# SUPREME COURT OF NOVA SCOTIA

**Citation:** *R. v. D.M.D.*, 2016 NSSC 343

**Date:** 20161221
**Docket:** CRH. No. 447536
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

D.M.D.

| **Restriction on Publication: Publication Ban until conclusion of trial** |
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| **Editorial Notice:** | Identifying information has been removed from this electronic version of the judgment. |
| **Judge:** | The Honourable Justice Peter Rosinski |
| **Heard:** | December 6, 2016, in Halifax, Nova Scotia |
| **Counsel:** | Rick Woodburn and Brian Cox for the Crown<br>Brad Sarson and Brandon Rolle, for the Defence |

**By the Court:**

**Introduction**

[1] As Justice Arnold stated in *R. v. Way*, 2014 NSSC 180, at para. 63:

> …when a human source handler speaks directly to the source the SHNs are the raw notes of the human source handler. The SDRs are reports prepared from the SHNs. The SDRs generally are a boiled-down version of the SHNs, prepared in an effort to remove information that could potentially identify the source. The ITO often contains a more significantly edited version of the SDRs. The Crown argues that in this case the ITO was specifically drafted in such a way as to avoid the possibility of identifying the sources. **Since the ITO contains an edited version of the information that was possibly relied on by the police when creating the SDRs it is understandable why an accused person would want to have the SHNs and the SDRs to compare to the ITO when challenging the validity of a search warrant. An accused may ask: Was the judicial official who authorized the search warrant provided with an ITO that accurately reflects what the source originally told the police?**
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> [My emphasis added]

[2] Whether such SHNs and SDRs are presumptively disclosable by the Crown as part of its "first party" disclosure obligations, particularly where the disclosure is sought to challenge the sufficiency of the grounds to support the issuance of a Production Order, is in issue in this case, and the relevant law has not been authoritatively settled.

[3] Though the court was aware of this unresolved issue, as Justice Moldaver stated for the court in *World Bank Group v Wallace*, 2016 SCC 15, at paras. 131-132:

> **We need not address the boundaries of *Stinchcombe* disclosure in the *Garofoli* context, as that issue is not before us**. However, it is clear that lower courts consider disclosure and production of documents [from third parties] to be analogous to cross examination [of an affiant who created the supporting documentation upon which a Production Order, search warrant or wiretap etc. was based]. They have therefore applied the same relevance threshold [a reasonable likelihood that the records sought will be of probative value to the issues on the *Garofoli* application]. Where courts have departed from this proposition, they have done so in cases where documents being sought were found to come within

> *Stinchcombe* disclosure requirements… It is axiomatic that **if in fact the documents in question are in the hands of the authorities and are determined to be subject to *Stinchcombe* disclosure, they must be produced.**
>
> We agree that these two discovery tools – cross examination of affiants and third-party production orders – should be subject to the same relevance threshold. **Therefore, to obtain third-party production in the *Garofoli* context, an accused must show a reasonable likelihood that the records sought will be of probative value to the issues on the application**. As with cross -examination of an affiant, it must be reasonably likely that the records will be *useful.*
>
> [my emphasis added]

[4] The *Stinchcombe/McNeil* relevance threshold for Crown disclosure requires disclosure if there is a reasonable possibility that the withholding of information will impair the right of an accused to make full answer and defence, unless the non-disclosure is justified otherwise, or by the law of privilege: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at paras. 21-22, per Sopinka J.

[5] However, as Justice Willcock stated for the court in *R. v. McKay*, 2016 BCCA 391, at para. 49-51:

> **49** The judgment in *Stinchcombe* left a number of questions open for further consideration, including those addressed by the trial judge in the case at bar:
>
> > a) what material in the hands of the police may be said to be in the possession of the Crown;
> >
> > b) of that material, what may be said to be relevant to a *Garofoli* application; and
> >
> > c) how is the scope of informer privilege to be circumscribed?
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> **50** As the trial judge noted in this case, subsequent jurisprudence, ***McNeil* in particular, suggests, at least insofar as evidence going to the case at trial is concerned, the first question is largely settled by reference to relevance. The police have an obligation to disclose all relevant material pertaining to its investigation of the accused to Crown counsel (the "fruits of the investigation" or the "investigative file"). Therefore, it may be assumed that all relevant evidence in the possession of the investigating police will be provided to or obtained by the prosecutor.** It is not open to Crown counsel to explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it: see *McNeil* at paras. 14, 20-24.
>
> **51 The present case turns on the second and third questions: the scope of material relevant to a *Garofoli* application and the restrictions on production necessitated by informer privilege. The question of relevance is relatively**

> **simple in relation to the *Stinchcombe* obligation to disclose material that strengthens or weakens the prosecution's case at trial. It is much less clear in relation to information with respect to how the investigation was conducted, sought on a *Garofoli* application, challenging the validity of a search warrant or wiretap authorization.**
>
> **[my emphasis added]**

[6] I agree with the answers given to those two questions, by Justice Willcock in *McKay*, at para. 159:

> On a *Garofoli* application, there is no presumption of disclosure of background information other than material referred to in an ITO or affidavit in support of a wiretap authorization. Background material may be producible on a case-specific basis if the defence establishes likely relevance to an issue on the application. Even where the relevance threshold is met, production of SHNs and SDRs may not be consistent with informer privilege.

## Background

[7] D.M.D. is charged with manslaughter - Section 236 *Criminal Code* of Canada- an offence which carries a maximum of life imprisonment. His trial by jury is scheduled for 20 days starting on February 27, 2017. The Crown is expected to introduce evidence regarding the usage and location of, as well as content sent to or received by, a telephone linked to the number [...]. The Crown alleges that the telephone number was consistently used by D.M.D. around the time of K.D.'s death in downtown Halifax during the early morning hours of August 11, 2012.

