie (1850), 2 Mac. & G. 231, 42 E.R. 89; R. v. Kensington Income Tax Commissioners, [1917] 1 K.B. 486 (C.A.); Re Church of Scientology and The Queen (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), at p. 528; United States of America v.

Friedland, [1996] O.J. No. 4399 (QL) (Gen. Div.), at paras. 26-29, per Sharpe J. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.

- [66] The ITO does not have to include minute details; even a basis that is schematic in nature may suffice. In looking for reliable information on which the authorizing judge could have granted the warrant or production order, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the challenged warrant or production order could have issued: Araujo at para. 51.
- [67] Finally, it also bears repeating that alternate inferences from the information in the ITO do not negate available inferences. To put it another way, the fact that there may be alternate inferences available does not negate the existence of the inculpatory inferences that are also available: Latimer at paras. 74 and 75.

Analysis

- [68] With the foregoing principles in mind, I turn to an examination and analysis of the impugned ITOs at issue on this application. For each ITO, I will set out the general architecture of the ITO. I will then deal with the contested excisions and additions. For the BMO Production Order ITO and the BMO General Warrant ITO, I will then briefly summarize what the corrected ITO establishes and determine whether the corrected ITO contains some evidence that might reasonably be believed on the basis of which the warrants could have issued. As mentioned previously, I will only address excisions and additions for the Public Storage General Warrant ITO and will conduct the sufficiency examination at a later date, once the issue in para. 187(b) of the ITO is resolved.

i) The General Architecture of All Three ITOs

- [69] Det./Cst. Wu was the affiant for all three ITOs. The April 5 BMO General Warrant ITO and the April 11 Public Storage General Warrant ITO built upon the March 28, 2012 BMO Production Order ITO.

- [70] Reduced to their most basic structure, the three ITOs contain the following sections:

1. a prologue with the affiant's explanation of orders sought, statutory pre-requisites for the application, and sources of information;
2. a glossary of terms;
3. a summary of the offence and broad overview of the steps taken;

4. the body of the ITO, including the grounds for belief;
5. conclusions as to the basis for belief; and
6. in respect of the two general warrants, a brief recitation as to why the statutory pre-requisites for general warrants have been satisfied.

[71] As noted earlier, the March 28, 2012 BMO Production Order ITO is the first ITO, and the next two ITOs in issue here build on this ITO and contain added information in light of the ongoing investigation. I will address the "Grounds of Belief" for this first ITO in a bit more detail. In respect of the other two ITOs, I will simply add further new information that is relevant to the orders being sought therein.

ii) The March 28, 2012 BMO Production Order ITO

a) The Architecture of the ITO

[72] This ITO is 118 pages in length. The "Summary" section of the ITO outlines in brief compass the summary of the offence and an "Overview" of the steps taken at paras. 9-24. It outlines the theory of the investigation--that the killing of Mr. Duhre was a planned hit and Mr. Wiwchar is a suspect, as he was seen weeks after the offence with a substantial amount of cash at a casino and had attended at the West Georgia St. BMO branch with a briefcase, but did not attend at a teller or an ATM.

[73] The "Grounds of Belief" section of the ITO, at paras. 25-127, spells out the investigative steps undertaken that outline the readily available and reasonable inferences for the issuing justice to draw in terms of there being reasonable grounds to believe that the offence of murder has been committed, that documents or data will afford evidence about the commission of the offence, and that the person (or entity) subject to the order has possession or control of the documents or data.

[74] The "Grounds of Belief" section of the BMO Production Order ITO can be divided into 15 components or subsections, as follows:

- a) paragraphs 25-32 address the initiation of the investigation and the scene of the crime;
- b) paragraphs 33-49 summarize the eye witness evidence of 16 people who were in and around Café One at the Sheraton Wall Center at the time of the offence. These witnesses were either employees or customers. Notably, two individuals see the suspected shooter enter and exit the Wall Center, and a waitress provides corroboration to the inference that this was a targeted hit in light of Mr. Duhre's greeting of the person who was the shooter;
- c) paragraphs 50-51 identify the victim of the shooting as Mr. Duhre and outline his movements in the 24 hours preceding his death;

- d) paragraphs 52-56 summarize the information provided by the deceased's fiancé. Significantly, they also flag for the issuing justice the reticence of the fiancé to provide details or sources of her information. Accordingly, the issuing justice is able to determine independently how much weight, if any, to attach to the fiancé's information;
- e) paragraphs 58-60 summarize the identification of Mr. Duhre's friend Reuben Vivar and the information that he provided to the investigators, which again provides the basis for the reasonable inferences that this was a targeted hit;
- f) paragraphs 62-69 summarize the forensic examination of the scene, the exhibits, and the autopsy;
- g) paragraphs 70-88 summarize the CCTV video evidence from a number of cameras, which includes corroborative information for the eye witnesses seeing the suspect enter the Wall Center and also provides some of the evidence of a possible spotter scenario, where two men are seated at the bar and one makes eye contact with the shooter as he entered the restaurant;
- h) paragraphs 94-96 summarize further information from the fiancé, some of it essentially being "word on the street" information, the source of which she is reticent to disclose. Again, this is flagged for the issuing justice, who is able to independently assess how much weight to attach to this information;
- i) paragraphs 97-102 summarize the painstaking steps investigators took to identify, locate, and seize two vehicles, the occupants of which were believed to be involved in the killing of Mr. Duhre. One of the vehicles is a 2007 Toyota Avalon with a connection to James Riach, an individual well known to the police. Its provenance or ownership before and after the offence is outlined. The other vehicle is a 2001 grey Mazda MPV minivan. This vehicle had an unusual number of changes of ownership before and after the offence, and Mr. Wiwchar is tied to this vehicle in four ways:
 - 1. Mr. Wiwchar's affiliation with Maly Morn, the owner of the vehicle before the offence, at the time of the offence, and for a brief period after the offence;
 - 2. Mr. Wiwchar's flight itinerary over the Christmas holidays of 2011 and into 2012 being found in the vehicle in March 2012 when it was seized;
 - 3. Mr. Wiwchar being stopped in December 2011 driving this vehicle, then owned by Mr. Morn; and
 - 4. Mr. Wiwchar being observed to attend the address of the new owner of the vehicle in late March 2012.

A further significant piece of information that supports the all too reasonable inferences that this vehicle was likely the getaway vehicle that took the shooter to the scene and removed him after is the fact that the getaway vehicle appeared to be missing its rear windshield wiper, and the vehicle seized was also missing its rear windshield wiper.

