

CANADA / JUDGMENT

R. v. Zacharias

2022 BCSC 2333

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2022 BCSC 2333 R. v. Zacharias

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zacharias,

2022 BCSC 2333

Date: 20220615

Docket: 68317-2; 68317-4

Registry: Chilliwack

Regina

v.

George Don Zacharias

Before: The Honourable Mr. Justice Williams

Oral Ruling on Voir Dire No. 1

Counsel for the Crown:

F. Lépine

Counsel for the Accused:

R. Dhanu

Place and Dates of Trial:

Abbotsford, B.C.

April 26-29 and May 4-6, 2022

Written Submissions Received:

May 11 and 17, 2022

Place and Date of Judgment:

Abbotsford, B.C.

June 15, 2022

- [1] THE COURT: Before I start, I am going to explain that I am going to deliver the decision I am making today orally and there will be the usual caveat that when a transcript is prepared, I will reserve the right to make minor editorial corrections. Probably the more important feature is this: The ruling I am giving today is partial only and it is partial because my findings on earlier issues, that is issues that arise earlier in the sequence of events, will, as I see it, necessarily impact subsequent conclusions. In that sense, there is a certain modularity to the rulings that I am going to provide you. I am going to go ahead right now and deliver what I will today and then explain further how I see this matter playing out beyond that.
- [2] George Don Zacharias is before this Court, standing trial in respect of 10 allegations of offences under the Controlled Drugs and Substances Act, S.C. 1996, c.19 [CDSA] and the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Specifically, he is charged with possession for the purpose of trafficking cocaine. This offence is alleged to have occurred at or near Abbotsford on July 11, 2017. The remaining nine counts all allege unlawful possession or storage of firearms; those offences are alleged to have occurred at Kelowna on July 12, 2017.
- [3] Mr. Zacharias has entered pleas of not guilty to each of the charges.
- [4] At the outset of trial, the Court embarked upon a multi-issue voir dire, essentially concerned with the admissibility of certain evidence.
- [5] The issues are best understood with a broad overview of the police investigation.
- [6] In early 2017, having received certain information from confidential sources who identified Mr. Zacharias as a cocaine and marihuana trafficker, a specialized section of the RCMP based in Kelowna, the Southeast District Combined Forces Special Enforcement Unit, began an investigation into the activities of Mr. Zacharias. General background information was collected and some surveillance was conducted. Ultimately, Mr. Zacharias was arrested and a quantity of cocaine was seized. As well, his residence was searched, resulting in the seizure of a number of firearms.
- [7] The specific investigational activities which are the subject of this voir dire are the following:

1. On March 28, 2017, Cst. Orb swore an information to obtain ("ITO") a vehicle tracking warrant pursuant to s. 492.1(1) of the Code and, on that same date, a judge of the Provincial Court of British Columbia in Kelowna issued the warrant, valid for 60 days. At the same time, a sealing order was issued by the court. Acting on the authority of the warrant, a tracking device was attached to a vehicle operated by Mr. Zacharias and that device was used to surveil him in the course of the investigation.
2. On May 29, 2017, Cpl. Traas filed another ITO, seeking a further 60-day vehicle tracking order under the same Code provision. He also sought an order permitting the tracking of a telephone (a transmission data recorder warrant) for a similar period of 60 days, pursuant to s. 492.1(2) of the Code. Both of those orders were issued by the same Provincial Court judge. The vehicle tracker remained in place and was monitored by the police in their investigation and, as well, measures were taken to track his cellphone as authorized by the warrant.
3. On July 17, 2017, police were conducting a physical surveillance of Mr. Zacharias. They observed that he drove from Kelowna and went to an address in Vancouver. He was subsequently found to be making his way eastbound in the Fraser Valley, apparently travelling in the direction of Kelowna. At approximately 6:00 p.m., investigators directed uniformed personnel to conduct a vehicle stop and to arrest Mr. Zacharias. That vehicle was stopped and Mr. Zacharias, the sole occupant, was arrested without warrant for the offence of possession of cocaine for the purpose of trafficking. In the course of a subsequent search, a substantial quantity of cocaine, in the order of two kilograms, was found in Mr. Zacharias's vehicle and seized. He was subsequently taken to the Abbotsford Police Department headquarters.
4. The following day, July 12, 2017, in the late afternoon, police in Kelowna conducted a search of a residence associated to Mr. Zacharias, located at Unit 11 - 433 McCarren Avenue in Kelowna. That warrant was issued by a Judicial Justice of the Peace at the Justice Centre in Burnaby, pursuant to s. 11 of the CDSA and s. 487.1 of the Code, acting on an ITO filed by telecommunication. Upon execution of the warrant, the police found a number of firearms which give rise to the bulk of the charges before this Court, that is Counts 2 through 10 on the indictment.

[8] The issues for determination on this voir dire are as follows:

1. Mr. Zacharias challenges the basis upon which the tracking warrant of March 28, 2017 was issued. In his submission, there was no proper basis for the warrant to be issued and he alleges a breach of his rights under s. 8 of the Canadian Charter of Rights and Freedoms [Charter].