[8] On August 29, 2012, Detective Constable Tyler Anstey sworn affidavit before Justice of the Peace, Elizabeth Mullally seeking a Production Order pursuant to Section 487.012 of the *Criminal Code* to require Telus Communications Company to produce:

a. Subscriber name, address and all billing information records pertaining to the following phone number: [...];

b. All phone calls, text messages, and data plan communication sent and received from August 1, 2012 to August 29, 2012, by phone number [...]; and

c. Call details and telephone subscriber information for all incoming and outgoing calls and text messages, all cellular tower information, times, date and locations for towers accessed for the following dates and times for the following cellular telephone; August 1, 2012 to August 29, 2012, by phone number [...].

[9] As part of the unredacted affidavit in evidence, the Justice of the Peace had information therein from three confidential informant sources: an anonymous Crime Stoppers tip "Source B"; and two confidential informants known to their police source handlers.

[10] D.M.D. has made an application for disclosure from the Crown:

a. All notes of the affiant Detective Constable Tyler Anstey, made while drafting the affidavit seeking production orders in this matter;

b. Source debriefing reports reviewed by Detective Constable Tyler Anstey for the purpose of drafting affidavit seeking Production Orders in this matter. Notably:

   a. Source debriefing report reviewed on August 29, 2012, submitted by Detective Constable Jonathan Jeffries in relation to confidential human source, "Source A";

   b. Source debriefing report reviewed on August 29, 2012, submitted by Constable Jody Allison of the RCMP in relation to information gathered from "Source C";

   c. All Source Handler Notes for "Source A" and "Source C" insofar as they relate to the allegation from August 11, 2012;

   d. All documents (electronic or otherwise that the affiant relied upon or reviewed in drafting the ITO).

[11] The evidence suggests that no Source Handler Notes [SH notes] were created. However, Source Debriefing Reports [SDRs] do exist.

[12] On January 23 – 24, 2017, D.M.D. will challenge the sufficiency of grounds to obtain the Production Order placed before the Justice of the Peace. In the herein application, he has requested the court to review the Crown's decision to refuse to disclose any Source Debriefing Reports for Source A or C.

**The positions of the defence and Crown**

[13] D.M.D. suggests that the disclosure is appropriate, *inter alia* because, it could reasonably relate to "the reliability of the confidential human sources": It could confirm whether or not the source was relaying hearsay information to their handler; if Source A was present in the vicinity, it could provide information "regarding the intoxication level, if any, of Source A and his or her ability to observe the incident"; and could clarify whether, although not paid for information by August 29, 2012, "any arrangement was in place for payment at a later date with respect to this information which would speak to the potential financial motivation of Source A";… similar concerns arise from a review of the information provided by Source C."

[14] D.M.D. says he does not wish to trench on the proper limits of confidential informant privilege. He argues that the court should be provided with "sealed copies of the original, unredacted version of all the requested disclosure" and that the court determine if there is relevant material, which is not protected by the privilege and should be disclosed.

[15] He argues that the materials sought are properly seen as "first party disclosure" – i.e. the materials are part of the "fruits of the investigation" and therefore "should form part of the first party disclosure package provided to the Crown for its assessment of relevance according to the edicts of *Stinchcombe*" at para. 53, *R. v. McNeil*, 2009 SCC 3, per Charron J .

[16] Alternatively, he argues that in relation to the presumptively irrelevant (i.e. as outside of first party disclosure) materials sought, they should nevertheless be ordered disclosed since he has met the modest threshold to show relevance to the issue of the sufficiency of grounds in the affidavit of Detective Constable Tyler Anstey, per Arnold J., in *R. v. Way*, at para. 110.

[17] The Crown argues that the materials sought are not "first party disclosure". However, alternatively the Crown does accept that the test for materials beyond "first party disclosure" are properly scrutinized as disclosable, based on the "modest relevancy threshold". Having said that, they are rightly insistent that any

disclosure must respect the full and generously interpreted protection afforded by informer privilege.

[18] D.M.D.'s application to have the court order the Crown to disclose to him the relevant SDRs (subject to redaction by authorized police authorities to protect the informer privilege of Sources A and C), is initially justified by him as relevant to a challenge to the facial validity of the Production Order, but he has not ruled out a sub-facial challenge thereto as well.

**A review of *World Bank Group v. Wallace***

[19] In *World Bank Group v. Wallace*, 2016 SCC 15, the court discussed "the *Garofoli* framework" in the context of assessing the reasonableness of a search, specifically wiretaps pursuant to ss. 185 and 186 of the *Criminal Code*. While that case dealt with third party production in the context of the *Garofoli* framework, the court's restatement of the common law, and comments about disclosure requirements, are the most recent word from that court.

[20] In *World Bank Group*, the trial judge concluded that the documents sought by the accuseds were likely relevant to issues that would arise on a *Garofoli* application:

> Virtually all of the information relied on by the affiant [RCMP Sgt. Driscoll] in the affidavits filed in support of the wiretap authorizations came from the INT and its investigative file. [Sgt. Driscoll] did not keep handwritten notes of his work preparing the affidavits. Accordingly, the trial judge ordered that the documents listed under headings a, b, c and e, in para. 23 above, be produced for review by the court, the second step in an *O'Connor* application. - at para. 30.

[21] Those documents, ordered produced from the World Bank Group, of which the INT was its investigative branch, included:

> a- all notes, memoranda, emails, correspondence and reports received or sent by Mr. Paul Haynes of INT regarding the investigation ;
>
> b- all source documents from all so-called "tipsters" sent to INT, whether or not such information was shared with the RCMP as part of INT's cooperation with the RCMP investigation into the Padma Bridge project;
>
> c- all emails and other communications between INT and the tipsters;…
>
> e- any other investigative materials relevant to the investigation in the possession of other World Bank officials, including [a listing of individual's names].- at para. 23.