- j) paragraphs 105, 107-113 summarize that Mr. Wiwchar was identified as a person of interest with links to Maly Morn, the owner of the believed-to-be getaway vehicle, at the time of the offence;
- k) paragraphs 117-119 summarize the surveillance observations of Mr. Wiwchar at the Edgewater Casino losing approximately \$11,000 at the baccarat table and also being observed to have a significant quantity of cash in \$50 and \$100 bills, estimated to be around \$30,000 in cash;
- l) paragraphs 120-121 and 125 address the surveillance observations of Mr. Wiwchar attending at the BMO branch on the afternoon of March 26, 2012. He was carrying a laptop sized briefcase. He was in the BMO for approximately eight minutes, but not at an ATM, any of the tellers, or in an office;
- m) paragraph 122 outlines the March 26, 2012 evening surveillance observations of Mr. Wiwchar and his girlfriend's brief attendance at the address of the new registered owner of the Mazda MPV minivan--the believed-to-be getaway vehicle. Their attendance at this address is brief, around four minutes. An hour and 20 minutes later, Mr. Wiwchar is observed at the Public Storage facility on 64th Avenue in Surrey trying to gain access to the facility using a code, but access was not gained (likely because, as we learned in another ITO, the facility is closed after 8:45 p.m. and Mr. Wiwchar was observed trying to gain access to it at 10:15 p.m.);
- n) paragraph 126 summarizes surveillance observations of Mr. Wiwchar and his girlfriend on March 27 attending at an auto dealership and driving away in a Suzuki vehicle; and
- o) paragraph 127 outlines information from the Edgewater Casino video surveillance, where Mr. Wiwchar was on March 27, 2012. On this occasion it appears that that he lost approximately \$7,000 within 66 minutes.

[75] The final section within the BMO Production Order ITO is the "Conclusion" section, wherein the affiant outlines her belief as to how the statutory pre-requisites are satisfied, with reference to the evidence that supports the reasonable belief required. The affiant then requests a production order and sealing order.

b) Excisions and Additions to the BMO Production Order ITO

[76] I turn now to the issue of the excisions and additions that Mr. Wiwchar seeks in respect of the BMO Production Order ITO. Again, I am only addressing the contested excisions and additions. The Crown consented to some of the excisions and additions, including paras 119(j) and (n), and these are to occur.

- [77] Mr. Wiwchar originally sought that paras. 105-107, 109, 119(t) (but only in respect of the amount of money police estimated they observed), and para. 128 be excised.
- [78] However, following the close of submissions by amicus curiae, Mr. Wiwchar only sought that paras. 106, 109, 119(t) and 128 be excised. These were the excisions the Crown opposed. Amicus curiae only addressed para. 106 as needing to be excised.
- [79] Insofar as para. 119(t) is concerned, Mr. Wiwchar seeks the reference to \$30,000 be excised. He contends that this is an unrealistic estimate of the amount of money he was observed to pull out of his then girlfriend's purse, at 2:30 a.m. on March 26, 2012 while at Edgewater Casino. He contends it was more in the realm of \$10,000. The excision is unnecessary. This is simply Det./Cst. Wu's repetition of what the surveillance members estimated they saw in terms of the amount of money they thought Mr. Wiwchar was handling at 2:30 a.m. on March 26, 2012 at the casino. There is nothing to suggest that the estimate was misleading or done with an intention to mislead. The Crown properly points to *World Bank Group v. Wallace*, 2016 SCC 15 at paras. 119, 121-123 to support its position that the issue is not whether the allegation is true, but what the affiant knew or ought to have known at the time of affirming the ITO. In this case, there is no indication that anything was amiss with respect to the point about the amount of money the officers believed Mr. Wiwchar had at the time of the observation. Det./Cst. Wu certainly did not have access to the information Mr. Wiwchar provided in his submissions on this application. She was reviewing a surveillance summary and was entitled to rely upon that estimate. Accordingly, the reference to \$30,000 in para. 119(t) of the ITO need not be excised.
- [80] Insofar as para. 106 of the ITO is concerned, the Crown contends it should not be excised. It provides information that within weeks of the murder of Mr. Duhre, Mr. Wiwchar was engaged in a bar fight that resulted in the Montreal Police Service Gang Unit attending. The fight shows Mr. Wiwchar's propensity to violence. Mr. Wiwchar contends it is prejudicial and irrelevant. Amicus curiae contends it is irrelevant.
- [81] For the benefit of Mr. Wiwchar, it is important to reiterate that the notion of prejudicial information in an ITO, in the vein of bad character evidence about uncharged criminal conduct and the like, is not prohibited and is often necessary depending on the context and offence: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1169, 1989 CanLII 13; *R. v. Emery*, 2019 BCSC 1710 at para. 33; *R. v. Sunner*, 2017 BCSC 2445 at para. 29.
- [82] In *R. v. Gill*, 2020 BCSC 1216, Justice Masuhara wrote:
- [48] While defence counsel has pointed me to authorities that generally stand for the proposition that including information in an ITO about "investigations and charges which did not result in criminal convictions" are "prejudicial and irrelevant," (see *R. v. Gardner and Howard*, 2015 BCSC 801 at para. 59), I note that there is also a line of authorities which hold that the rule against referring to uncharged criminal conduct or bad character evidence is a rule that only applies in the trial of a criminal charge, and it is not a rule that applies to an ITO sworn in support of a search warrant: *R. v. Sunner*, 2017 BCSC 2445 at para. 29; *R. v. Della Penna*,

2012 BCCA 3 at para. 36-37; *Her Majesty the Queen v. Guindon et al.*, 2015 ONSC 4794 at paras. 64-66.

[49] I am persuaded by the often cited approach taken by the Supreme Court of Canada in *R v. Debot*, [1989] 2 S.C.R. 1140, [1989] S.C.J. No. 118 [Debot]. The Court in *Debot* addressed defence counsel's argument that a person's past, uncharged criminal activities and reputation should not be used to buttress a search warrant. Ultimately, the Court could not accept the proposition that the past activities of a suspect are irrelevant, provided they relate to the investigation at hand, and that they do not form the primary grounds for the search:

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

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

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

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

[p. 1169.]

[50] Ultimately, I take from the Court in *Debot* that while evidence of prior conduct would not be enough on its own to justify the authorization, it is a piece of information that can be considered in the context of the ITOs as a whole. However, I would place a weighted emphasis on the requirement that the evidence of prior conduct be directly, and defensibly, relevant to the ostensible reasons for the search.

