

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Cater, 2011 NSPC 89

Date: November 22, 2011

Docket: 1997518 to
1997550; 2035773 - 2035784

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Kyle Cater, Paul Cater and Torina Lewis; Kyle Cater

Editorial Notice

Some information has been redacted in this electronic version of the judgment.

DECISION ON GAROFOLI APPLICATION

JUDGE: The Honourable Anne S. Derrick

HEARD: November 22, 2011

DECISION: November 22, 2011

CHARGES: Sections 86(1) x3; 88(1) x3; 95(1) x 2; 92(1) x 2; 92(2) x 1 of the *Criminal Code* (Cater, Cater and Lewis); Sections 100(2) x 6 ; 99(2) x 6 (Kyle Cater)

COUNSEL: Shauna MacDonald and Richard Hartlen, for the Crown

DEFENCE: Elizabeth Cooper, for Kyle Cater
Alfred Seaman, for Paul Cater
Cameron MacKeen, for Torina Lewis

Introduction

[1] Kyle Cater has brought a *Garofoli* application in relation to the Authorization granted on November 18, 2008 for a Part VI interception of his and others' private communications. Yesterday I decided that I would conduct a *Garofoli* review of the authorization although I rejected Ms. Cooper's request for permission to cross-examine the Affiant.

[2] The Affidavit and Information to Obtain is 247 pages long and identifies 13 targets of the police investigation, including Kyle Cater.

Kyle Cater's *Garofoli* Application

[3] Mr. Cater's *Garofoli* application is an assertion by him that his section 8 *Charter* right to be free from unreasonable search or seizure was violated by the interception of his private communications, an interception that was authorized on November 18, 2008 on the basis of the November 14, 2008 Affidavit. Mr. Cater is seeking to have the intercepted communications excluded from evidence pursuant to section 24(2) of the *Charter*.

[4] In support of Mr. Cater's *Charter* motion, Ms. Cooper has filed a lengthy Brief. 240 paragraphs of the Brief concern issues related to the *Garofoli* application and an as-yet-to-be-heard abuse of process application.

[5] It is paragraphs 102 – 206 of Ms. Cooper's Brief that focus on the information in the Affidavit used to obtain the authorization for the intercepts. In these paragraphs Ms. Cooper makes a number of submissions, which I will address shortly, concerning the source information about Mr. Cater. I will also address submissions Ms. Cooper made orally.

[6] Ms. Cooper attacks the authorization for the intercepts on the basis that the information supplied in the Affidavit and Information to Obtain was unreliable. She has focused on the information provided specifically with respect to Mr. Cater from two confidential sources, Sources "E" and "F", and an anonymous, handwritten two page note from Source "V" received at the Halifax Integrated

Drug Section office on February 25, 2008 alleging that Mr. Cater was selling “coke, crack and marijuana, usually around the Spryfield area.”

***Garofoli* and the Authorization of Part VI Intercepts**

[7] *Garofoli* ([1990] S.C.J. No. 115) establishes that the applicable test is whether at the time of granting the authorization there existed, on an objective basis, reasonable grounds to believe that:

- (a) an offence was or will be committed and;
- (b) information concerning the offence will be obtained by the proposed interception.

[8] What is to be determined in granting the authorization is whether the interception of a named person’s private communications may assist the investigation, not whether there are reasonable grounds to believe that the person is a party to an offence. (*see, R. v. Schreinert, 2002 O.J. No. 2015, paragraph 43 (Ont. C.A.)*)

The *Garofoli* Review Hearing

[9] The *Garofoli* review hearing is simply an evidentiary hearing to determine the admissibility of relevant evidence about the offence obtained pursuant to a presumptively valid court order. The review hearing is not intended to test the merits of any of the Crown’s allegations against Kyle Cater. The truth of the allegations asserted in an Affidavit and Information to Obtain as they relate to the essential elements of the offences with which Mr. Cater is charged remain to be proved by the Crown beyond a reasonable doubt at the trial proper. (*R. v. Pires; R. v. Lising, [2005] S.C.J. No. 67, paragraph 30*)

[10] The *Garofoli* review does not take on the character of a trial, “where the truth of the allegations is explored.” (*R. v. Ebanks, [2009] O.J. No. 5168, paragraph 21(Ont.C.A.)*) The reviewing judge is not assessing whether