[22] The court concluded:

> [The accuseds] argue that the documents they seek are likely relevant to their *Garofoli* application and therefore should be produced. In the alternative, they argue that the documents in the World Bank Group's possession should be presumed relevant because certain documents which would have been disclosed under *Stinchcombe* were lost or not created.
>
> Respectfully, the trial judge erred in assessing both arguments. Although he correctly placed the burden on the [accuseds], he did not properly assess the relevance of the documents being sought. In particular, he blurred the distinction in a *Garofoli* application between the affiant's knowledge and the knowledge of others involved in the investigation.
>
> In this case, that distinction is crucial. While the documents sought may be relevant to the ultimate truth of the allegations in the affidavits… they are not reasonably likely to be of probative value to what Sgt. Driscoll knew or ought to have known since he did not consult them. Even if the documents were to reveal material omissions or errors in the affidavits, this would not undermine the preconditions for issuing the authorization unless there was something in the documents which showed that Sgt. Driscoll knew or ought reasonably to have known of them. -at paras 137-138.

[23] The court went on to more generally examine the disclosure obligations under *Stinchcombe*, as contrasted with the regime under *O'Connor* regarding the right of parties to seek production of materials in the possession of third parties - see paras. 112 – 135:

> O'Connor and Stinchcombe
>
> **112** The respondents seek the INT's records, listed above at para. 23, under the *O'Connor* framework for third party production. The *O'Connor* framework addresses the right of an accused to obtain documents that are in the hands of third parties. In view of the privacy interests at stake, an accused bears the burden of demonstrating that the documents sought are "logically probative to <u>an issue at trial or the competence of a witness to testify</u>" (*O'Connor*, at para. 22 (emphasis in original)).
>
> **113** An *O'Connor* application is a two-step process. At the first step, an accused must demonstrate that the records sought are *likely relevant* to an issue at trial, such as the credibility or reliability of a witness. If an accused meets the likely relevance threshold, the documents will be produced to the trial judge, who must then weigh the "salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence" (*O'Connor*, at para. 30).

**114** This process is distinct from the *Stinchcombe* framework which applies when documents are in the hands of the Crown or the police. Under that framework, the Crown must disclose all documents in its "possession or control" which are relevant to an accused's case (*R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 22; R. *v. Stinchcombe*, [1991] 3 S.C.R. 326). To withhold disclosure, the Crown must demonstrate that the documents sought are "clearly irrelevant, privileged, or [that their] disclosure is otherwise governed by law" (*McNeil*, at para. 18; see also *Stinchcombe*, at p. 336).

**115 *Stinchcombe* places the burden on the Crown to justify non-disclosure. In contrast, *O'Connor* requires the accused to justify production. These two regimes share a fundamental purpose: protecting an accused person's right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure when required.**

(3) The Proper Threshold for Third Party Production on a *Garofoli* Application

**116** The respondents seek the INT's records in a *Garofoli* application designed to challenge the wiretap authorizations. A typical *O'Connor* application is designed to deal with production of documents that relate to material issues at trial bearing directly on the guilt or innocence of the accused. A *Garofoli* application is more limited in scope, relating as it does to the admissibility of evidence, namely intercepted communications (*Pires*, at paras. 29-30). This is an important distinction -- and one which requires clarification. An *O'Connor* application made in the context of a *Garofoli* application must be confined to the narrow issues that a *Garofoli* application is meant to address. Policy considerations in this context dictate a similar narrow approach.

**117** The *Garofoli* framework assesses the reasonableness of a search when wiretaps are used to intercept private communications. A search will be reasonable if the statutory preconditions for a wiretap authorization have been met (*Garofoli*, at p. 1452; *R. v. Duarte*, [1990] 1 S.C.R. 30, at pp. 44-46).

**118** In this case, the authorization was sought under ss. 185 and 186 of the *Criminal Code*. The statutory preconditions are straightforward. Granting an authorization must be in the best interests of the administration of justice (*Criminal Code*, s. 186(1)(a)). This means that there must be reasonable grounds to believe an offence has been committed and that information concerning the offence will be obtained (*Duarte*, at p. 45). Other investigative procedures must also "have been tried and have failed", be "unlikely to succeed", or the matter must be urgent "such that it would be impractical to carry out the investigation of the offence using only other investigative procedures" (*Criminal Code*, s. 186(1)(b)).

**119** A *Garofoli* application does not determine whether the allegations underlying the wiretap application are ultimately true -- a matter to be decided at trial -- but rather whether the affiant had "a reasonable belief in the existence of the requisite statutory grounds" (*Pires*, at para. 41). What matters is what the

affiant knew or ought to have known at the time the affidavit in support of the wiretap authorization was sworn. **As this Court stated in *Pires***, albeit in the context of an application to cross-examine the affiant:

> ... **cross-examination that can do no more than show that some of the information relied upon by the affiant is false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known that it was false. We must not lose sight of the fact that the wiretap authorization is an investigatory tool. [para. 41]**

When an accused seeks evidence in support of a *Garofoli* application by way of cross-examination, this narrow test must be kept in mind. As we will explain, the same test applies when production of third party records is sought.