- [83] As amicus curiae notes, Masuhara J. urges that the evidence of prior conduct be directly and defensibly relevant to the ostensible reasons for the search. Paragraph 106 refers to a bar fight around five and half weeks after the murder. While it may show Mr. Wiwchar has a propensity to engage in such conduct, it is, in my view, too long a bow to draw, to translate that type of violence to the proposed inference that Mr. Wiwchar was involved in the Duhre murder as the shooter.
- [84] The more relevant information is that contained in paras. 105 and 107-109 that establish associations and Mr. Wiwchar's absence from British Columbia shortly after the murder, and also corroborates his Vancouver address on Jervis St.
- [85] Accordingly, I am satisfied that para. 106 should be excised, but paras. 105, 107-109 are relevant and will not be excised from the ITO.
- [86] Paragraph 128 is the last paragraph that Mr. Wiwchar seeks excised. It references that there was confidential informant information received by investigators, but that it was not relied upon by the affiant. While this information does not add to the grounds of belief in the ITO, it is an important disclosure the officer was duty bound to make. In *R. v. Raju*, 2022 BCSC 1392, Justice Tammen addressed the issue of whether an affiant can disclaim reliance on certain information that is included in an ITO. Justice Tammen held that:
- [22] it is open to police to specify in the ITO which bits of information are put forward as part of the objective grounds for issuance of the warrant, and which bits of information are merely included as part of the duty to make full disclosure. Because it is an ex parte procedure where the police entirely control the process, there is no potential for an unjust result in that approach.
- [87] It would have been obvious to the issuing justice that para. 128 played no role in the grounds for the issuance of the BMO production order. Like Tammen J. in *Raju* concludes, there is no need to excise this paragraph from the ITO, and similarly, I do not intend to consider it on the review of the ITO.
- [88] I turn now to the additions that Mr. Wiwchar seeks at paras. 40(m)(iii) and 49(e) of the ITO.
- [89] These two paragraphs relate to summaries from two eye witnesses to the shooting of Mr. Duhre who were endeavoring to provide a description of the shooter.
- [90] In *R. v. Ley and Wiwchar*, 2015 BCSC 84, Bowden J. addressed an aspect of this very point, albeit in relation to a different authorization that Mr. Wiwchar and his co-accused Mr. Ley were challenging in their firearms trial:
- [27] A number of witnesses described the racial appearance of the shooter of Mr. Duhre as being black. A number also described him as white or Caucasian. Wiwchar is a Caucasian. On the basis of the descriptions of the eye witnesses, including the ITO as amplified, there is a basis upon which the issuing justice could have rationally concluded that the shooter was likely black. There is also a basis upon which the issuing justice could have concluded that the

shooter was white, particularly if one accepts the evidence of two witnesses who appeared to have the best opportunity to observe him; namely, Candice Sharpe-Terreault and Karolina Jaciunskiene.

- [28] A reasonable conclusion that the issuing justice could have reached, based on the knowledge that eye witness identification evidence is notoriously frail and unreliable particularly when the face of the shooter was partially covered, would be that the race of the shooter was not determinative of his identity.
- [91] The Crown acknowledges that the summary of the transcribed statements of the two eye witnesses--Ms. Wong and Ms. Roach--included in the ITO did not have the full passage relating to the witnesses' description of the shooters' skin color. Mr. Wiwchar interprets their full descriptions in the transcripts to mean "possibly Black" and seeks to have that phrase added in to both paras. 40(m)(iii) and 49(e).
- [92] At para. 40(m)(iii) of the BMO Production Order ITO, Det./Cst. Wu summarizes Ms. Wong's description of the shooter as follows:
- a) approximately 5'8';
 - b) wearing a black ski cap;
 - c) wearing an aqua blue track suit with a zippered jacket and a pattern;
 - d) possibly wearing gloves; and
 - e) had a pistol in his right hand that had a longer barrel but was not a rifle.
- [93] The actual transcript of Ms. Wong's description is:
- D: And was he wearing gloves?
- W: Oh, that's a good question. I think he was
- D: And why do you think that?
- W: Because I didn't see anything white. It was dark. So he could have been wearing gloves or he could be his skin colour, but it, it was dark. It was a dark hand.
- D: Now did you get an impression of his ethnicity?
- W: Uh, he was very quick. When he was running out.
- D: Okay.
- [94] Mr. Wiwchar's contention that "possibly Black" should be added as part of Ms. Wong's description of the shooter is, with respect, misconceived. Ms. Wong has not said the person was White or Caucasian either. The most appropriate addition is, as the Crown suggests, the excerpt of the transcript above. This is what is to be added to the ITO at para. 40(m)(iii).

[95] Insofar as para. 49(e) of the ITO is concerned, Det./Cst. Wu summarizes Ms. Roach's interview description of the man running out of the bar after the shooting occurred. The description Det./Cst. Wu provided was:

- i. Male;
- ii. Medium height, not tall with a stocky build; and
- iii. Wearing a reflective vest and possibly a balaclava or something over his face.

[96] The actual transcript of Ms. Roach's description of the male running from the bar immediately after the shooting was as follows:

D: Yeah. And p-, the balaclava?

R: Well I

D: Or, something.

R: see, like I say, something, you know. I mean it appear--, it's funny because I, I, in fact I think Brian said that he thought maybe the guy was dark skinned and

D: Right.

R: and I wasn't sure whether he was actually dark skinned or whether he had something over his head so

D: Okay.

R: you know what I mean it's, it's

D: Yeah.

R: it's really hard to judge.

[97] Mr. Wiwchar's contention that "possibly Black" should be added to Ms. Roach's description of the male is again misconceived. Her statement does not go that far. Like the addition for Ms. Wong's statement, I am satisfied that the appropriate addition is to include the excerpt of the transcript of Ms. Roach's statement, and so that is what is to be added to the ITO at para. 49(e).

c) Is the "Corrected" BMO Production Order ITO sufficient?

[98] With those excisions and additions in place, as well as those that were agreed to by the Crown, I now turn to determining whether the BMO Production Order ITO, as now corrected, was sufficient to support the issuance of the production order for Mr. Wiwchar's BMO banking and safety deposit information.

- [99] Mr. Wiwchar contends that with para. 119(j) and (n) excised from the ITO, what remains contains insufficient grounds to support the issuance of the BMO production order. The Crown says there are still more than sufficient grounds with this excision. Amicus curiae concludes that even with the excisions and additions, there are likely sufficient grounds to support the issuance of the BMO production order.
- [100] Paragraph 119(j) and (n) contained extracts of text messages that Mr. Wiwchar was sending while at the casino on the night of March 25. The Crown agreed to excise these messages, as Bowden J. found that the information had been obtained by means of a breach of Mr. Wiwchar's s. 8 rights and that it was not admissible in the firearms trial. Mr. Wiwchar contends that when these text messages, which he acknowledged were alarming, are excised, there remain insufficient grounds for the issuance of the production order.
- [101] Mr. Wiwchar's argument distills to a siloed approach to the information in the ITO and microscopic parsing of that material--an approach eschewed by the jurisprudence. His focus is on what had been removed, but it fails to come to terms with the totality of what the ITO outlines in the way of evidence that satisfies the reasonable grounds standard.
- [102] In other aspects of his argument, Mr. Wiwchar focused on only one inference with respect to certain features of the evidence in the ITO. The most notable example is his assertion that there is only one inference for his affiliation with the Mazda MPV minivan and it is purely innocent--he was driving the minivan to see his girlfriend when he was stopped by the police around five weeks before the shooting. Mr. Wiwchar's submissions ignore the larger picture that the ITO provides about his affiliation with the Mazda MPV minivan, the owners of it, and the fact that his travel itinerary from the 2011 Christmas break was found inside the Mazda MPV minivan when it was seized. While one of the inferences might be that Mr. Wiwchar's December 2011 driving of the vehicle was innocent, it is not the only inference. As I noted in Latimer at paras. 74-75, the fact that there may be alternate inferences available does not negate the existence of inculpatory inferences. The Mazda MPV minivan is believed to be the getaway vehicle used following the Duhre homicide. Mr. Wiwchar had a number of connections to the minivan. While those connections might support inferences other than involvement in the Duhre homicide, inferences consistent with involvement in the homicide, when viewed in the context of the totality of the information in the ITO, are also available.
- [103] The "corrected" ITO establishes a number of things. First, it clearly establishes that there are reasonable grounds to believe an offence contrary to the Code had been committed--Mr. Duhre was shot ten times in the right side of his head while seated in the Café One restaurant at the Sheraton Wall Centre on January 17, 2012. The shooter wore a disguise and fled the scene on foot. He left the area and went to the Mazda MPV minivan waiting for him in a laneway across Hornby St. behind the Royal Bank office at Hornby and Nelson St.