...there were reasonable grounds to lay charges against the individual but rather whether there were reasonable grounds to believe that interception of his communications may assist in the investigation of the offence...It is not necessary for the trial judge in effect to conduct a trial as to whether

the reliability of the anonymous tipsters, the reliability and veracity of what the witnesses told the police, and the other evidence could be established beyond a reasonable doubt. (*Ebanks, paragraph 33*)

[11] And, as *Garofoli* makes clear:

56 The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[12] The law is settled that a *Garofoli* review “is to be based on the material before the authorizing judge.” (*R. v. Barzal, [1993] B.C.J. No. 1812, paragraph 35 (B.C.C.A.)* referring to *Garofoli; R. v. Pires and Lising, paragraph 8*) Furthermore, *Garofoli* establishes that if the Crown can support the authorization on the basis of the material, as edited, that went before the authorizing judge, the authorization is confirmed. (*Garofoli, paragraph 79*)

The Affidavit and Information to Obtain the Authorization

[13] In oral submissions on Mr. Cater’s *Stinchcombe* application, the Crown has described the Affidavit presented to the authorizing justice as detailing an intricate web of individuals acting in concert to commit criminal acts. Source information in the Affidavit indicates that the leader of SMOB (Spryfield Money Over Bitches) is BJ Marriott with trusted members including Jeremy LeBlanc, Shawn Shea and Ricky Butler. BJ Marriott is in prison but, according to source information, “has criminal associations in the Montreal area who will help him in illegal activities, such as drug trafficking, in the Halifax area, as well as elsewhere in Nova Scotia.” (*paragraph 59(b)*) The Affidavit details source information that Jeremy LeBlanc and Shawn Shea are affiliated with SMOB and heavily involved in violence and drug dealing. Dawn Anne Bremner, BJ Marriott’s mother, is also described by source information as actively involved in assisting her son’s illegal activities. She is in a relationship with Ricky Butler.

[14] The police investigation that led to an authorization to intercept private communications being sought relied on numerous confidential sources. Confidential police sources “E” and “F”, who provided information to police handlers about Kyle Cater, are described in the Affidavit as “confidential and reliable” sources. Sources “E” and “F” are both said to have had many months of contact with their police handlers. Their information is described as having been “confirmed by other means [other than searches] such as other source information, queries of police databases and physical surveillance.” In some instances, information provided by Sources “E” and “F” was not used for searches as doing so could have compromised them by revealing their identities.

[15] Kyle Cater is described in the Affidavit as a member of YMOB, a group of young males who have been recruited to work for SMOB. The Affidavit states about YMOB:

As mentioned throughout this Affidavit and corroborated through source information, physical surveillance and searches, YMOB members are recruited to work for SMOB. Part of the YMOB duties include carrying firearms, drug trafficking, running crack and weed shops, assisting SMOB members in acquiring and maintaining drug territory. (*paragraph 67(a)(i)*)

[16] Kyle Cater’s involvement with members of SMOB and YMOB is described in the Affidavit by Sources “E” and “F” and in the anonymous two page, handwritten note from Source “V”. The Affidavit details the source qualifications and addresses the limitations of the sources and their information, and provides considerable detail about investigative necessity in paragraphs 205 – 217.

[17] Source E provided the following information about Mr. Cater on November 6, 2007:

- That he is selling “crack” with Everette MacNeil for Joey Chan;
- That he and Everette MacNeil are dealing drugs from an older model red Honda Accord;
- That Kyle Cater’s cell phone number is 229-4400;
- That he wears a bullet proof vest;
- That he has just bought a .38 caliber gun;

[18] The anonymous, two page handwritten note from Source “V” received by police on February 25, 2008 contained the following information:

- That Kyle Cater is a member of the Spryfield “Young Mob”;
- That he lives on Hartlen Avenue in Spryfield and sold “coke, crack and marihuana, usually around the Spryfield area”;
- That he is “very short, small build and wears a lot of expensive jewelry;
- That he is known as “Cater” or “Peanut”.

[19] Source F told their police handler on February 28, 2008, the following about Kyle Cater:

- “SMOB” is the group controlling the drug trade in Spryfield and supplying large quantities of marihuana and cocaine to “YMOB”, who are a group of younger males, selling drugs at the street level;
- Kyle Cater goes by the name “Peanut” and was selling “up to pounds level of marihuana”;
- Kyle Cater is a member of the “YMOB” and is supplied by Jeremy LeBlanc, Shawn Shea or Joey Chan.