**120 As a general rule, there are two ways to challenge a wiretap authorization: first, that the record before the authorizing judge was insufficient to make out the statutory preconditions; second, that the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at paras. 50-54; *Pires*, at para. 41; see also *R. v. Grant*, [1993] 3 S.C.R. 223, on the exclusion of unconstitutionally obtained information from warrant applications). The challenge here is brought on the second basis, sometimes referred to as a subfacial challenge.**

**121 In view of the fact that a subfacial challenge hinges on what the affiant knew or ought to have known at the time the affidavit was sworn, the accuracy of the affidavit is tested against the affiant's reasonable belief at that time. In discussing a subfacial challenge to an information to obtain a search warrant, Smart J. of the British Columbia Supreme Court put the matter succinctly as follows:**

> **During this review, if the applicant establishes that the affiant knew or should have known that evidence was false, inaccurate or misleading, that evidence should be excised from the [information to obtain] when determining whether the warrant was lawfully issued. Similarly, if the defence establishes that there was additional evidence the affiant knew or should have known and included in the [information to obtain] in order to make full, fair and frank disclosure, that evidence may be added when determining whether the warrant was lawfully issued.**
>
> **(*R. v. Sipes*, 2009 BCSC 612, at para. 41 (CanLII))**

**122** Smart J.'s comments apply equally to a *Garofoli* application (see *R. v. McKinnon*, 2013 BCSC 2212, at para. 12 (CanLII); see also *Grant*, at p. 251; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 40-42). **They accord with this Court's observation in *Pires* that an error or omission is not relevant on a *Garofoli* application if the affiant could not reasonably have known of it (para. 41). Testing the affidavit against the ultimate truth rather than the**

**affiant's reasonable belief would turn a *Garofoli* hearing into a trial of every allegation in the affidavit, something this Court has long sought to prevent (*Pires*, at para. 30; see also *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 21).**

**123 When assessing a subfacial challenge, it is important to note that affiants may not ignore signs that other officers may be misleading them or omitting material information. However, if there is no indication that anything is amiss, they do not need to conduct their own investigation (*R. v. Ahmed*, 2012 ONSC 4893, [2012] O.J. No. 6643 (QL), at para. 47; see also *Pires*, at para. 41).**

**124 With these principles in mind, while we do not foreclose the possibility that the *O'Connor* process may be used to obtain records for purposes of a *Garofoli* application, the relevance threshold applicable to such an application is narrower than that on a typical *O'Connor* application. Specifically, where an accused asserts that third party documents are relevant to a *Garofoli* application, he or she must show a reasonable likelihood that the records sought will be of probative value to the issues on the application. The fact that the documents may show errors or omissions in the affidavit will not be sufficient to undermine the authorization. They must also support an inference that the affiant knew or ought to have known of the errors or omissions. If the documents sought for production are incapable of supporting such an inference, they will be irrelevant on a *Garofoli* application (*Pires*, at para. 41).**

**125** This test for third party production is also consistent with another form of discovery on a *Garofoli* application: cross-examination of the affiant -- and so it should be. Both forms of discovery serve similar purposes and engage similar policy concerns. They should be treated alike.

**126 On a *Garofoli* application, an accused may only cross-examine the affiant with leave of the trial judge. Leave will only be granted if the accused shows "a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge" (*Pires*, at para. 3; see also *Garofoli*, at p. 1465). Simply put, the accused must show that the cross-examination is reasonably likely to be *useful* on the application.**

**127** In *Pires*, this Court upheld the constitutionality of the requirement that leave be sought to cross-examine the affiant, as well as the applicable threshold. **The Court did so for three reasons. First, only a limited range of questioning will be relevant to the test on a *Garofoli* application (*Pires*, at paras. 40-41). The threshold primarily ensures that the cross-examination will be relevant (paras. 3 and 31). Second, cross-examination creates a risk of inadvertently identifying confidential informants (para. 36). Third, cross-examination can create waste and unnecessary delays. The threshold is "nothing more than a**

**means of ensuring that ... the proceedings remain focussed and on track" (para. 31).**

**128** The three justifications that warrant limiting cross-examination of the affiant apply with equal force to third party production applications. First, the issues on a *Garofoli* application remain narrow. The relevance of the information sought will be judged in relation to these narrow issues. A finding that some information in Sgt. Driscoll's affidavits is false will only be relevant if it tends to support the inference that he knew or ought to have known that it was false.

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

**130** Finally, broad third party production requests can derail pre-trial proceedings. The production order in this case could involve hundreds or even thousands of pages. Sweeping disclosure requests are a common cause of delays (P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at pp. 45-55). The same can be said of third party requests. The process of obtaining, reviewing and vetting documents in wiretap cases may require significant resources on the part of police (see, on this point, R. W. Hubbard, P. M. Brauti and S. K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), vol. 2, at pp. 8-12 to 8-12.7). In the case of an *O'Connor* request, the same would apply to third parties. A narrow relevance threshold is therefore needed to prevent "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" production requests (*R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32, quoted by Lamer C.J. and Sopinka J., who were in the majority on this issue, in *O'Connor*, at para. 24).

131 **Lower courts have acknowledged these concerns, both as regards documents in the hands of the police and documents in the hands of third parties** (*Ahmed*; *R. v. Ali*, 2013 ONSC 2629; *R. v. Alizadeh*, 2013 ONSC 5417; *Croft*; *R. v. Way*, 2014 NSSC 180, 345 N.S.R. (2d) 258). **We need not address the boundaries of *Stinchcombe* disclosure in the *Garofoli* context, as that issue is not before us. However, it is clear that lower courts consider disclosure and production of documents to be analogous to cross-examination. They have therefore applied the same relevance threshold. Where courts have departed from this proposition, they have done so in cases where the documents being sought were found to come within *Stinchcombe* disclosure requirements** (see *R. v. Bernath*, 2015 BCSC 632, at paras. 78-80 (CanLII); *R. v. Edwardsen*, 2015 BCSC 705, 338 C.R.R. (2d) 191, at paras. 73-

74; *R. v. Lemke*, 2015 ABQB 444). **It is axiomatic that if in fact the documents in question are in the hands of the authorities and are determined to be subject to *Stinchcombe* disclosure, they must be produced.**

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

**133** The "reasonable likelihood" threshold is appropriate to the *Garofoli* context and fair to the accused. It does not require an accused to first prove the evidence which is being sought. By the same token, it prevents fishing expeditions and ensures efficient use of judicial resources. In short, it focuses on the issues relevant to a *Garofoli* application, which are narrower than those relevant to the case as a whole.