[104] The second statutory criteria that must be met is that the ITO must disclose reasonable grounds to believe the documents or data (being bank account and safety deposit box information in this instance) for Mr. Wiwchar will afford evidence respecting the commission of the offence. The Crown's written reply fairly summarized this pre-requisite as including the following salient facts and reasonable inferences disclosed in the ITO:

- 1) The Duhre murder was a planned, premeditated, coordinated attack involving several conspirators:
 - a. Ruben Vivar ("Vivar") said he met with Duhre at the Wall Centre coffee shop at 5:45 p.m. Duhre and Vivar entered the Café One restaurant at 7:18 p.m. The shooter arrived in the vicinity of the Wall Centre about 41 minutes later, arriving at the lane south of Nelson Square at 7:59 p.m. The shooting occurred 48 minutes after that, at 8:47 p.m. In sum, the murder was not the product of a random or spontaneous encounter.
 - b. The shooter had the necessary skill and composure to walk up to Duhre in a public place, at 8:47 p.m. on a Thursday night, in full view of the many people about, and fire 10 shots in the right side of Duhre's head, killing him.
 - c. The shooter had disguised or shielded his identity.
 - d. The shooter was aided by a getaway driver.
 - e. The two males at the bar (POI #2 and POI #3) appeared to be assisting the murder by acting as spotters, having regard to the following:
 - i. They arrived near the Wall Centre (8:00 p.m.) at almost exactly the same time as the shooter in the MPV (7:59 p.m.)
 - ii. The timing of their presence at the bar (8:03 p.m. until 8:41 p.m., and then 8:44 p.m. until the shooting at 8:47 p.m.)
 - iii. One of the males kept looking towards the back of the restaurant, i.e. where Duhre was seated with Vivar.
 - iv. The males looked like they were both on their phones. The shooter also looked like he was using a phone.
 - v. After the shooting, one of the males spoke to the front desk clerk and didn't look shocked or have a reaction. The clerk didn't know how the male knew that someone was dead.
 - vi. As the shooter walked through the bar area immediately before the shooting, one of the males turned and looked briefly at him as they passed each other.
 - vii. The shooting took place at the very moment that Vivar was out having a cigarette, leaving Duhre alone.

- 2) An inference could be drawn that Duhre had been set up. The information from Duhre's common-law spouse, Anita Uppal ("Uppal") and Vivar was that Duhre was expecting to meet up with a "PI" that night. Vivar took that to mean a private investigator. As the shooter approached him, Duhre looked up and started to say "Nice to meet you" to the shooter.
- 3) There was information from Uppal that the private investigator was paid \$350,000 to set up Duhre. Although Uppal was not willing to divulge whose BlackBerry she saw this information on, or who was providing her the information, much of the information she gave to the police was corroborated by other information. It was an inference reasonably open to the issuing justice that the murder was a paid hit.
- 4) Even without the information from Uppal that the murder was for payment, it was open to the issuing justice to infer, based on the degree of coordination, sophistication and professionalism of the murder, that it was a paid hit.
- 5) The evidence that the Mazda MPV located by the police on February 17, 2012 at Ibrahim Ibrahim's residence in Surrey, and searched on March 5, 2012 was the getaway vehicle (Unknown Vehicle 2) was compelling. There were many similarities between the vehicle observed in the Nelson Square surveillance video and the Mazda MPV. The missing rear wiper arm on both vehicles was particularly distinctive. As Bowden J. noted in R. v. Ley and Wiwchar, it is likely that only a very small number of Mazda MPV ES's shared all of the matching traits.
- 6) There was cogent evidence that the applicant was involved, in some way, in the murder of Duhre (this was not disputed in NOA 25 but is denied on this application):
 - a. The description of the shooter was consistent with the applicant's appearance. While some eyewitnesses described the shooter as black, the witnesses with the best opportunity to observe him (Candace Sharpe-Terrault and Karolina Jaciunskienne) described him as Caucasian. The descriptions of the shooter's height, weight and body description were generally consistent with Wiwchar's height, weight and body description. The applicant was described in the ITO as a white male, 6'2", slim build, short brown hair.
 - b. There was compelling evidence that Wiwchar used the getaway vehicle within a month of the murder. On December 19, 2011, Wiwchar was stopped by the police in a vehicle bearing BCL: 821 NNK. That was the same licence plate number that was registered to the grey Mazda MPV minivan (which there were compelling grounds to believe was the getaway vehicle for the murder) from October 31, 2011 to January 30, 2012, i.e. a period of time that encompassed the traffic stop and the murder. That licence plate was also found in the Mazda MPV when it was searched on March 5, 2012. When he was stopped by the police, Wiwchar told them he had borrowed the vehicle from his friend, Maly Morn. Morn was the registered owner of the Mazda MPV minivan with 821 NNK attached to it, from October 31, 2011 to January 30, 2012.

- c. A flight itinerary in Wiwchar's name was found in the Mazda MPV getaway vehicle on March 5, 2012. The booking date was December 23, 2011, so the itinerary must have been placed there on or after that date. The itinerary showed a departure date of December 24, 2011 from Vancouver to Toronto, and a return date of January 5, 2012 from Toronto to Vancouver. The MPV also contained two portable two-way radios, and a red plastic gas container.
- d. On March 26, 2012, within 7 hours of his attendance at the BMO branch, Wiwchar attended at the residence of Ibrahim Ibrahim, the current registered owner of the Mazda MPV minivan (i.e. the getaway vehicle). Ibrahim became the registered owner of the vehicle on January 30, 2012 (within 2 weeks of the murder).
- e. Wiwchar and his girlfriend were checked by members of the VPD Gang Crime Unit at Earl's Restaurant, 1185 Robson Street, Vancouver, on January 12, 2012 (i.e. 5 days before the murder). This is proximate to the location of the murder at the Wall Centre (4 blocks away).
- f. Wiwchar left British Columbia and was in Montreal from at least February 24 to March 1, 2012, and had flown from Montreal to Vancouver on March 23, 2012.
- g. Wiwchar was seen gambling extensively (mostly unsuccessfully), on March 25/26 and 27, 2012 at the Edgewater Casino. It is notorious that gambling in casinos provides an opportunity to launder ill-gotten cash.
- h. Wiwchar was observed in possession of significant amounts of cash (estimated to be approx. \$30,000) at the Edgewater Casino on March 25/26, 2012, which is consistent with him having recently earned money through a criminal endeavour (as crime is often a cash business).
- 7) The fact that Wiwchar was in possession of a large amount of cash on the night of March 25, 2012 is also relevant to assessing his attendance at the BMO branch on March 26, 2012.
- 8) Wiwchar drove to the BMO branch on March 26, 2012 and retrieved a black laptop-sized briefcase from the rear seat.
- 9) Wiwchar carried the briefcase into the branch. He entered the branch shortly after 14:00. (14:02, based on the combined effect of paragraphs 120(e) and 125(a)(iii)), and exited at 14:10 p.m.
- 10) When Wiwchar entered the front door of the BMO branch, surveillance members lost sight of him
- 11) A check of the automated teller area, the teller wickets, and the offices off the main lobby of the bank was made and there was no sign of Wiwchar until he exited at 14:10.
- 12) At 14:10 p.m., when Wiwchar left the branch, he was still carrying the black laptop-sized briefcase.
- 13) After he exited the branch Wiwchar got back into his vehicle and drove away.