[20] On February 28, 2008, Shawn Shea was pulled over by police in Spryfield driving a rental car. Kyle Cater was in the front passenger seat. In the back seat was Justin Larade. A search of the vehicle produced a bag of “weed” and two bags of crack cocaine in the back seat. Kyle Cater was arrested for a breach of recognizance but was subsequently released without charge after having stated that he did not know Shawn Shea and Justin Larade had criminal records.

[21] On February 29, 2008, Source F told their police handler that:

- Kyle Cater deals marihuana;
- Brandon Hatcher owes Kyle Cater money;
- Kyle Cater’s phone number is 902-229-4400;
- Kyle Cater and other individuals described by Source F all refer to themselves as “YMOB.”

[22] On April 21, 2008, Source F told their police handler that:

- Kyle Cater is supplying Aaron Marriott's "weed and crack shop" at 48 Emerald Crescent, Spryfield with crack and weed while Aaron Marriott has been running it;
- Kyle Cater continues to be supplied drugs by Shawn Shea and Jeremy LeBlanc.

[23] On April 21, 2008, the Halifax Integrated Drug Section executed a *Controlled Drugs and Substances Act* warrant at 48 Emerald Crescent. Two males (Gerry Young and Chris Young) were present and arrested. A shoe box containing 21 foil wrapped quantities of marihuana in a larger ziplock bag, operational digital scales and packaging were seized. A wallet with identification in the name of Gerry Young, \$315 cash and a score sheet were found. The score sheet had amounts of money owed to Kyle Cater written on it. A small marihuana grow with five plants was found upstairs in the bedroom of Chris Young. Next to the stove in the kitchen were large quantities of baking soda and vinegar. Cocaine swabs of the stove were positive. The police believed that cocaine was being cooked into crack at this location. (*paragraph 141(f), Affidavit*)

[24] The Affidavit for the authorization indicates that "Information from Source F was used as part of the grounds" in obtaining the warrant for 48 Emerald Crescent.

[25] Source F told their police handler on May 5, 2008 that R. S. was selling and holding cocaine for Kyle Cater. The handler was told that S. was holding Kyle Cater's cocaine "at his residence at 12 Foxwood Terrace, apartment 3." The Affidavit indicates that the police located R. S. in the database repository "VERSATERM" maintained and used by the Halifax Regional Police and RCMP in the Halifax Regional Municipality. In the Affidavit it is stated that although VERSATERM confirmed a current address for S. on Herring Cove Road and a previous address on Lynnett Road, "He has never had an address on Versaterm for Foxwood Terrace."

[26] On May 28, 2008, Source F repeated to their police handler that R. S. was "selling and holding crack cocaine for Kyle Cater."

[27] On June 6, 2008, Halifax Regional Police did a compliance check for Kyle Cater at his address on Purcells Cove Road in relation to conditions he was on. The Affidavit confirms that Mr. Cater was at home at the time of the compliance check.

[28] On July 28, 2008, Source F reported to their police handler that R. S. was selling crack for Kyle Cater and that Mr. Cater was being supplied by Jeremy LeBlanc and Shawn Shea. Source F reiterated that Kyle Cater's phone number was 229-4400.

[29] In the course of the investigation, Dialed Number Recorder Warrants were obtained by police "for telephone information...relating to phones either subscribed to, or believed to be used by, the targets..." identified in the Affidavit. (*paragraph 188, Affidavit*)

[30] The Affidavit indicates that no calls were recorded between Kyle Cater's number and Joey Chan's (*paragraph 196(f)*) in the period of March 3, 2008 when the DNR Warrant was granted to April 9, 2008 when Joey Chan was arrested and remanded to jail.

[31] DNR Warrants were granted for the period of April 30, 2008 – June 27, 2008 for phones believed to be used by Jeremy LeBlanc and Shawn Shea, both targets of the investigation. As noted earlier, source information indicated to police that Kyle Cater was being supplied drugs by Jeremy LeBlanc and Shawn Shea. During the period of April 30, 2008 – June 27, 2008, Jeremy LeBlanc's phone had 166 phone contacts with 902-229-4400, believed to be used by Kyle Cater and Shawn Shea's phone had 176 phone contacts with 902-229-4400. Jeremy LeBlanc's phone had 840 phone contacts with a cellular number believed to be used by Shawn Shea.

[32] A DNR Warrant for a cellular number believed by police to be used by two other investigation targets, Dawn Anne Bremner and/or Ricky Butler, indicated four phone contacts with 902-229-4400, and Dawn Anne Bremner's business cellular phone indicated one contact with 902-229-4400.