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

**135** Having addressed the relevant legal test, we turn now to its application in this case.

[24] Interestingly, in contrast to the case at bar, although the INT shared the tipsters' emails with the RCMP, the affiant RCMP Sgt. Driscoll, who obtained the wiretap authorizations in dispute, did not consult the documents being sought by the accuseds in that case (para 138). Nevertheless, the court went on to say in relation to Mr. Haynes, the investigator for the INT [an independent investigative unit within the World Bank Group] who had effectively received emails from four tipsters regarding possible corruption by three SNC - Lavalin employees and a Bangladeshi official:

**136** The respondents argue that the documents they seek are likely relevant to their *Garofoli* application and therefore should be produced. In the alternative, they argue that the documents in the World Bank Group's possession should be presumed relevant because certain documents which would have been disclosed under *Stinchcombe* were lost or not created.

**137 Respectfully, the trial judge erred in assessing both arguments**. Although he correctly placed the burden on the respondents, he did not properly assess the relevance of the documents being sought. **In particular, he blurred the distinction in a *Garofoli* application between the affiant's knowledge and the knowledge of others involved in the investigation.**

**138 In this case, that distinction is crucial. While the documents sought may be relevant to the ultimate truth of the allegations in the affidavits (a matter upon which we make no comment), they are not reasonably likely to be of probative value to what Sgt. Driscoll knew or ought to have known since he did not consult them. Even if the documents were to reveal material omissions or errors in the affidavits, this would not undermine the preconditions for issuing the authorization unless there was something in the documents which showed that Sgt. Driscoll knew or ought reasonably to have known of them.**

**139 To show that Sgt. Driscoll knew or ought reasonably to have known about the information contained in these documents, the respondents must show that it was unreasonable for him to rely on the information he received from the INT and other officers.** The respondents have not done so. The World Bank Group was forthcoming and cooperative with the RCMP. The INT shared what it knew about the tipsters, including concerns regarding their credibility and their reasons for seeking anonymity, if known.

**140** Furthermore, Mr. Haynes is a professional investigator with a reputable international organization. Like the RCMP, the INT was attempting to uncover the truth behind the tipsters' allegations. Under these circumstances, Sgt. Driscoll did not need to double-check his information with the original communications between the tipsters and the INT -- though, in fact, he did consult many of these communications. He also provided his draft affidavit to Mr. Haynes to check for accuracy, completeness and protection of source identity. Mr. Haynes did so and Sgt. Driscoll had no reason to doubt his integrity.

**141 Mr. Haynes's position in this case is analogous to that of an informer handler: someone who acts as an intermediary between an affiant or investigator and an informant. Lower courts have repeatedly rejected the proposition that affiants must have directly consulted informers or informer handler notes, or otherwise investigated the information communicated to them by other officers (see, e.g., *Croft*; *Ahmed*; *Ali*). While affiants must not allow themselves, either knowingly or through wilful blindness, to be misled by informer handlers and other officers, there is no evidence of any**

**discrepancies or errors that should have put Sgt. Driscoll "on notice" to investigate further.**

**142** Only one set of documents among those sought would tend to show what Sgt. Driscoll knew: Mr. Haynes's notes of any conversations he had with Sgt. Driscoll. But the record is silent on whether Mr. Haynes made any such notes. Regardless, the fact remains that the respondents have received voluminous disclosure, including all documents in the Crown's possession covered by *Stinchcombe*. It is not unfair to ask them to demonstrate the relevance of their requests on the basis of the information they already have. This disclosure includes:

* The redacted wiretap and search warrant affidavits;

* A draft of the affidavit used for the first wiretap application;

* All materials that were before the authorizing judges;

* The notes made by all of the main RCMP investigators, including those of the lead investigator, Staff Sgt. Bédard;

* Forty liaison reports sent between the INT and the RCMP from March 31, 2011 to January 27, 2012, including 33 that contained source information;

* Transcripts and the original audio of all relevant intercepted communications;

* More than one million items seized in the execution of search warrants at SNC-Lavalin offices, including 2,332 potentially relevant documents.

**143** Of particular importance, the respondents have the affidavits presented to the authorizing judges (redacted to protect the tipsters' identities), as well as every report and document referred to therein that the RCMP have in their possession. They have the handwritten notes of Staff Sgt. Bédard, which include conversations he sat in on between Sgt. Driscoll and the second tipster. The respondents have also cross-examined Sgt. Driscoll on some issues relevant to the *Garofoli* application, albeit in the context of a prior disclosure motion. **It is speculative that an examination of the records sought would reveal an omission or error which Sgt. Driscoll knew or ought to have known about but which escaped the already extensive disclosure**.

[25] The law regarding what is “first party disclosure” in the context of informer privilege and *Garofoli* applications (which includes cases where Production Orders such as the one herein have issued), has been rapidly evolving in the last several years: e.g. see *R. v. Way*, 2014 NSSC 180, per Arnold J.; *R. v. MacKenzie*, 2016 ONSC 242, per KL Campbell, J; *R. v. Plowman*, 2015 ABQB 667, per EF Macklin J.; *R. v. Lemke*, 2015 ABQB 444, per JB Veit J.