- 14) When Wiwchar exited his vehicle at 14:45, 35 minutes later, he was no longer carrying the black briefcase, suggesting it no longer contained anything of value or concern to him.
 - 15) Wiwchar also attended at a storage locker later that night, at 22:15, but was unable to gain access to a locker, i.e. he attended at multiple premises where items can be stored away from one's residence, but only successfully gained access to one of them - the bank, suggesting he was storing something there.
 - 16) The use of a safety deposit box minimizes a financial paper trail, as opposed to keeping money in a bank account.
- [105] Having been taken through the ITO during submissions and having reviewed it again while writing this ruling, I agree with that description of the salient facts and reasonable inferences that were available to the issuing justice and remain available after the ITO was corrected by the excisions and additions made. In the end, it is clear that the ITO, as corrected with the excisions and additions, contains sufficient grounds to support the issuance of the BMO production order. The ITO contains reliable evidence that might reasonably be believed, on the basis of which the production order could have been issued. Accordingly, the BMO Production Order ITO is sufficient and Mr. Wiwchar's challenge to its sufficiency fails.

iii) The April 5, 2012 BMO General Warrant ITO

a) The Architecture of the ITO

- [106] This ITO is 159 pages in length. It is important to note that it has the same architecture of the previous ITO and contains much the same information, as well as additional information either gathered after the issuance of the BMO production order or prior to the issuance of the production order but that was not included in the BMO Production Order ITO. I do not propose to outline the architecture of this ITO in as much detail, as it is essentially the same ITO as the BMO Production Order ITO, with more information included, a different set of statutory criteria outlined, and an explanation as to how the criteria are met.
- [107] The "Grounds of Belief" section of the BMO General Warrant ITO, at paras. 31-165, contains much of the same information as the BMO Production Order ITO. However, the paragraph numbers have shifted in light of the recitation of the statutory pre-requisites and a bit more information included in the "Summary" section. A review of the BMO General Warrant ITO includes the following additional pieces of evidence or information relevant to the general warrant application:
- a) paragraph 104 includes a reference to the suspect's jacket being identified;
 - b) paragraph 126 provides information about the accused's residential address at Jarvis street and that he had no Telus service at that location;

- c) paragraphs 129-156 outline further surveillance observations that included the following details:
 - i. Mr. Wiwchar had purchased the Suzuki vehicle at the dealership on March 26, 2012;
 - ii. Mr. Wiwchar was observed in the company of Philip Ley accessing a condominium on 108th Avenue in Surrey on March 28;
 - iii. Mr. Wiwchar was observed to be engaging in counter surveillance driving measures;
 - iv. Mr. Wiwchar attended at the BMO branch on March 30, 2012;
 - v. on April 1, 2012, Mr. Wiwchar and his girlfriend were observed to leave the Teahouse Restaurant approximately two hours after they had left their residence;
 - vi. on April 1, 2012, Mr. Wiwchar and his girlfriend were observed to go to an indoor shooting center in Port Coquitlam and leave 53 minutes later;
 - vii. on April 3, 2012, Mr. Wiwchar was observed to engage in a series of counter surveillance moves at SkyTrain stations and on a train; and
 - viii. On April 4, 2012, Mr. Wiwchar was observed at the Edgewater Casino handling at least \$3,000 in cash buying chips and then cashed the chips in for \$3,000 in the form of thirty \$100 bills;
- d) paragraphs 161-164 outline the results of the execution of the BMO production order. The information obtained from the production order included:
 - i. Mr. Wiwchar had a chequing account xxxx-717 with a zero balance;
 - ii. Mr. Wiwchar opened a large safety deposit box on February 2, 2012, the dimensions being 1x1 square foot and 3 feet deep. This is the largest type of safety deposit box offered by this BMO branch;
 - iii. Mr. Wiwchar opened another chequing account xxxx-358 on February 3, 2012 and had a balance owing of \$5.95. There was no activity on the account between its opening and March 28, 2012, when the production order was served;
 - iv. Mr. Wiwchar's personal information on file at BMO confirmed his Jervis street address, telephone number, SIN, birth certificate, and driver's license number; and
 - v. Between opening the safety deposit box and the execution of the production order, Mr. Wiwchar accessed the safety deposit box three times--two times on February 3, 2012 and a third time on March 26, 2012 at around 2:03 p.m. (a time consistent with the surveillance observation of him entering the BMO branch with a black laptop-size briefcase and exiting around eight minutes later); and
- e) paragraph 164 outlines that the investigators had determined that Mr. Wiwchar did not have bank accounts at the four remaining Canadian "big banks", nor did he have accounts at seven other banks or credit unions.

[108] The final section of the BMO General Warrant ITO is the "Conclusion" at paras. 166-175. It would be fair to say that this section, which outlines the affiant's beliefs and the bases for her beliefs, is a succinct recapitulation or summarization of the more salient features of the evidence in the "Grounds of Belief" section of the ITO. To that end, the "Conclusion" section outlines and establishes the statutory pre-requisites for the issuance of a general warrant, including:

- a) The offence of murder had been committed;
- b) The belief that Mr. Wiwchar was involved as the shooter based on his ties to the Mazda MPV, his physical description being very similar to the general physical features of the shooter as provided by an eyewitness, and a comparative analysis of his walking gait from a surveillance clip of him walking on a Vancouver street on March 24, 2012 to that of the suspect entering the lobby of the South Tower of the Sheraton Wall Center at 8:25 p.m. on January 17, 2012--20 minutes before the shooting;
- c) The belief that the killing of Mr. Duhre was a planned contract hit;
- d) The belief that Mr. Wiwchar was in possession of a large amount of money, with the inference being he was storing it in the safety deposit box given the lack of account activity at BMO and only safety deposit box activity; and
- e) The belief that Mr. Wiwchar might also be storing other items of evidence related to the offence including clothing and the firearm in the large safety deposit box.

[109] The affiant, in paras. 176-178, addresses the statutory pre-requisites for a general warrant, explaining why it was in the best interests of justice to issue the general warrant, that no other provision of the Code would authorize this technique, and that proceeding without a general warrant would constitute a breach of s. 8 Charter rights.