[33] The phones that were subject to the DNR Warrants recorded numerous contacts amongst other targets of the investigation and individuals named in the Affidavit as either members or associates of SMOB or YMOB.

[34] The Affidavit does not detail what Ms. Cooper claims are many police stops and searches of Kyle Cater which produced no evidence of any illegal activity. I dealt with this issue in my decision on Mr. Cater's *Stinchcombe* application (2011 NSPC 86):

[32] I do not accept Ms. Cooper's submission that silence in the ITO about police stops and searches of Mr. Cater with negative results was a material omission in the material put before the authorizing justice. That information, whatever it may have consisted of, was irrelevant information. As *Ebanks* held: "The affiant must exercise some judgement in deciding what should and should not be included in a good and effective affidavit." (*R. v. Ebanks*, [2009] O.J. No. 5168, paragraph 43 (Ont.C.A.))

[35] The Crown has the following to say in its Brief about the Affidavit and the source information relating to Mr. Cater:

...The corroborative value of the three (3) independent sources who specifically refer to Mr. Cater's links with this organization [referring to the web of inter-connected individuals being investigated] have to be considered in the context of the information provided about the organization by the other sources and what else was revealed by the other investigative measures taken by the Police. On the basis of the source information, the Dialed Number Recorder Warrant results linking Kyle Cater's phone to the other targets and the results of the other investigative measures described in the affidavit, it is clear that the Issuing Justice felt that there was sufficient information provided to satisfy the statutory prerequisites...(paragraph 17, Brief submitted on behalf of the Crown)

Reviewing the Affidavit

[36] As I indicated earlier, Ms. Cooper has attacked the reliability of the source information about Mr. Cater. In distilling her submissions on this issue, I have identified below her complaints about the source information and the relevant Affidavit content that was before the authorizing justice.

Source E

- Ms. Cooper makes the submission that in the period of November 2007 – June 11, 2008, Source E's information was never tested by way of search warrant. According to the Affidavit, Source E provided information on two

occasions which could have been used in search warrants, but the information was not acted on in either case, thus the reliability of the information was “not tested or confirmed.” (*paragraph 25 (g) and (h), Affidavit*)

I note that the Affiant discusses the limitation of searches in paragraph 209(e) of the Affidavit, noting the Affiant’s belief that the execution of search warrants will not identify who “all the co-conspirators are, reveal their respective roles in the conspiracy and the chain of command in this criminal network.”

- During the November 2007 – June 2008 period of Source E’s informing on Mr. Cater, according to Ms. Cooper, Mr. Cater was searched twice in a red Honda and no drugs were found. The omission of this information from the Affidavit is described by Ms. Cooper as “misleading” and not “full, frank and fair disclosure.” (*paragraph 106, Brief submitted on behalf of Kyle Cater*)

I do not regard the absence of this information, or any information about police stops and searches of Mr. Cater with negative results, to be a material omission in the Affidavit. Such information is, in my view, irrelevant.

- Ms. Cooper also submits that the police found no phone calls between Mr. Cater and Joey Chan “so they know this too and fail to add this.” She offers the opinion that “it is not very likely that Mr. Cater is selling crack for Joey Chan, if there are never any phone calls between them.”

Paragraph 196 (f) of the Affidavit in fact indicates that a DNR Warrant for Joey Chan’s phone revealed no calls to phones believed to be used by Kyle Cater and certain other targets of the investigation. This information was explicitly disclosed to the authorizing justice.

- Ms. Cooper has argued that the DNR Warrant information, which I referred to earlier in these reasons, showing phone contact between phones believed

by police to be used by Jeremy LeBlanc, Shawn Shea and Kyle Cater, all targets of the investigation, is indicative of nothing as there is no evidence that any of these individuals were actually making these calls, especially as the phones being used were subscribed to by other individuals.

Source information indicated to police that the phone numbers that were the subject of the DNR Warrants were being used by the identified targets. There is no evidence to dispute this. Sources E and F each told police that Kyle Cater's phone number was 229-4400. A VERSATERM inquiry by the Affiant established that this police database referenced 229-4400 as Kyle Cater's cell phone number. There is no evidence that undermines the inference the authorizing justice could have drawn that the calls recorded as a result of the DNR Warrants were calls between Jeremy LeBlanc, Shawn Shea and Kyle Cater, and between Joey Chan and Jeremy LeBlanc, Shawn Shea, and Dawn Anne Bremner, amongst others. In light of the source and VERASATERM information, suggesting that someone other than Kyle Cater was having phone conversations with Jeremy LeBlanc and Shawn Shea is pure speculation.