Because this is a challenge to a warranted search, Mr. Zacharias bears the onus of proving, on a balance of probabilities, that there was a breach of his Charter rights.

2. Mr. Zacharias challenges the issuance of the tracking warrants, both for the vehicle and the telephone device, as issued on May 29, 2017. He submits that there was not a proper basis for the issuance of those warrants, and he claims that the activities of the police in furtherance of those warrants was a breach of his rights under s. 8 of the Charter.

As there were two warrants issued, this will require separate determinations for each, even though they were issued at the same time.

3. Mr. Zacharias alleges that the warrantless arrest that was effected on July 11, 2017 was without proper grounds and that it was a breach of his rights under s. 9 of the Charter. A search of Mr. Zacharias and his vehicle was conducted incidental to that arrest and, accordingly, the lawfulness of that search is also implicated in the analysis.

Because this was a warrantless action taken by the police, the matter of determination of the challenge requires that the Crown establish, on a balance of probabilities, that the circumstances of the arrest satisfied the common law and statutory requirements for the arrest.

4. With respect to the search that was conducted at the McCarren Avenue residence in Kelowna on July 12, under the authority of the search warrant that had been issued, Mr. Zacharias alleges that there were not proper grounds for the issuance of that warrant and accordingly, it should be set aside, with the result that the search is unlawful and a breach of his rights under s. 8 of the Charter.

[9] In the course of the voir dire, a number of witnesses were called, including the officers who authored and filed the ITOs for the tracking warrants and the search warrant for the residence in Kelowna (the "affiants") and one of the principal investigators. Additionally, the officer who effected the arrest on July 11 testified on the voir dire, as did another officer who was involved with the residential search. The final witness was a member of the Abbotsford Police Department; his evidence concerned certain facilities at the police headquarters.

[10] As well, an agreed statement of facts was filed.

[11] The judicial authorization, that is the ITOs that were filed to obtain the warrants, together with the actual warrants and the Forms 5.2 were also received as exhibits on the voir dire (Exhibit 10).

[12] The approach I have elected to take for the purpose of this ruling is to deal with each of the challenged circumstances individually. The submissions of counsel on these issues have been extensive and I have been provided with extremely comprehensive written arguments by both Mr. Zacharias and by the Crown. To some extent, I found the submissions of Mr. Zacharias to be so comprehensive that the points made tended to overlap and repeat. In the circumstances, I have endeavoured to distill the arguments into specific headings or siloes in order to analyze the points being advanced to determine whether Charter breaches have been made out.

- [13] The determination of some of these challenges, depending upon outcome, may have an effect upon subsequent issues. For example, if this Court determines that any of the first three warrants, the tracking warrants, were improperly issued, then a breach of Mr. Zacharias's s. 8 Charter rights is made out. In such case, it then becomes necessary to determine what result should follow with respect to the evidence obtained, in accordance with s. 24(2) of the Charter, and what impact there might be for subsequent issues, such as the warrantless arrest of Mr. Zacharias and the search warrant that was later issued for the residence in Kelowna.
- [14] Accordingly, as will be seen, there will necessarily be multiple stages to the ultimate determination of the Charter issues that this case throws up.
- [15] At the outset, I will make some reference to certain legal principles that inform the analysis and which have application to more than one of the circumstances being assessed. Additionally, in the course of examining specific challenges, I will refer to particular principles that bear upon the issues that the facts of the challenge raise.

Legal Principles and Some Initial Observations

- [16] Where agents of the state seek to intrude into the privacy sphere of individuals, save for certain situations of urgency or necessity, they are required to act within a model of prior judicial authorization: that entails an application being made to a judicial officer establishing that the circumstances meet the statutorily prescribed standard required to justify the extraordinary measure of a warrant being issued for execution.
- [17] Typically, that is done by the warrant applicant presenting a judicial officer with the body of evidence supporting the conclusion that the grounds are present. Most usually, that is in the form of an ITO, which is an affidavit setting out the grounds.
- [18] That application process takes place without the involvement of the party whose privacy rights are to be compromised by the search. Indeed, in most instances, the target is unaware of the warrant application. Accordingly, the application process is *ex parte*.
- [19] For that reason, a body of common law jurisprudence has developed, a key aspect of which is that the applicant for the warrant is under a duty to make full, frank, and fair disclosure of all the circumstances, including those that might militate against issuance of the warrant.
- [20] In circumstances where warrants are issued by the judicial officer and executed as part of the investigation, prosecution may result.
- [21] It is in the context of the criminal litigation attending the prosecution that the party affected by the search, where evidence has been obtained, has the opportunity to challenge the propriety of the issuance of the warrant. Although this step necessarily occurs after the warrant has been issued and acted upon, the common law has developed a body of authority to govern this challenge process.