[110] Finally, paras. 179-186 outline the proposed operational plan on how the investigation would conduct the general warrant search if authorized.

b) Excisions and Additions to the BMO General Warrant ITO

[111] I turn now to the issue of the excisions and additions that Mr. Wiwchar seeks in respect of the BMO General Warrant ITO. Again, I am only addressing the contested excisions and additions. Similar to the circumstances for the BMO Production Order ITO, the Crown consents to some of the excisions and additions and those are to occur. As well, excisions and additions made to the BMO Production Order ITO carry over into this ITO where that evidence made its way into the BMO General Warrant ITO.

[112] Mr. Wiwchar sought to have paras. 60, 62, 63, 141(h), and 169 of the BMO General Warrant ITO excised. The Crown opposed these excisions. Amicus curiae supported the excision of the bracketed statements of the affiant's beliefs at paras. 141(h) and 169, but did not suggest that paras. 60, 62, and 63 be excised.

- [113] Paragraphs 60, 62, and 63 relate to the affiant's summarization of three interviews of the deceased's fiancé, Anita Uppal. The overall tenor of Ms. Uppal's interviews as summarized is that of a reluctant witness not wanting to disclose the source of some of her information. This would have been abundantly apparent to the authorizing judge, who could assign the appropriate weight, if any, to the information from Ms. Uppal. Accordingly, there is no need to excise this information.
- [114] Similarly, para. 169(a) relates to one point from Ms. Uppal's statements--a text message Ms. Uppal received after Mr. Duhre was shot. The affiant uses this text message as support for her belief that Mr. Wiwchar was paid money for killing Mr. Duhre. I have determined that the recitation part of this sub-paragraph--that is, the evidence component not in brackets that speaks to Ms. Uppal's statements--should not be excised for the same reasons related to not excising paras. 60, 62, and 63 in the ITO. However, at the end of para. 169(a), the affiant provides a bracketed italicized sentence outlining her opinion as to what the information from Ms. Uppal means. This sentence should be excised. I agree with the submissions of amicus curiae that the opinion is misleading and seemingly inconsistent with the content of paras. 62(c) and (d) that address more squarely the content of the text message that Ms. Uppal received and the mystery as to who the message was from. Accordingly, the italicized sentence at the end of para. 169(a) is excised.
- [115] Paragraph 169(b) ties back to para. 12 of the ITO. This relates to a reference to information from a confidential informant that was not relied upon. For the same reasons provided in respect of the confidential informer information outlined in the March 28, 2012, ITO, there is no need to excise this sub-paragraph from this ITO.
- [116] Paragraph 141(h) relates to surveillance observation of Mr. Wiwchar shopping at a London Drugs in the Guildford Mall on March 28, 2012. He was observed to purchase bleach and several packs of Lysol cleaning wipes. Both Mr. Wiwchar and amicus curiae contend that the affiant's belief, outlined thereafter in italics, that these products were going to be used to clean up a crime scene should be excised because it is prejudicial and also speculative. If it was only prejudicial, I would not excise it for the reasons I provided earlier, referencing the decision of Justice Riley in *Sunner and Masuhara J. in Gill*. However, I find this opinion to be speculative and unnecessary and so the italicized section of para. 141(h) is to be excised.
- [117] I turn now to the additions that Mr. Wiwchar seeks in the vicinity of para. 108(q) and for para. 109(k)(ii), being Mr. Ibrahim's criminal record and Mr. Wiwchar's own criminal record as contained in Exhibit #6. Mr. Wiwchar contends that the fact that Mr. Ibrahim has a conviction for an offence committed with a firearm and that Mr. Wiwchar does not should be in the ITO to support the inference that it is more likely that Mr. Ibrahim was the shooter than Mr. Wiwchar.

- [118] Mr. Wiwchar's argument about the need for this information appears to rely upon his perception that alternate inferences undercut the validity of the ITO. I have already addressed this point earlier in these reasons. Alternate inferences do not negate other available reasonable inferences.
- [119] The affiant's duty to make full, fair, and frank disclosure did not require her to include the criminal records of Mr. Ibrahim or Mr. Wiwchar, or the circumstances behind Mr. Ibrahim's conviction. The fact that individuals named in the ITO, like Mr. Ibrahim, had criminal records does not: (1) undercut the probability that the alleged offence has been committed, or (2) undercut the probability that there is evidence to be found at the place of the search. Nor would the criminal records challenge the reliability and credibility of the information the affiant relies upon to establish grounds for the warrant: Booth at para. 56.
- [120] To state it another way, the criminal records of Mr. Ibrahim and Mr. Wiwchar are not within the frame of material information that should be included in the ITO to satisfy the obligation of making full, fair and frank disclosure in this instance.
- [121] Including the criminal records was not necessary, and to require them to be included would dilute Justice LeBel's admonition from Araujo at para. 46 about what the ITO should include: full and frank disclosure of material facts that is clear and concise and addresses the legal test for the issuance of the authorization sought. The addition Mr. Wiwchar seeks on this point is denied.
- c) Is the "Corrected" BMO General Warrant ITO Sufficient?
- [122] With the excisions and additions in place, I now turn to determining whether the ITO as "corrected" was sufficient to support the issuance of the BMO General Warrant to search Mr. Wiwchar's safety deposit box.
- [123] Mr. Wiwchar maintains that with para. 132(dd) and (ll) (formerly 119(j) and (n) of the BMO Production Order ITO) excised from the ITO, as well as with the other excisions and additions in place, the BMO General Warrant ITO, as corrected, does not contain sufficient grounds to support the issuance of the BMO general warrant.
- [124] The Crown contends that as the BMO Production Order ITO has been found to be sufficient, the BMO General Warrant ITO is sufficient, as it contains the same sufficient information from the previous ITO. Furthermore, the BMO General Warrant ITO also contains the added information gleaned from the execution of the BMO production order, to wit: Mr. Wiwchar had within approximately two weeks of the shooting opened a new account at BMO, it had no money in it, and he had also rented an unusually large safety deposit box. When this information is considered in the context of Mr. Wiwchar's profligate spending at the Edgewater Casino and the large amounts of cash he had on hand after his return from Toronto in late March 2012 that was not in a bank account, the inference is irresistible that the safety deposit box would contain the proceeds and possibly other physical evidence connected to the Duhre homicide.