The criminal records of Jeremy LeBlanc and Shawn Shea were before the authorizing justice and indicate that both targets have prior convictions for possession of a controlled substance for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*. Both Jeremy LeBlanc and Shawn Shea also had, at the time the authorization for the intercepts was granted, serious *Criminal Code* offences on their records.

The DNR Warrants tie Kyle Cater into an association with targets who had criminal records for the type of illegal activity being investigated. It would have been a reasonable inference by the authorizing justice that the contact between Kyle Cater and Jeremy LeBlanc and Shawn Shea was for an illicit purpose.

- Ms. Cooper states that Everette MacNeil became a police informant in August 2007 and that it is therefore unlikely that Mr. Cater would be in a car with Mr. Everette as "his former friends no longer associate with him", a fact she says was known to the police.

There is no evidence before me to establish this allegation and even if there was, the suggestion that Mr. Cater would not associate with Mr. MacNeil presupposes Mr. Cater would have known about this and amounts to speculation.

- Ms. Cooper notes that the police received information from Source E about Kyle Cater on November 6, 2007 (that he and Everette MacNeil were selling crack for Joey Chan, that they were dealing drugs from an older model red Honda Accord, that Kyle Cater's phone number was 229-4400, and that Kyle Cater was wearing a bullet proof vest) (*paragraph 90, Affidavit*) and that on November 9, 2007 when surveillance was made of the residences of Kyle Cater and Joey Chan "to determine their activities", only information about Joey Chan's movements are noted in the Affidavit. As no drug activity was noted, Ms. Cooper submits that the Affidavit is "misleading" and Source E's information "was not corroborated and was in fact wrong." (*paragraph 110, Brief submitted on behalf of Kyle Cater*)

The fact that surveillance neither produced information about Kyle Cater's activities nor showed him associating with Joey Chan does not establish that Source E was wrong. It is also not misleading when all the Affidavit does is indicate Source E's information and record what was observed through surveillance, especially given that the Affidavit addresses the limitations of physical surveillance in paragraph 208(1).

- Ms. Cooper also submits that the physical surveillance "showed no connection between Mr. Chan and Mr. Cater, which is also significant, in that the source's information was that they were selling drugs together." (*paragraph 110, Brief submitted on behalf of Kyle Cater*)

The Affidavit actually does not indicate anywhere that Source E told police Kyle Cater and Joey Chan "sold drugs together." Source E told police on November 6, 2007 that Kyle Cater and Everette MacNeil were selling crack "for Joey Chan." (*paragraph 90, Affidavit*)

The successes and limitations of physical surveillance of the targets of the investigation are detailed in the Affidavit at paragraphs 207 – 208 (pages 209 – 213) with the Affiant concluding as follows:

It is my belief that surveillance has not resulted, and will not result, in obtaining evidence of all the co-conspirators, known and unknown at this point, in the trafficking of controlled substances and in the commission of Criminal Code offences. Some of these persons have different roles in regards to the trafficking, and are never personally with other targets, and never are in possession of the controlled substances, yet are involved in the conspiracy to traffick...(paragraph 208(1), Affidavit)

- Ms. Cooper submits that Source E is shown to have been unreliable in relation to information about other targets of the investigation. In support of this submission, she refers to Source E's information to police on January 8, 2008 that Jeremy LeBlanc and Shawn Shea were responsible for beating up Ronnie Snelgrove on January 7, 2008. Source E told police that Ronnie Snelgrove confided in him/her about the beating and identified Jeremy LeBlanc and Shawn Shea as the assailants who beat him because they suspected him of being a "rat". The Affiant checked VERSATERM and learned that Ronnie Snelgrove was badly beaten on January 7, 2008 and had refused to identify his attackers. According to the Affidavit, Mr. Snelgrove's wife started to give a statement to police until her son told her that was how people in Spryfield get killed and she refused to cooperate further. Source E also told police that Jeremy LeBlanc and Shawn Shea had threatened to kill Albert LeBlanc. The Affiant reviewed VERSATERM and found no police complaint from Albert LeBlanc about any death threats against him by Jeremy LeBlanc and Shawn Shea. (paragraph 113, Affidavit)