- [22] The concept underlying the challenge is Charter-based. The procedure that is followed is generally known as a Garofoli application. That is the process which this voir dire is conducting with respect to the tracking warrants and the residential search warrant.
- [23] As noted, in each of these instances, the police acted on the authority of warrants issued by judicial officers.
- [24] Because warrants were issued, they are presumed to be valid. The onus rests upon the party bringing the challenge to persuade the reviewing justice that there was not a sufficient reason for the warrant to have been issued.
- [25] Such challenges may be facial, that is, an examination of the ITO to determine whether the justice could have issued the warrant, or subfacial, by that is meant the reviewing court examines the reliability of the content of the ITO and will be concerned with such matters as material omissions and nondisclosure and the presence of false or misleading information.
- [26] The test to be applied by the reviewing justice was set out in the Supreme Court of Canada decision in *R. v. Morelli*, 2010 SCC 8 at paras. 40-42:
- [40] In reviewing the sufficiency of a warrant application, however, "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. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.
- [41] The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58) Furthermore, the reviewing court may have reference to "amplification" evidence -- that is, additional evidence presented at the voir dire to correct minor errors in the ITO -- so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.
- [42] It is important to reiterate the limited scope of amplification evidence, a point well articulated by Justice LeBel in *Araujo*. Amplification evidence is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds. The use of amplification evidence cannot in this way be used as "a means of circumventing a prior authorization requirement" (*Araujo*, at para. 59)
- [Emphasis in original.]
- [27] A particularly concise and practical statement of the standard of review was provided by the Court in *R. v. Araujo*, 2000 SCC 65 at para. 51:

In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.

[Emphasis in original.]

- [28] The issue of amplification and its scope in the review process, as discussed in Morelli, was also the matter of comment by the British Columbia Court of Appeal in *R. v. Wilson*, 2011 BCCA 252:
- [68] This brings me to amplification. It is important to keep in mind that in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, as in *Garofoli*, the discussion with respect to amplification arose in the context of "new" facts being brought out through cross-examination (which I take to include proper re-examination). As discussed by Mr. Justice LeBel in *Araujo*, amplification cannot be used to circumvent the need for the informant to satisfy a justice of the peace that the requirements for the issuance of a search warrant have been met. However, if the evidence on the voir dire reveals that the informant, "in good faith, made some minor, technical error in drafting", then, on the review, those errors can be taken as corrected: para. 59. For example, had Mr. Wilson brought out the error with respect to when the August 2008 complaint had been made, the correct date would have been considered on the review.
- [29] One point to be noted is with respect to circumstances where the ITO, as submitted to the judicial officer, contains information provided by a confidential informant, as in this case. Typically, the ITO will make specific reference to the informant, other circumstances involving the informant's activities and dealings with the police, and the details of the information received.
- [30] In a subsequent *Garofoli* hearing, the prosecution may have concerns that militate against disclosing that information to the defendant. In fact, the Court in *Garofoli* considered that situation and set out a six-step process that could be followed. It entails judicial editing, provision of the edited affidavit to the accused and, if deemed necessary, the preparation of a judicial summary of the excised material.
- [31] In the matter at bar, the ITO relied on information from two separate confidential informants.
- [32] For the present review, the Crown has taken what is a more straightforward approach to the issue. The prosecutor has edited the copy of the ITO which he has provided to Mr. Zacharias and to the Court. The editing consists of redacting many portions of the document that relate to the confidential informants.

- [33] I see nothing objectionable to that, nor has any concern been raised by Mr. Zacharias. It simply means that this Court will assess the adequacy of the ITO to support the issuance of the warrant on the material that remains and will not be able to consider information that might have been before the issuing justice. I infer that the Crown is content that the review may proceed on the basis of the edited ITO and does not intend to make application for further disclosure of the edited material under the Garofoli part 6 protocol.
- [34] In assessing sufficiency, the court must be guided by the statutory standard for the issuance of the warrant.
- [35] In the matter at bar, for each of the vehicle tracking warrants, the Code provision allows issuance of a warrant where the justice or judge is satisfied that there are "reasonable grounds to suspect that an offence has been or will be committed " [Emphasis added.]
- [36] For the telephone tracking warrant, the Code requires "reasonable grounds to believe that an offence has been or will be committed " [Emphasis added.]
- [37] The residential search warrant was issued under s. 11 of the CDSA. That, too, requires that the judge or justice be satisfied that there are reasonable grounds to believe that certain offence-related items are in the place sought to be searched.
- [38] The meaning to be assigned to the standard of suspicion was explained in *R. v. Chehil*, 2013 SCC 49 at paras. 25-27:
- [25] The reasonable suspicion threshold respects the balance struck under s. 8 by permitting law enforcement to employ legitimate but limited investigative techniques. This balance is maintained by subsequent judicial oversight that prevents indiscriminate and discriminatory breaches of privacy interests by ensuring that the police have an objective and reasonable basis for interfering with an individual's reasonable expectation of privacy.
- [26] Reasonable suspicion derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. This scrutiny is exacting, and must account for the totality of the circumstances. In *Kang-Brown, Binnie J.* provided the following definition of reasonable suspicion, at para. 75:

The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

- [27] Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.