- [125] Amicus curiae acknowledged that even with the excisions and additions, there are likely sufficient grounds to support the issuance of the BMO general warrant.
- [126] My reasons for concluding that this ITO was sufficient are the same as the reasons I previously gave in upholding the BMO Production Order ITO and finding that, as "corrected", that ITO still contained reliable evidence that might reasonably be believed on the basis of which the BMO production order could have issued, even though the statutory pre-requisites are slightly different.
- [127] As noted, similar to the BMO Production Order ITO, the BMO General Warrant ITO clearly establishes the first statutory pre-requisite--the offence of murder had been committed.
- [128] Insofar as the pre-requisite that the issuing judge be satisfied that there are grounds to believe that information concerning the offence will be obtained through the use of the general warrant technique is concerned, the Crown's earlier summary of how the data obtained through the BMO production order would afford evidence respecting the commission of the offence applies here with equal force. In addition, the investigation had uncovered more evidence in the timeframe between the two ITOs.
- [129] The Crown's summary of this further information at para. 78 of its written reply fully addresses this pre-requisite:
78. In addition to that evidence, there was additional information in the April 11 ITO that the police had been able to collect since the prior applications. This can be summarized as follows:
- 1) A surveillance member observed Mr Wiwchar and an unknown male exit from a business near 3451 No. 3 Road in Richmond on the afternoon of March 28. The following day, that member viewed a video and a photo of Philip Ley, and confirmed that the unknown male was Philip Ley. The grey Mazda MPV (the getaway vehicle) had a temporary operators permit attached to it on October 31, 2011. Philip Ley was associated to the temporary operators permit.
 - 2) On the evening of March 28, 2012, Mr. Wiwchar and an unknown male walked into London Drugs inside Guildford Mall at 152nd Street and 104th Avenue in Surrey, and purchased three 2.8 litre bottles of bleach as well as several Lysol cleaning wipes. They then drove to 133rd Street and 108 Avenue. Mr. Wiwchar used a key fob to gain access to the front door of 13380 108th Avenue in Surrey.
 - 3) Mr. Wiwchar engaged in several obvious counter-surveillance techniques, including allowing a surveillance vehicle to drive past him before pulling up behind the surveillance vehicle and following it, pursuing a surveillance vehicle, looking intently at every person on a Skytrain platform
 - 4) Mr. Wiwchar went to various locations in Richmond and Vancouver with Philip Ley on the afternoon and evening of March 29, 2012.

- 5) Mr. Wiwchar made a second attendance at BMO on March 30, 2012;
- 6) Mr. Wiwchar gambled extensively at the Edgewater casino on the evening of April 4;
- 7) Mr. Wiwchar opened a safety deposit box at the BMO on West Georgia Street in Vancouver on February 2 2012 (just over two weeks after the Duhre homicide). He accessed the safety deposit box on February 3 (twice), and March 26, 2012
- 8) Mr. Wiwchar had no apparent legitimate source of income.

[130] In addition, Mr. Wiwchar was observed to attend at a shooting range with his girlfriend on April 11, 2012.

[131] Having been taken through the ITO during submissions and having reviewed it again while writing this ruling, I agree with the Crown's summary of what the ITO establishes insofar as to the salient facts and reasonable inferences that were available to the issuing judge to consider. They remain available after the ITO was corrected by the excisions and additions made to it. In the end, it is abundantly clear that the BMO General Warrant ITO, as corrected, contains more than sufficient grounds to support the issuance of the BMO general warrant. The BMO General Warrant ITO contains reliable evidence that might reasonably be believed on the basis of which the general warrant could have issued. Accordingly, the BMO General Warrant ITO is overwhelmingly sufficient to support the issuance of the order. Mr. Wiwchar's challenge to the sufficiency of this ITO fails.

iv) The April 11, 2012 Public Storage ITO

a) The Architecture of the ITO

[132] This ITO is 164 pages in length. It has the same architecture of the two previous ITOs and contains much the same information, as well as additional information gathered after the issuance of the BMO general warrant. I do not propose to outline the architecture and contents of this ITO in as much detail, as it is essentially the same ITO as the BMO General Warrant ITO with more information included.

[133] The "Grounds of Belief" section of the Public Storage General Warrant ITO, at paras. 45-192, contains much of the same information as the previous ITOs. Again, the numbering has shifted in light of the recitation of the statutory pre-requisites and a bit more information included in the "Summary" section of the ITO.

[134] A review of the Public Storage General Warrant ITO reveals the following additional pieces of evidence or information relevant to this general warrant application:

- a) Paras. 116-118 provide additional information of the association of the various people connected to the suspected getaway vehicle and to each other;
- b) Para. 169 outlines observations of Mr. Wiwchar with Mr. Ley attending to the location of a condo on 108th Avenue in Surrey and using a black Dodge Caravan on April 6, 2021;

- c) Paras. 170-171 outline various surveillance observations of Mr. Wiwchar and Mr. Ley using the black Dodge Caravan, attending at a World Gym location and watching the parking lot in front of the World Gym, returning to the address of the condo on 108th Avenue, changing clothes, then driving the Dodge Caravan to a location in East Vancouver and departing in cabs, with Mr. Wiwchar returning to his residence;
- d) Paras. 176-177 outline, in detail, the movements of Mr. Wiwchar on the afternoon of April 9 and into the early morning hours of April 10. In summary, Mr. Wiwchar is observed to be engaged in counter surveillance maneuvers, and at 12:33 a.m. he meets up with Mr. Ley and gets into the black Dodge Caravan, driving to the address on 108th Avenue, entering it at 1:05 a.m., leaving it at 6:26 a.m., and driving the Dodge Caravan back to the same World Gym location. After spending almost two hours in the vicinity of the World Gym, the pair returned to the 108th Avenue address, went inside, spent two hours in that address, and then both exited wearing different clothes.
- e) Paras. 180-182 summarize the results of the execution of the BMO General Warrant and the discovery of the \$140,000 in Mr. Wiwchar's safety deposit box;
- f) Para. 183 outlines further surveillance observations about Mr. Wiwchar and Mr. Ley's April 7, 2012 attendances at the 108th Avenue address, where they accessed a particular unit, spent a few hours in the condo, and exited with Mr. Wiwchar wearing different clothes;
- g) Paras. 184-186 outline information about another shooting investigation "Project Revolt", and also note that another individual, Jujhar Khun-Khun, was observed at the World Gym on Jan. 20, 2011;
- h) Paras. 187-189 address particulars of investigative steps conducted in relation to the Surrey Public Storage facility; and
- i) Paras. 190-191, summarize the investigative steps over the provenance of the Dodge Caravan that Mr. Wiwchar and Mr. Ley were observed to drive. It was rented for a two-week period commencing April 2, 2012 by one of the individuals mentioned in the Project Revolt investigation, which involved a shooting at the Best Neighbours Restaurant on Oak St. on December 20, 2010.

[135] The "Conclusion" section of the Public Storage General Warrant ITO is at paras. 193-197 and outlines the affiant's belief and the bases for her beliefs, as well as addresses the statutory pre-requisite for the issuance of a general warrant.

b) Excisions and Additions to the Public Storage General Warrant ITO

[136] I turn now to the issue of the excisions and additions to this ITO, as sought by Mr. Wiwchar. I will first address the agreed excisions summarily and then move to the contested excisions. Obviously, the excisions from the two previous ITOs automatically roll over and are to be applied to this ITO. The excisions that the parties agreed to were as follows:

- Paras. 120-122, 124;
- Para. 130 (the italicized portion);
- Para. 165 (g);
- Paras. 178-179;
- Para. 185 (b);
- Para. 186 (a), (b), (e) and the italicized belief at the end of this sub-paragraph; and
- Para. 196 (a), (g), (h).

[137] I will now address the excisions that Mr. Wiwchar seeks but which the Crown opposes. Amicus curiae had very limited submissions on more targeted excisions than what Mr. Wiwchar seeks.