The facts disclosed in the Affidavit that Ronnie Snelgrove did not name as his attackers the men Source E told police had assaulted him and the absence of any formal complaint from Albert LeBlanc concerning threats by Jeremy LeBlanc and Shawn Shea raises no issue with respect to the reliability of what Source E told police. In the context of discussing the use of police

agents in paragraph 211(d) of the Affidavit, the Affiant made the following statements:

As indicated in this Affidavit there is also a culture of fear and intimidation that permeates SMOB, YMOB and associates. As already illustrated throughout this Affidavit various forms of violence and threats of violence are used by this group such as explicit threats, drive by shootings, shootings, assaults, possession of handguns, attempted murders, murders and other forms of intimidation. These acts are committed not only against enemies, but those considered to be providing information to the police...It is made clear that anyone who provides information to the police, or otherwise cooperates with the police is taking a chance that they may face bodily harm or death...

- Ms. Cooper submits that because Source E's three police handlers did not describe identical motivations for Source E's involvement as a source, this is misleading. (*paragraphs 123 – 129, Brief submitted on behalf of Kyle Cater.*) Source E's first handler reported that Source E was motivated by financial gain and for personal moral reasons in wanting to help the police. Source E's subsequent police handlers told the Affiant that Source E was motivated by financial gain and seeking leniency with respect to outstanding charges. (*paragraphs 24 – 26, Affidavit*)

The fact that Source E's motivations may have expanded in the course of his/her involvement with police as a source is not an indication of unreliability.

- Ms. Cooper notes that only Source E's first handler received information that was tested "by way of three CDSA search warrants [that did not result] in negative searches." (*paragraph 24(c), Affidavit*) Ms. Cooper wonders what is meant by a "negative search" and whether Source E's information resulted in positive searches. (*paragraph 131, Brief submitted on behalf of Kyle Cater*)

I agree that the reference to information not resulting in “negative searches” in an Affidavit that in other places refers to warrants resulting in “positive searches” is somewhat unclear and raises in my mind at least a question about what exactly is meant by the term. However, having said that, it would have been reasonable for the authorizing justice to have inferred that “negative searches” are searches that turn up nothing and that information that is tested by way of *CDSA* searches that do not have “negative” results indicates source reliability. It is not an indication of unreliability even if it remains unclear why the police would not have said that the *CDSA* warrants resulted in “positive searches.”

- Ms. Cooper suggests that Source E was handed off from their initial police handler to subsequent police handlers, indicating that the handlers “wanted to get rid of them.” There was no further contact with Source E after May 2008 because Source E was “not providing [the police handler] with information that assisted his investigations, not due to any reliability issues.” (*paragraph 27, Affidavit*)

The discontinuing of contact with Source E and the issue of reliability is squarely dealt with in the Affidavit and the suggestion the police were handing off the source like an unpalatable hot potato is pure speculation, speculation that is not supported by anything found in the Affidavit.

- Ms. Cooper submits that Source E’s unreliability is evidenced by their continuing to engage in criminal activity (seeking leniency in relation to criminal charges) and states that Source E “has no respect for the law, is a serious criminal, spends their time with criminals and is continuing to commit crimes.” (*paragraph 126 – 130, Brief submitted on behalf of Kyle Cater*)

It is axiomatic that the police are obliged to get their information from people who like Sources “E” associate “freely with persons involved in criminal activity.” The Affidavit points this out. (*paragraph 24*) The fact that a confidential police source may continue to commit offences does not mean the source’s information is rendered less reliable. Issues such as

warnings about unsavoury witnesses testifying for the Crown and the scope of cross-examination by Defence of such witnesses are trial issues.

- Ms. Cooper submits that no weight should be given to the allegations made by Source E against Mr. Cater. “They are bald face (sic) statements that are not corroborated in any way and the source has no indicia of reliability.” (*paragraph 137, Brief submitted on behalf of Kyle Cater*)

Source F

- Ms. Cooper submits that the failure to provide the criminal record of Source F is “not full disclosure.”

In my decision on Mr. Cater’s *Stinchcombe* application I dealt with the issue of source criminal records and the potential for such information to reveal the identity of confidential sources. (*paragraphs 40 and 41*) It is not a failure of “full disclosure” for the police not to have included this information in the Affidavit.

- Ms. Cooper submits that as Source F is indicated in the Affidavit to have been “currently charged” (*paragraph 28 (b)*) and simultaneously giving information to police, this suggested the “strong possibility” Source F was motivated by obtaining leniency, “which raises concerns about the reliability of their information.” (*paragraph 141, Brief submitted on behalf of Kyle Cater*)

The Affidavit is explicit about the motivations of the sources supplying information to the police. This is an issue that would be relevant to the cross-examination of a Crown witness at trial but is not a matter of concern at the intercept authorization stage.