- [39] As for the standard of reasonable grounds to believe, that has been succinctly described as credibly-based probability.
- [40] Any evidence contained in an ITO that was obtained illegally or unconstitutionally will be excised from the ITO in the process of the Garofoli review and will not be considered as part of the grounds.
- [41] One of the issues for determination on this voir dire concerns the arrest of Mr. Zacharias by police officers without warrant. Section 495 of the Code deals with the conditions and limitations of the authority for a peace officer in such circumstances. There is also a large body of case law that has application to the issue.
- [42] I will deal with those matters when I come to analyze that particular issue.

Vehicle Tracking Warrant: Issued March 28, 2017

- [43] This application sought a vehicle tracking warrant for a Dodge Ram truck. The ITO was an affidavit filed by Cst. Orb.
- [44] The affidavit is in what appears to be a fairly standard format. It is 45 pages in length.
- [45] The affiant states that he has reasonable grounds to suspect that the offences of trafficking and possession for the purpose of trafficking in controlled substances had been committed or will be committed by George Zacharias.
- [46] The affiant describes the vehicle sought to be subject of tracking: a black Ram pickup truck, which he describes as being used by Mr. Zacharias, but registered to another party, Kholton Zacharias, believed to be the son of the defendant George Zacharias.
- [47] The affiant makes reference to an event that occurred in Alberta on February 17, 2017, which involved police stopping Mr. Zacharias in a vehicle, finding a large quantity of marihuana and other substances, and arresting him. The evidence before me is that that investigation resulted in a prosecution but, ultimately, there was a finding by the trial judge that the police conduct had breached the Charter rights of Mr. Zacharias. Even though the trial judge subsequently admitted the evidence which had been obtained, counsel before me are both of the view that any reference to this incident is not eligible to be considered by this Court on the current application given that it involves information and evidence that has been found to have been obtained in an unconstitutional way. It shall be struck from the affidavit and, accordingly, I intend to make no further reference to that event or that information, and in my review of the issuance of the tracking warrant, I will attach no weight to any reliance that the affiant placed upon the Alberta information.
- [48] In the ITO, the affiant also makes reference to information which came to the police, originating with two separate confidential informers. In the ITO, Cst. Orb declines to name the informers or their handlers, citing security and confidentiality issues.

- [49] In the copy of the ITO which is before this Court on the review, a substantial portion of the text relating to the confidential informers and the information obtained from them, which would have been before the issuing justice, has been deleted. As well, the affidavit indicates that the affiant filed a separate appendix (Exhibit A) detailing further information about the informants. That, too, has been redacted from the document which is before this Court.
- [50] Accordingly, I am working with somewhat skeletal information, and that is all I will be able to rely upon in assessing the information provided to the issuing justice. Obviously, it would be improper for me to speculate upon any information that was not provided to me and, of course, I will not do so.
- [51] The information that is contained within the ITO and which is available for my consideration states that two separate individuals provided information to the police on a confidential basis. One of the individuals, referred to as Informer A, reportedly told a police handler in 2017 that Mr. Zacharias was looking for cocaine; that source also told police that Mr. Zacharias was a resident of Kelowna. The other source, referred to as Informer B, told police in October and November 2016 that Mr. Zacharias transported marihuana in a black Dodge Ram pickup, and in January 2017, advised police that Mr. Zacharias transported cocaine in that same vehicle. This source also reported that Mr. Zacharias was a resident of Kelowna and provided a telephone number for him. It was on the basis of that information that the police investigation commenced. The affiant notes that the investigation has confirmed that Mr. Zacharias drives such a vehicle and has confirmed that the subscriber to the telephone number indicated by the source is the defendant.
- [52] With respect to source A, the ITO states that this person provided information voluntarily and received no special benefits or promises. The ITO indicates that some of the information has been corroborated, but other aspects of the information, because of its particular nature, could not be corroborated. The affiant deposes that no information provided by the source has been shown to be false and misleading or inaccurate, and the source is believed to be reliable.
- [53] In fact, similar statements are made with respect to the other informant, source B, although there is no mention as to benefits or promises.
- [54] The ITO sets out certain general background information with respect to Mr. Zacharias, including that motor vehicle records indicate that he has a valid driver's licence and is a registered owner of a Mustang automobile. Those records also disclose an address on Sunview Drive; the affiant states that the information has been followed up and the investigators are of the view that he is no longer associated to that address.
- [55] There is a reference in the ITO to a dated, and what I would describe as a non-relevant, criminal record.

[56] In addition, there is information provided with respect to the Ram truck. The affiant describes that in the course of the investigation to date, Mr. Zacharias has been observed driving that vehicle. It is noted that the registered owner is his son, Kholton Zacharias. There is reference to one police index entry that associates Kholton Zacharias to that vehicle.

[57] The affiant describes police surveillance which has been conducted of Mr. Zacharias. Reference is made to seven different days upon which surveillance has been conducted and observations made. Very briefly, the observations are as follows:

- February 8, 2017: Mr. Zacharias was observed leaving No. 11 - 433 McCarren Avenue in Kelowna and driving the Dodge Ram to downtown Kelowna, making a number of stops. The surveillance officers observed certain driving patterns that the affiant says suggested Mr. Zacharias was operating the vehicle in a way consistent with an intention to detect any surveillance which might be ongoing, including travelling by what are described as unusual and somewhat circuitous routes, making a number of apparently unwarranted lane changes, and making a U-turn in the middle of the road. The vehicle was seen later at 2350 Boucherie Road in West Kelowna.