[138] Mr. Wiwchar seeks to have paras. 73(a)-(i), 74, and 106-108 excised. These paragraphs relate to information from Ms. Uppal. He advances the same reasoning for their being excised as he did in respect of the BMO General Warrant ITO. I have already addressed why these proposed excisions need not be made. The same reasoning applies to this ITO. The issuing judge had information within those paragraphs to determine how much, if any, weight to attach to that information. Accordingly, they will not be excised.

[139] Mr. Wiwchar also wants para. 170(a), the last italicized square bracket of para. 171, para. 176(y), and para. 196(e) excised, as he contends the references to cleaning behaviour is speculative and prejudicial.

[140] Amicus curiae made a more focused submission that the reference to "cleaning" is undefined and unclear, as well prejudicial.

[141] Having looked at these sections of the ITO and considered them as a whole, it is clear that the term "cleaning" is another way of describing counter surveillance measures undertaken by Mr. Wiwchar at the time.

[142] There is nothing unclear about this term when considered in the context of the surveillance observations described. Nor is it prejudicial. It is simply an explanation and the officer's belief as to what the observed behaviours mean. Moreover, even if it is "prejudicial", such information is not prohibited as an investigative tool, as I explained before. These paragraphs will not be excised.

[143] Mr. Wiwchar seeks to have paras. 181 and 182 excised. These relate to the results of the execution of the BMO General Warrant and finding \$140,000 in cash. I understood Mr. Wiwchar to be making the submission for excision to preserve this argument for a higher authority. I have found the ITO behind the BMO general warrant to be sufficient and that the general warrant sought was properly authorized. It follows that the results of the search had to be included in this ITO. Those paragraphs will not be excised.

- [144] Next, Mr. Wiwchar seeks to have all of paras. 184-186 excised, not just the agreed to excisions, arguing that reference to the Project Revolt investigation is prejudicial and not relevant.
- [145] I do not need to address the prejudicial challenge. For the reasons previously enumerated about prejudicial information, I would not excise these paragraphs on that basis. I would also not excise them on the basis of no relevance. It is obvious that the information was within the knowledge of the police and provides links and associations between a number of individuals that also relate to Mr. Wiwchar. Paras. 184-186 will only be excised to the extent of the consented-to excisions. The rest will remain in the ITO.
- [146] Mr. Wiwchar seeks to have para. 192 excised, being the reference to confidential informant information not relied upon. I addressed this earlier in respect of the two previous ITOs. The same reasoning applies here, and it will not be excised.
- [147] Mr. Wiwchar seeks to have para. 195 excised. This relates to the affiant's belief that the killing of Mr. Duhre was a planned hit and her explanation for why that was so. This paragraph is identical to para. 168 in the BMO General Warrant ITO. That was not the subject of an excision request. I decline to excise this paragraph here or retroactively to the BMO General Warrant ITO. It is simply the affiant's belief derived from the investigative information, including the observation of the waitress following behind the shooter, the information from Reuben Vivar, and other pieces of information throughout the affidavit. The reference to Ms. Uppal's information about a targeted hit has already been addressed. This aspect of the information was for the issuing judge to assign a weight that was considered appropriate. Paragraph 195 will not be excised.
- [148] Mr. Wiwchar seeks to have all of para. 196(b) excised, whereas amicus curiae contends only the bracketed italicized belief should be excised. Para. 196(b) relates to the clear observation by surveillance that Mr. Wiwchar was using a rented vehicle and parking it away from his residence. There is nothing inaccurate or inappropriate about this aspect of para. 196(b). The italicized belief of the affiant seems speculative. I would note, however, that the issuing judge might well have reached that inference without the stated belief of the affiant. The italicized bracketed belief of the affiant is to be excised.
- [149] Mr. Wiwchar seeks to have para. 197(b) excised. This sub-paragraph references the fact that \$140,000 cash was found in his safety deposit box, but no other items of interest to the police were found in it. A storage locker is a logical place to secure items that one does not want discovered in their residence. The information in para. 197(b) had to be included in order to assist in satisfying the pre-requisite that information concerning the offence could be obtained through executing the general warrant at this location. This information will not be excised, it is relevant to showing that items pertaining to the offence that were not found in the safety deposit and had not yet been located, could well be in the storage locker.

[150] Finally, Mr. Wiwchar seeks to have para. 202(h) excised, as he contends it adds to the reader's subconscious feelings about him. Para. 202(h) is simply part of the outline of the operational plan for how the general warrant sought would be executed, if authorized. It has to be read in conjunction with the rest of paragraph. In that respect, para. 202(h) merely explains what the police intended to do if they discovered firearms in the storage locker. Para. 202(g) establishes that they would disable them and 202(h) establishes they would leave the disabled firearms in the locker and maintain constant surveillance on Mr. Wiwchar until it was reasonable to arrest Mr. Wiwchar without compromising the ongoing investigation. Para. 202(h) will not be excised.

[151] I turn now to the additions that Mr. Wiwchar seeks.

[152] First, the additions agreed to in the previous ITOs are rolled over and are to be applied to this ITO.

[153] The other additions Mr. Wiwchar seeks and the Crown opposes will not be made. They can be stated summarily as follows:

- 1) Para. 114(j): The criminal records of all the individuals associated with the Mazda MPV will not be made for the same reason I did not add in the criminal records of Mr. Ibrahim and Mr. Wiwchar to the BMO General Warrant ITO. They add nothing vis-à-vis the statutory pre-requisites and are not material information as, explained by Paciocco J. in Booth at para. 56;
- 2) Paras. 115 and 117: The descriptions of the Askari brothers and the suggestion that at least one is involved in multiple murders are not material information that addresses the pre-requisite for issuing the authorization; and
- 3) Para. 159: Mr. Wiwchar wants added in that the attendance at the shooting centre occurred on Easter Sunday and his girlfriend was wearing high heels. He appears to suggest that this supports the alternate inference that he was on a date with her. While that may be one inference, it does not undermine the alternate reasonable inference that he was attending the shooting centre to practice shooting; Latimer at para. 75.

[154] The additions that Mr. Wiwchar seeks do not constitute material information and again stray into offending the astute observations of LeBel J. in Araujo at para. 46.

[155] None of the additions Mr. Wiwchar seeks on this ITO will be made.

[156] As I outlined earlier in these reasons, I have not addressed the sufficiency of this ITO, and will wait to do so once the issue with para. 187(b) is clarified.

Conclusion

[157] For the reasons outlined above, notwithstanding excisions and additions to the March 28, 2012 BMO Production Order ITO, the corrected ITO is sufficient and Mr. Wiwchar's challenge to its sufficiency fails. Similarly, notwithstanding excisions and additions to the April 5, 2012 BMO General Warrant ITO, the corrected ITO is sufficient and Mr. Wiwchar's

challenge to its sufficiency fails. Various excisions have been ordered with respect to the April 11, 2012 Public Storage ITO. Apart from the additions from the previous ITO that roll over into this ITO, there were no other additions ordered for this ITO. The challenge to the sufficiency of the corrected April 11, 2012 Public Storage ITO will be dealt with at a later date once the reasonable expectation of privacy issue raised in respect of para. 187(b) and how the VPD obtained the information about Mr. Wiwchar's rental of a storage locker at the Surrey Public Storage facility has been determined.

"Ker J."

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