- Ms. Cooper submits that Affidavit paragraphs 28(e) and (f) are misleading. Paragraph 28(e) states that Source F provided information that “police were able to act on, has been corroborated through investigations conducted,

physical surveillance, police reports and information supplied by other confidential sources.” Paragraph 28(f) states that Source F supplied CDSA information that led to three CDSA searches under warrant where controlled drugs were seized, individuals arrested and charges laid. On another occasion, Source F’s information could not be acted on as the police handler felt it might disclose Source F’s identity. This information could not be confirmed by any other investigative means. (*paragraph 28 (f), Affidavit*)

These paragraphs are not misleading, either alone or read together.

- Ms. Cooper submits that Source F’s main piece of information about Kyle Cater – his alleged involvement in a crack cocaine shop at 48 Emerald Crescent - was not confirmed. She does not see the search of 48 Emerald Crescent as turning up any evidence connecting the activities at that address to Mr. Cater. (*paragraphs 164 – 172, Brief submitted on behalf of Kyle Cater*)

The Affidavit indicates that the search did locate a score sheet that had “amounts of money owed to Kyle Cater written on it.” (*paragraph 141(d)*) Whether this was actually a score sheet or a list of entirely legitimate debts is a trial issue, were this document to be introduced into evidence – which presumably it won’t be because Mr. Cater is not charged with possession for the purpose of trafficking. The Affidavit describes a score sheet. There is no evidence to contradict this description and nothing to support any suggestion that the police misrepresented the nature of this document.

- Ms. Cooper submits that Source F’s information to the police handler on February 28, 2008 that Kyle Cater is selling up to pounds of marijuana, is a member of the YMOB, and is being supplied by Jeremy LeBlanc, Shawn Shea or Joey Chan, lacks sufficient detail to make it credible. (*paragraph 149, Brief submitted on behalf of Kyle Cater*)

This is not the only source and other information that ties Kyle Cater into the activities of the other targets.

- Ms. Cooper submits that the February 28, 2008 stopping and searching of a car driven by Shawn Shea, with Mr. Cater as a passenger, which resulted in the seizure of crack cocaine and marijuana is not corroborative of Source F's information because Mr. Cater was not charged with any offences. Another passenger, Justin Larade was charged with a CDSA offence.

Whether charges are laid or not is a matter of police discretion. The authorizing justice would have known this. The fact that police did not charge Mr. Cater does not establish that Source F is unreliable. If anything, the February 28 police stop supports Source F's information associating Mr. Cater with drugs and individuals involved in the drug trade.

- Ms. Cooper submits that Source F's information on April 8, 2008 that Aaron Marriott and Brandon Martell run the crack cocaine shop at 48 Emerald Crescent and are supplied by Jeremy LeBlanc is shown to be false by the April 21, 2008 CDSA search of 48 Emerald Crescent. Neither Aaron Marriott nor Brandon Martell was located there and Ms. Cooper, submits, "there is not a crack cocaine shop there." (*paragraph 155, Brief submitted on behalf of Kyle Cater*)

The fact that neither Aaron Marriott nor Brandon Martell were at Emerald Crescent on the day of the police raid does not undermine Source F's reliability. Source F described Emerald Crescent as a "crack shop": according to the Affidavit, the police did find evidence crack was being cooked at that location. If anything, this supports Source F's reliability.

- Furthermore, submits Ms. Cooper, Source F told the police handler on April 21, 2008 that Kyle Cater supplied 48 Emerald Crescent with "crack and weed" while Aaron Marriott has been running it. (*paragraph 140 (a) and (b), Affidavit*) This, she says, is inconsistent with what Source F's information had been about 48 Emerald Crescent.

Source F's information was reliable enough that it was used as part of the grounds for obtaining the search warrant for Emerald Crescent which did produce evidence of a commercial trade in drugs.

- Ms. Cooper submits that Source F lacks credibility because they describe Mr. Cater variably as supplied with drugs by Shawn Shea and Jeremy LeBlanc (*paragraph 140(d), Affidavit*) and as being a supplier himself of drugs to 48 Emerald Crescent. (*paragraph 140(b), Affidavit*)

The two roles - being supplied and being a supplier - are not mutually exclusive.