- February 9, 2017: On this date, police observed Mr. Zacharias drive the Ram truck to Vernon, BC, where he met a man in a parking lot and they conducted a meeting, nine minutes in duration. The affiant notes that the trip was made on a day when road and weather conditions were described as marginal and that Mr. Zacharias was driving in a way that appeared to again be intended to detect any possible surveillance. In Vernon, Mr. Zacharias met with the man in a parking lot. The affiant describes that man as having been identified as Jason Beaumont; one of the investigators is stated to have recognized Mr. Beaumont and knew him to have been a target of an earlier police investigation in 2013 that resulted in charges and a conviction under the CDSA. Mr. Zacharias was then observed driving back to Kelowna. He was seen to stop at a restaurant, and then carried on to the McCarren address.

- February 15, 2017: Police surveillance observed Mr. Zacharias driving the Ram truck away from the Boucherie Road address and then making a number of stops before heading to downtown Kelowna. Later he was observed at the McCarren Avenue address moving items between the truck box and the garage. In the course of that, he was observed placing a black bag in the back seat of the truck, then closing the door. He was subsequently followed from the McCarren Avenue residence; he drove to Campbell Road in West Kelowna where he was seen to stop his truck on the roadway. The surveillance then observed an unknown male with a dog walk up to the rear passenger door of the Ram truck and open it. The male took off a black backpack and placed it inside the rear seat of the truck. Mr. Zacharias was described as twisting to the right in the seat and moving items in the rear seat of the truck. Immediately after, Mr. Zacharias left the area. Sometime later, the Ram vehicle was observed at an address on Sandstone Crescent in West Kelowna, parked on the driveway and backed up to the garage door. Other vehicles were also seen at that same location. Two of those were determined to be registered to an individual named Alicia Chadsey. In the ITO, it is stated that Alicia Chadsey is the wife of Matthew Chadsey. Police data indices indicate that Mr. Chadsey was investigated in 2012 as a suspected marihuana

trafficker and has a criminal record for possession and production of a scheduled substance. Later that morning, after the Ram truck had left the Sandstone address, it was observed in the parking lot of the Superstore in West Kelowna. Mr. Zacharias was seen to go inside the store. The affiant describes that one of the police investigators approached the Ram truck in the parking lot and noted a strong odour of fresh marihuana from the rear driver side pickup box. The officer also observed through the window a black and white bag on the back seat; in the front centre console, the officer observed a cellphone, a wallet, and other miscellaneous items. On the front passenger seat, police observed a black fabric shopping bag with multiple stacks of currency bundled with elastic bands. The currency stack was described as approximately four inches thick and comprised of denominations ranging between five and 100 dollars. A short time later, Mr. Zacharias returned to the vehicle and left the parking lot. Surveillance was terminated.

- February 20, 2017: On this date, the Ram truck was observed to arrive at the McCarren address shortly after 2:00 p.m. It was backed into the driveway next to the garage door and an unknown person emerged from the vehicle. That person retrieved a large black duffel bag or knapsack from the rear seat and went to the back door and into the residence. Sometime later, Mr. Zacharias left the residence with a "weighted red and white" gym bag. He then left in the Ram vehicle.

- February 21, 2017: The Ram truck was observed at the Boucherie residence; no observation of any moment has been described.

- February 22, 2017: At approximately noon on this date, Mr. Zacharias emerged from the McCarren residence and got into the Ram truck. Efforts at surveillance that day appear to have been somewhat hit and miss. No substantive observations are reported, other than the vehicle was observed travelling about.

- March 16, 2017: The Ram truck was initially located at the Boucherie Road residence; it then travelled to downtown Kelowna. Mr. Zacharias was seen at a number of locations in the downtown area of Kelowna. No further observations of any substance are reported.

Discussion

[58] I commence with making mention of the approach that I will take in reviewing the adequacy of the ITO. I propose to consider the matter in what I would describe as a fairly big-picture way. I do not intend to engage in an examination of the minutiae of each element of the ITO. I take direction from the Supreme Court of Canada which said this in *Chehil*:

[6] For the reasons that follow, I would dismiss the appeal. The reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour. It does not require the police to investigate to rule out exculpatory circumstances. The Court of Appeal correctly concluded that the trial judge erred in assessing the factors individually rather than in their entirety and in finding the sniffer dog to be unreliable.