[26] The jurisprudence in Ontario and British Columbia seems to have settled on answering this question generally as follows: "the right to make full answer and defence in this context is a right to the disclosure of material which had been before the authorizing judge."- *R. v. McKay*, 2016 BCCA 391, at para. 44. Therefore, any confidential informant source materials *relied upon* by the affiant in the affidavit sworn in support of an application for a Production Order is part of "first party disclosure", and must be disclosed to the extent that it is not clearly irrelevant, otherwise justified, or privileged. However, generally stated, "documents not seen by or provided to the affiant, such as the SHNs here, speak only to whether the informer was truthful or whether the information was accurately described to the affiant. Because such documents do not speak to the affiant's belief, they are not capable of supporting the challenge to the affidavit."- *McKay* at para. 142.

[27] More recently, as stated by Justice JE Watchuk in *R. v. Robertson*, 2016 BCSC 2075, at para. 24-25:

> Since the SHNs and SDRs authored by officers other than the affiant are not *prima facie* documents pertaining to the police investigation of the accused (but rather information from a specific source) they are not part of the fruits of the investigation into the accused or contents of the investigative file associated with the accused (see *McKay* at paras. 130-140).
>
> If a disclosure request goes beyond what was before the authorizing judge or part of the investigative file disclosed pursuant to the Crown's *Stinchcombe* obligations, the accused must show some basis for believing that there is a reasonable possibility such material would be useful on the *Garofoli* application (McKay, at para. 82).

[28] In *McKay*, the court also stated:

> Even the material provided to the investigators [by police analysts that had made a preliminary determination at some confidential information with respect to the accused should be provided to the investigating officers] did not form part of the fruits of the investigation, as that expression is used in *Stinchcombe*. Neither the SHNs nor the SDRs (with one exception) were provided to the affiant or referred to in the ITO… The one SDR relied upon by the affiant in preparation of the ITO was disclosed, in edited form, to defence counsel. -*McKay* at para. 131.
>
> **Evidence, with respect to the manner in which the investigation was conducted, only becomes relevant if the Crown is aware of the basis for some concern with respect to disclosure or police conduct in relation to the obtaining of the warrant (where as in *McNeil*, there is an expectation that will be disclosed) or where the requesting party can meet the low threshold of**

> **establishing a reasonable likelihood that the records sought will be of probative value to the issues on the application. In this regard, I adopt the following passage from the judgment of Campbell J in McKenzie:**
>
> > **44 … I agree with the sentiments expressed by Goldstein J in *R v Grant*, 2013 ONSC 7323,…at paras 17, 31 – 32 where, in refusing to review a confidential informant file to determine its potential relevance to the accused's challenge to a search warrant, he refused to undertake the proposed exercise of "random virtue testing of the police by the judiciary" by engaging in such "inquisitorial procedures" that could quickly turn into an "endless series of collateral inquiries that have nothing to do with the main function of the court on a *Garofoli* application.**
>
> … If the Crown did not intend to adduce the evidence obtained pursuant to the warrant, "what the confidential sources said to the police that moved them to seek an authorization [in this case a warrant] would be prima facie he irrelevant". -at para. 135, *McKay*.
>
> In my view, where the Crown can establish that a document has been created to record information provided by a confidential informer they could tend to reveal the informer's identity, as it appears to have done to the satisfaction of the judge in this case, and the document is not disclosed or relied upon to obtain an order, there is no *prima facie* right to obtain an edited version of the document. The Crown should not be required to demonstrate that un-edited portions are "clearly irrelevant"… On a *Garofoli* application there is no presumption of disclosure of background information other than material referred to in an ITO or affidavit in support of a wiretap authorization. Background material may be producible on a case specific basis if the defence establishes likely relevance to an issue on the application. Even where the relevance threshold is met, production of SHNs and SDR's may not be consistent with informer privilege. – at paras 157-159 (see also para 135)

[29] I adopt, as persuasive, the positions taken in *R. v. McKay*.

## The evidence in this case

[30] True copies of the affidavit of Detective Constable Tyler Anstey and the Production Order consequently issued, were placed before the court by consent, and are found at Tab A and B of the defendant's memorandum of law filed November 14, 2016.

[31] The court also had the benefit of the credible testimony of Sgt. Mark MacDonald. He has been a member of the Halifax Regional Police (HRP) service since April 1989. He is presently a member of the Criminal Investigation Section

– Investigative Support Operations, and assigned to the Human Source Office since October 2010. His *curriculum vitae* lists his present responsibilities as, to:

a. Train and monitor all source handlers in HRP;

b. Maintain all source files;

c. Review, vet and disseminate all source information;

d. Determine and arrange payments for source information;

e. Assist with source issues;

f. Maintain and distribute covert funds for special operations.

[32] He was qualified as an expert to give opinion evidence relating to "sources, source handling, policy and procedure relating to source handling, and the dissemination and use of source information as well as the breach of source identification, and possible risks associated therein."

[33] Typically, each confidential informant/source has only one "source handler". Each source handler has a special source notebook which contains only information relevant to the relationship between the source and the source handler, and tends to be unfiltered information. No one else has access to the source handler's notes and the notebook is treated, even with in the police department itself, as off-limits to anyone other than the source handler. When not in possession of the source handler, the source notebook is to be stored under extremely high level security conditions.

[34] From these source handler notes, or on some occasions from their memory, source handlers will use their best judgment regarding what is useful for police purposes, but which will not tend to identify the source. They will reduce this information to an unvetted SDR. Often, those documents have "very sensitive" corroborating information therein. These documents are then stored locally, on a "source file", to which a very limited number of specifically authorized members of HRP have restricted access.