- Ms. Cooper points out that although Source F indicated to the police handler on May 5, 2008 that R. S. was holding Kyle Cater's cocaine at his residence at 12 Foxwood Terrace, VERSATERM had no address for R. S. at Foxwood Terrace at any time. The Affidavit acknowledges this. (*paragraph 145(b)(ii)*) Source F tells the police handler on May 28, 2008 that R. S. is "selling and holding crack cocaine for Kyle Cater" and on July 23, 2008 that he is "selling crack" for him. (*paragraphs 147(h) and 154(b)*) According to Source F, Tyler Fitzgerald "watches over the crack in the apartment while R. S. is out." (*paragraph 154 (e)*) Ms. Cooper notes that Mr. S. does not have an address on Foxwood Terrace according to the police database. Ms. Cooper submits that Source F's information about Mr. Cater and Mr. S., the holding of cocaine at Foxwood Terrace, shows that Source F is unreliable. (*paragraph 184 – 187, 189,192, Brief submitted on behalf of Kyle Cater*)

The fact that Tyler Fitzgerald has no criminal record and R. S. has no record for drugs offences is seen by Ms. Cooper as significant to the issue of Source F's reliability. (*paragraphs 178 and 183, Brief submitted on behalf of Kyle Cater*)

All these facts about R. S.'s address and his criminal record and the lack of any record for Tyler Fitzgerald are disclosed in the Affidavit. (*paragraphs 145(b)(iii) and 154(e)(ii)*) The fact that 12 Foxwood Terrace was not shown

in the police database as an address for R. S. does not establish that he was not residing at and holding drugs at this location.

Source V

- Ms. Cooper notes that Source V produced “an anonymous, undated, handwritten note.” She indicates that the Affidavit states that “It is not possible to evaluate the credibility of the author and whether or not they have provided accurate information to the police in the past.” (*paragraph 52, Affidavit*)

Although Source V is unknown, he or she provided information about a number of SMOB and YMOB members who are the subject of allegations by other confidential police sources in the Affidavit. Source V’s information is consistent with other source information in the Affidavit. The Affiant fully disclosed the fact that Source V’s credibility could not be evaluated.

What is Required in an Affidavit Used to Obtain an Authorization?

[41] What is required in an Affidavit being used to obtain a Part VI authorization has been plainly set out in *R. v. Araujo*, [2000] 2 S.C.R. 992:

46...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.

47 A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong -- and much right -- with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions.

48 Finally, while there is no legal requirement for it, those gathering affidavit material should give consideration to obtaining affidavits directly from those with the best

firsthand knowledge of the facts set out therein, like the police officers carrying on the criminal investigation or handling the informers. This would strengthen the material by making it more reliable...

[42] The Affidavit I have reviewed is a very extensive, detailed and comprehensive Affidavit. It does not rely on boiler plate. It is not misleading. It is full and frank. It contains information obtained from police officers carrying on the investigation and handling the confidential informants. The limitations of the source information are apparent on a reading of the Affidavit and the Affidavit sets out the limitations of various investigative options, including the limitations inherent in the use of confidential sources.

[43] The Affidavit does not overstate or misrepresent the sources' reliability. The confidential sources E and F are not shown to be unreliable by an examination of the Affidavit. At no time in the Affidavit did the police indicate they regarded Sources E and F to be unreliable. The Affidavit states that Source E's original handler for 18 months described Source E as someone "whom he believes." (*paragraph 24*) Source F's handler described him/her in the Affidavit as someone "whom he believes." (*paragraph 28*)

[44] The police disclosed that they could not verify certain information these sources provided. There is independent confirmation for some of the information about Kyle Cater as I have discussed. The Affidavit indicates that the Affiant spoke "with individuals responsible for the administration of confidential sources, or source handlers, [and] learned that none of the sources "A" to "U" are persons identified in paragraph 4 of this Affidavit", the paragraph that describes the targets of the investigation. (*paragraph 54*) The source information and the DNR Warrant results connects Kyle Cater into the network of targets being investigated for serious criminal offences.

[45] The Affidavit provides an ample basis on which the authorizing justice could have concluded that there were reasonable and probable grounds to believe that Kyle Cater was engaged in drug trafficking activities with or on behalf of other named targets and other individuals and that the interceptions being sought may assist in the investigation of these activities. Mr. Cater's section 8 *Charter* rights were not violated by the granting of the authorization and the evidence obtained as a result of the authorization is not excluded from Mr. Cater's trial.