- [59] In the vernacular, I consider it important that this Court not become preoccupied with examining the trees and failing to look at the forest.
- [60] The Chehil quote is also relevant in the context of another point that has been urged upon this Court by Mr. Zacharias: he contends the ITO is deficient, in that it is not balanced. He says the affiant has repeatedly failed to make mention of considerations or alternative explanations that might support innocent interpretations of events. In short, he contends that the ITO demonstrates a tunnel vision of certain events, looked at through a jaundiced police lens.
- [61] In my view, that reflects something of a misunderstanding of the role of the affiant. As Chehil makes clear, the police are not required to investigate to rule out exculpatory circumstances. Certainly, the Court must be alive to the concern that the police have failed to disclose relevant information or have structured the material to present a distorted picture, but that does not extend to the point that Mr. Zacharias urges.
- [62] As I had indicated earlier, I accept that any reference to the Alberta investigation must be deleted from the ITO at this review stage, and I will proceed on that basis.
- [63] Beyond that, Mr. Zacharias has worked assiduously to make arguments in this Court which take issue with virtually every aspect of the ITO. Certainly, he is not to be faulted for having done so, but it seems to me that taking the "big picture" view renders many of his complaints and criticisms of relatively less effect.
- [64] I will now speak to a number of the points raised by Mr. Zacharias.
- [65] One general theme of his position appears to be that the police have not conducted sufficient investigation at the point of application for the tracking warrant. The defence seemingly takes the view that the investigation had been inadequate and under-resourced, and that should impact upon the review assessment.
- [66] In my view, that is of negligible import in the analysis. Barring any suggestion that the investigation was purposely distorted to conceal or suppress information that would be of benefit to the defendant, and I find that not to be the case in the matter at bar, then inadequacies in the investigation to that point in time will manifest themselves as deficiencies in the case available to support the issuance of the warrant.
- [67] A point urged strenuously upon this Court is that the confidential informant information, as it appears in the edited ITO that is before this Court on the review, does not meet the minimum standard that the authorities require. Specifically, Mr. Zacharias says that this information is neither credible, compelling, nor corroborated. He says the information is general in nature, lacking specificity. Beyond that, he says that the portion of the ITO dealing with the confidential informant information is replete with "boilerplate", such that it precludes any real assessment of the reliability of the sources.

- [68] I have considered this submission carefully. There is no question that the information, as it is available for this Court to consider on the review, raises concerns. What is before me is somewhat general and conclusory; it is not apparent to the reader how the information came to be known by the informants; some of the information is not close in time to the date of the ITO.
- [69] Notwithstanding those criticisms, I am of the view that the informant information, while it is "close to the line", is sufficient to pass muster as evidence which can be considered by the court on the review. It seems to me that, so long as the limitations of this evidence are properly appreciated, it can be taken into account as providing some basis for the necessary grounds.
- [70] With respect to the boilerplate complaint, I am not sure that criticism leads anywhere substantive. When the language used in the ITO is considered, it is evidence that the informants are of some proven track record. Obviously, the means of measuring that is not perfect. However, the evidence is that each of them have provided information on previous occasions, and in no instance has it been found that the information is false or inaccurate. All of that, whether couched in language that seems to be formulaic or otherwise, affords a basis to attribute some measure of reliability to the information.
- [71] It is also relevant, in my view, that further investigative efforts by the police lent some support, admittedly modest, to the information that is provided by the sources, specifically with respect to the vehicle operated by Mr. Zacharias and the particulars of where he lived and his telephone number.
- [72] I wish to make clear that I am not suggesting this stands as a model of perfection, but, on the call this Court has to make, I find that it is sufficient to permit it to be considered as part of the grounds for the issuance of the warrant.
- [73] There are a number of other issues raised by Mr. Zacharias; I propose to address those now:
- Reference is made to the fact that the affiant describes that Mr. Zacharias resides at the McCarren address, when there was certainly reason to also think that he maintained a residence at the Mount Boucherie address, apparently concurrently. It seems to me that any reasonable reading of the affidavit would lead the reader to understand that he had a significant connection with each of those addresses. The fact is, there was nothing particularly critical about the proposition that he resided at the McCarren address;
 - Reference is made to the police's failure to make sufficient reference to the fact that Mr. Zacharias was a registered owner of a Mustang automobile, and that the Mustang was observed by surveillance on a number of occasions. That, of course, is coupled with the fact that the registered owner of the Ram truck was Mr. Zacharias's son, not him. In my view, there is something of a red herring quality about this complaint. The police were investigating the information that Mr. Zacharias conducted drug dealing activities in the Ram truck. Their surveillance had disclosed that he appeared to be the principal operator of that truck; the role of

the Mustang automobile does not seem to be of any particular relevance, nor have I understood from submissions that it was;

- In the ITO, the affiant makes reference to certain driving activities observed by the investigators that were characterized as "heat checks": driving manoeuvres taken for the apparent purpose of detecting and "shaking off" surveillance. Mr. Zacharias points out that in some cases, the police characterized what they observed as such; in other instances, apparently not dissimilar, they did not do so. To my mind, that is of no moment in the assessment I am conducting; the ITO contained statements that some of the driving that was observed was, in the opinion of the affiant, of that type. It was an opinion, not a statement of any objective fact;