[35] On a daily basis, he receives from confidential informants/source handlers, all un-vetted SDRs. Sgt. MacDonald vets these by ensuring that all unsafe information is taken out of them. Those vetted SDRs are then uploaded to a federal repository database ACIIS which permits unrestricted access to members of HRP

who are trained in the use thereof, and incidentally also to similarly authorized police personnel across Canada in departments who have the restricted access to AIICS. Sgt. MacDonald noted that even the vetted SDRs are "very closely guarded even within our own department".

[36] Whether vetted or not vetted, SDRs are both subject to the third-party rule. That is, the release of any information therein is not allowed to be printed, forwarded or otherwise communicated to anyone without the permission of the source handler or Sgt. MacDonald [exceptionally, specifically authorized senior staff in the Criminal Investigation Division have access thereto to allow them to gain information if the source briefing comes down and suggests imminent concern to public or officer safety – but even then, only the vetted versions can be disseminated].

[37] Sgt. MacDonald stated that even with the vetted SDRs, "there is always risk, but less risk", that these will tend to identify a source. They contain "bare-bones information, but we don't want to hide anything [that can be disclosed without identifying the source]". The goal is to ensure that they contain "nothing that could come close to identifying a source".

[38] He noted, however, the difficulty is that "the risk starts as soon as you start to work with the source", and that "it would be dangerous" for someone other than himself or the source handler to attempt further redaction or vetting of SDRs.

[39] He elaborated that the persons, in order, who are in the best position to determine what further redactions or vettings of a vetted SDR would avoid identifying the source are: the target/subject/accused; the source; the source handler; the source co-handler; and Sgt. MacDonald.

[40] This is because "we don't know what piece of information may identify a source". He referred to the danger of "the mosaic effect". That is, if an accused obtains numerous sources of information, some from the police in this investigation, some from the police and other investigations that seem to bear a connection from his own sources on the street, from his own personal knowledge, etc., it may be possible in those circumstances for the accused to triangulate who is the source – one can imagine a wall covered with information with linkages drawn between documents etc., which through process of exclusion collectively reveal a source's identity. The mosaic effect is a reference to the phenomenon that when one [an accused] metaphorically stands back from all the material gathered by him/her, the picture of who is the source may come more clearly into focus.

[41] He agreed that in a city the size of Halifax, "many criminals know each other", and I infer they not only share information, but may have a common interest in identifying confidential informant sources.

[42] In relation to this specific case, Sgt. MacDonald confirmed that Detective Constable Tyler Anstey would not have had access to the un-vetted SDRs, and only had access to the vetted SDRs with the assistance of someone in HRP, specifically authorized to access those.

[43] Moreover, he reviewed the grounds for the Production Order in the affidavit (Appendix "A"), and contrasted those with the unvetted SDRs created from information provided by Source A and Source C.

[44] In relation to the information provided by Source A, he found that the information was consistent, and there was nothing that contradicted the relevant information in Appendix "A" (although he noted that "some information was removed from the SDR which would have increased the odds of identifying the source").

[45] In relation to the information provided by Source C, he found that the information was consistent, and there was nothing that contradicted the relevant information in Appendix "A", nor omissions, although there were some changes in phraseology – "personal style" changes which had no effect on the consistency between the two documents.

## Why the requested information need not be disclosed

[46] In *R. v. Way*, 2014 NSSC 180, Justice Arnold stated:

> … In Mr. Way's case we are not dealing with notes in the hands of third parties…We are instead dealing with SHNs and SDRs that are in the hands of the police, but which are not contained within the investigative file, having been referred to as "background materials". It should always be kept in mind that in *McNeil*, supra, the Supreme Court of Canada reiterated that the Crown and police each have important disclosure responsibilities.
>
> …
>
> The Crown clearly has an obligation to request any relevant information from the police. The Crown must review such relevant information to determine whether that material should be subject to disclosure. **However, in this case the Crown has called witnesses who have testified that the SHNs and SDRs cannot be safely vetted; that the ITO reflects all information that would be found in**

> **edited SHNs and SDRs; and that there are no inconsistencies between the SHNs SDRs and the ITO. These witnesses were not challenged by the defence on these issues.** This distinguishes Mr. Way's case from *Little*, supra [2012 NSSC 402 per N M Scaravelli J., who ordered the Crown to produce "undisclosed source handler notes and source debriefing reports" which he found "may be useful in the defence of the charges which include the possibility of challenging the search warrant" at para 13]."
>
> [paras. 88 and 103]

[47] Justice Arnold concluded that the materials sought in *Way* were not first party disclosure. The search warrant was supported through an ITO which referenced three confidential sources. The ITO copied to the defence was edited. Mr. Way requested additional disclosure from the Crown in the form of the SHNs and SDRs. Notably, while the affiant, who was the sources' handler, received oral information directly from the sources' themselves, "the SHNs and SDRs relating to Source A and Source C were not relied on by [the affiant] in creating the ITO. No SDRs were ever created for Source B. The SHNs relating to Source B were not relied on by [the affiant] in drafting the ITO." – at para. 13

[48] In that notable respect, the facts in *R. v. Way* are distinguishable from those in this application. This distinction may explain why Justice Arnold concluded the materials sought were not presumptively first party disclosure and why he used the "modest relevance" standard (e.g. paras. 31-32 from *Ahmed*, within para. 71 *Way*) which is shorthand for: "Is there some basis for believing that there is a reasonable possibility that" the sought–after disclosure will be of assistance on the application?

[49] Justice Arnold did not have to make a determination of what are the contours of first party disclosure for cases like this one - viz., involving a *Garofoli* application seeking to quash a Production Order on the bases (facial and sub-facial I presume at this stage) of insufficient or improper grounds, which grounds drew upon undisclosed confidential informant vetted SDRs - i.e. where the affiant relied upon the two Source's undisclosed, vetted SDRS.