- Mr. Zacharias makes a reference to the apparent error in the ITO with respect to his birthdate, and raises a suggestion that may well reflect that the police did not necessarily establish that he was the actual target of the investigation. Not to be disrespectful, but it seems to me that was an error that is fairly characterized as minor and of no meaningful consequence;

- Mr. Zacharias makes reference to the means by which the police identified him. Specifically, he notes that the police had reference to a photograph that was taken as a consequence of the arrest in Alberta. In his submission, the fact that there can be no reference to that event precludes the police being permitted to rely upon the photograph that was taken in conjunction with it. In my view, while there may well be validity to his submission that the police cannot rely upon the photo, the ITO also makes reference to a photograph that was accessed on a social media site, and so, on the basis of the ITO as before me for review, that appears to be a sufficient basis upon which he was identified;

- Reference is made to the fact that a member of the police investigation team walked up to Mr. Zacharias's truck when it was parked in the lot outside the Superstore in West Kelowna on February 15. The ITO describes that the officer detected the smell of cannabis in the vicinity of the truck and that he also made observations of money inside the cab. Mr. Zacharias takes issue with the specifics of the description of the smell of the cannabis. He notes that in one portion of the ITO, there is reference to it having apparently emanated from the box of the truck; at another point in the ITO, it was described somewhat differently. As well, he points out the evidence would suggest there was a fairly brisk breeze on that day, judging by a photo that shows the flag on the store well-extended. In my estimation, while those points and discrepancies are of some interest, the real issue is this: the officer approached the truck in the parking lot and detected a smell of what he concluded to be cannabis in that immediate vicinity. Whether it came from the box or some other part of the truck, it seems to me, is not of critical significance. The point that was made by that component of the ITO is that the smell of cannabis was detected in the immediate vicinity of the vehicle;

· In the ITO, the affiant makes reference to Mr. Zacharias having a criminal record: the specific entry is fairly characterized as both dated and of very minimal relevance to the application for a warrant. That said, I am not convinced the inclusion of this information was improper. It is characterizable as information relevant to him and known to the police. It, in fact, adds virtually nothing to the case in support of the issuance of the warrant, but it is difficult to conclude that it had any improper influence or that it was included for any improper purpose.

- [74] In overall summary, I recognize that the ITO as drawn was not perfect. It has been shown to include what could be described as minor errors. Based upon an exhaustive cross-examination, it is a quite compelling conclusion that the document could have been drafted in a better way.
- [75] That said, I find no basis to conclude that there was any material misrepresentation of the circumstances known to the police at the time of the application, nor was there any improper attempt to distort the circumstances or to mislead the issuing justice.
- [76] My conclusion is significantly driven by the fact that the standard required to be met for the issuance of the vehicle tracking warrant was one of reasonable suspicion; it was not necessary for the affiant to establish that there were reasonable grounds to believe that Mr. Zacharias had committed an offence.
- [77] In my view, the ITO, as it has been edited and adduced on this application, discloses reliable evidence that might reasonably be believed, which is sufficient to provide the basis on which the authorization could have been issued and to permit the justice to make the necessary findings to issue the warrant, given the reasonable suspicion standard that applies.
- [78] Accordingly, I dismiss Mr. Zacharias's application to strike down that warrant; I conclude there has been no violation of his rights under s. 8 of the Charter.

Vehicle Tracking Warrant and Telephone Tracking Warrant Issued May 29, 2017

- [79] As the authorization for the initial vehicle tracker warrant drew near the end of its 60-day term, police investigators elected to apply for a further authorization for the vehicle tracker and to also make application for a warrant that would permit them to track Mr. Zacharias's phone.
- [80] A single ITO to support the application for both of these warrants was prepared by Cpl. Traas, an officer who was part of the investigation team. That ITO is an exhibit on this proceeding. Because the ITO is common to both of the applications, my discussion of it will inform the review of each of the warrants.

- [81] I have examined the ITO carefully and, in the course of doing so, have compared it with the first ITO. The second ITO is 55 pages in length and similar in format to the initial ITO prepared by Cst. Orb. Generally, there is substantial content carried over from the first ITO, including general background and also the confidential informant information. The difference is that the ITO purports to be current to May 11, and thus can be expected to include further investigational findings generated in the previous two months.
- [82] The document sets out quite extensively the information that was contained in the first and in a way that is strikingly similar. Indeed, a point pressed upon the Court by Mr. Zacharias is that much of the ITO is just simply a cut and paste of the first ITO, to the extent there is reason to doubt the affiant's assertion that he fully and independently established the assertions in it. My inclination is not to fully engage with that criticism, given that there was a necessity to provide that same information again, and it hardly seems surprising that much of the language would track the earlier ITO. From the testimony of the affiant, I accept that the beliefs he set out were beliefs he held at the time he made the affidavit.
- [83] Before delving into details contained within the ITO, I will observe that again, while the affidavit contains reference to the Alberta investigation, any such reference must be deleted for the same reasons articulated earlier.
- [84] The second ITO also describes certain investigational activities that were conducted with respect to Budget Car Rental. Specifically, on May 16, police became aware that the Dodge Ram was parked at the Budget Car Rental facility in Kelowna. Investigators attended and saw another person, believed to be Mr. Zacharias's partner, driving away from that area in the Ram truck. As a consequence of those observations, the investigators initiated contact with an employee of the Budget Car Rental operation. That employee disclosed information to the investigators, essentially to the effect that Mr. Zacharias had rented a vehicle on May 16. Further information was provided at the time of the return of the vehicle.
- [85] In sum, the investigators were able to determine that Mr. Zacharias had rented a vehicle on May 16 and returned it on May 19. They were able to learn the details of the rental agreement and the distance that had been driven.
- [86] Subsequent to these events, a judge of this Court in *R. v. Alkhalil*, 2020 BCSC 444 ruled that the police obtaining such information from a car rental agency constitutes a search and that, in the absence of judicial authorization, that search violates s. 8 of the Charter.
- [87] The Alkhalil ruling deals specifically with whether such information should be excised from a subsequent ITO in which it is included.
- [88] On my understanding of the authority, the answer to that question is in the affirmative.
- [89] I consider that I am bound by the decision in Alkhalil, and accordingly, it is my view that any reference in the ITO at bar to information obtained from Budget Car Rental must be excised.

- [90] Beyond the Budget Car Rental information, the only additional content in the ITO of Cpl. Traas is a description of surveillance activities conducted on May 3, 9, 10, and 11 in and around Kelowna. In fact, no information of any apparent relevance is to be found on the first three days. The evidence with respect to surveillance conducted on May 11 describes that Mr. Zacharias attended at a residence on the Old Okanagan Highway in Kelowna; the affiant indicates that, some nine days earlier, Emergency Health Services ("EHS") had been called to the address where Mr. Zacharias had stopped, and that the EHS personnel had attended to a complaint of narcotic overdose.
- [91] The ITO also states that, on the same date, that is May 11, Mr. Zacharias was seen driving the Dodge Ram at 2730 Benedick Road in Kelowna, and then later to an address on Lakeview Place in Kelowna. The affidavit details how a query of police indices with respect to that address disclosed that, some six years prior, an individual (apparently associated to that address) was stopped for a traffic violation. In the course of that investigation, the police officer involved had located some plastic bags of potting soil that caused him to "believe" that the soil was from a marihuana grow operation.
- [92] In my respectful view, that information, both with respect to the property where the ambulance had attended and the address associated to a suspected grow operation some many years prior, is of negligible value as support for the issuance of the warrants that were sought.
- [93] The comments and observations I have made with respect to the first ITO are essentially that, while there were undoubtedly aspects of the ITO that were not especially strong, nevertheless I concluded that, given the reduced standard to be met - the standard of reasonable suspicion - there were sufficient grounds to find the issuing justice could have granted the warrant. With respect to the second application, a concern which occurs to me is whether, once the deletions which I have described are made; once it is taken into account that tracking has been going on for nearly 60 days; once the "additional information" (that is, nothing of any moment) is factored in; and recognizing that the first ITO supported the issuance of the first tracking warrant, but not robustly, is the second ITO simply so insufficient that I am unable to properly conclude that the issuing justice could have granted the vehicle tracking warrant on the ITO?
- [94] In considering that question, I note there is no statutory requirement that an application for a subsequent warrant must demonstrate some progress since the earlier application. Factually, it seems to me that there may well be a point at which it would be reasonable to expect there to have been progress, and the absence of same would weigh against granting the subsequent warrant. In this case, the police had conducted their investigation with the assistance of the vehicle tracking warrant, although it is apparent that a scarcity of resources had limited the number of days that they were actually surveilling Mr. Zacharias. The conclusion I reach is that, at the point the second application was made, the grounds to support its issuance were essentially the same as existed when the first application was made. No further compelling information had been learned.

- [95] As I have indicated, in cases such as this, there may well be a point where the failure to learn anything further will militate against a further warrant being issued. Presumably that will be informed by whether there is evidence disclosed that weighs against the suspicion that is being investigated, and whether it is reasonable to expect that there should have been further conduct of interest to have taken place in that time. Obviously, these are fact-driven matters. In the present case, I cannot say that the absence of further information suggestive of drug dealing in the preceding 60 days is a basis to conclude the warrant could not have been issued.
- [96] At the end of the day, again, not without some reservation, I conclude that the material is sufficient for me to conclude that the issuing justice could have issued the second vehicle tracking warrant, with the result that Mr. Zacharias's application must stand dismissed. I find no breach of his rights under s.8 arising from the police surveillance by way of the vehicle tracking warrant.
- [97] Then there is the matter of the telephone tracking warrant sought by the police at the same time, and I can deal with that summarily. Given the higher standard required to justify the issuance of such a warrant, which is an important factor, and given the deficiencies I have outlined with respect to the ITO, it follows necessarily that I am unable to conclude that the issuing justice could have granted the telephone tracking warrant on the material as it is before this Court.
- [98] Accordingly, I find that Mr. Zacharias has established that the issuance and the police acting upon that warrant does constitute a breach of his rights under s. 8 of the Charter.

"Williams J."

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