[50] In *R. v. Little*, 2012 NSSC 402, Justice Scaravelli concluded such materials constitute "first party disclosure" where an affiant relies in large part on the information provided by two confidential informants in swearing an affidavit in support of a search warrant:

> The defence is entitled to discover relevant information to the extent it does not compromise informer identity… The Crown has not established that the requested

> source documents[vetted source or information handler notes, and a source debriefing report for the purpose of determining whether to challenge the search warrant] are irrelevant and privileged… The Crown is directed to review the requested disclosure notes and disclose to the defence all information with the exception of any information that would likely identify the informants.

[51] Justice Scaravelli only had available to him the existing jurisprudence at that time.

[52] Since that decision in 2012, when the issue was novel, many more cases have examined the issues, including appellate courts.

[53] As noted earlier, the issue has not yet been authoritatively determined: "We need not address the boundaries of *Stinchcombe* disclosure in the *Garofoli* context, as that issue is not before us.… It is axiomatic that if in fact the documents in question are in the hands of the authorities **and** are determined to be subject to *Stinchcombe* disclosure, they must be produced." at para 131, per Moldaver J. for the court in *World Bank Group*.

[54] It must be recalled that Crown disclosure is intended to ensure that accused persons can make full answer and defence, so as to avoid conviction of the innocent. If there is a reasonable possibility that the withholding of information will impair the right of an accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege or otherwise, such information ought not to be withheld - *R. v. Stinchcombe*,[1991] 3 SCR 326, at paras. 21-22, per Sopinka J. . Disclosure obligations in the context of a *Garofoli* application are more limited, because the focus of the inquiry is more limited:

i. For facial attacks: whether on the basis of the material before the justice of the peace, the authorization/production order could have reasonably been issued (*R. v. Campbell*, 2011 SCC 32); and

ii. For sub-facial attacks: whether the material before the justice of the peace did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued (*World Bank Group v. Wallace*, 2016 SCC 15).

[55] In my view, when affiants rely on confidential source information as a basis for the grounds in an affidavit/information to obtain, this does not transform the source materials (electronic or hard copy) to first party disclosure and presumptively subject to the disclosure obligations set out by the Supreme Court of Canada in *Stinchcombe/McNeil*. The defendant has the burden to establish that these "background materials" are likely relevant to an issue on the application.

[56] If I am wrong in that regard, and the background materials are transformed into first party disclosure then unless those source materials are shown to be "clearly irrelevant", privileged, or otherwise governed by law, they must be disclosed to a defendant. At that point, the burden is on the Crown to justify the non-disclosure.

[57] The privilege in issue here is "informer privilege". The privilege protects the informer's identity, not the content of his/her information. That is a joint privilege held by both the Crown and the confidential informant – it can only be waived if both consent: *R. v. Basi*, 2009 SCC 52, at para. 40, per Fish J. It has not been waived.

[58] While the Supreme Court of Canada has repeatedly referred to the duty of citizens to provide information and assistance to the police authorities, and that thereby they may take the protection of "informer privilege", there is no doubting that the protection that the privilege entails for the informant may often be a matter of life and limb.

[59] Sgt. MacDonald has testified about the difficulty, approaching impossibility in some cases, of editing information received from sources, which is to be disclosed to a defendant, sufficiently to protect the identity of the source.

[60] I note that he has compared the unvetted SDRs for Source A and Source C with the information contained in the affidavit sworn by Detective Constable Tyler Anstey, and concluded there are no inconsistencies, contradictions or omissions of note between those documents.

[61] Is the further disclosure to the defendant of those vetted SDRs, relied on by Det. Cst. Anstey, with or without further redaction, possible without providing the defendant correct, or mistaken, thinking of who is the source, and thereby potentially putting the source or someone else at risk? While the latter risk may always be present, absent such evidence, concern about that risk is too speculative

to be given any weight when courts decide whether confidential source information provided in support of an affidavit should be ordered disclosed.

[62] *Stinchcombe/McNeil* require only disclosure by the Crown of all the information that the police investigation has discovered that is relevant to the guilt, or not, of an accused as would be determined by a trial ("the fruits of the investigation"), **or** in the possession of the police/Crown that is otherwise relevant to an issue at trial. Not everything that the police investigation has discovered must be disclosed, because not everything they discovered is relevant. However, only the accused is uniquely positioned to determine what will be useful to his/her defence to the charge(s). Therefore, practically the Crown disclosure must be assessed on an overly inclusive basis by police/Crown.

[63] If relevancy of information is disputed, courts will use the threshold for determining what is relevant as set out in *Stinchcombe* at paras. 21 – 22: If there is a reasonable possibility that the withholding of information will impair the right of an accused to make full answer and defence [which focus is different, be it at trial, or during an evidentiary hearing such as the *Garofoli* application herein] unless the nondisclosure is otherwise justified (e.g. by the law of privilege), such information ought not to be withheld.

[64] Conversely, if there is no reasonable possibility that withholding information will impair the right of an accused to make full answer and defence, then it is properly characterized as "clearly irrelevant".

[65] The burden of justifying a refusal to disclose information contained within the fruits of the investigation, is on the Crown.

[66] Courts have unhesitatingly accepted that the information that is relevant to an evidentiary hearing such as prompted by the *Garofoli* application herein, is much narrower than information that is relevant to guilt or not, determined by trial. Therefore, necessarily the inquiry regarding whether there is a reasonable possibility that withholding information will impair the right of an accused to make full answer and defence, will also be narrower.

[67] Specifically, in the case at bar, the Crown has the burden, on evidence, to satisfy the court that it is more likely than not that there is no reasonable possibility that withholding the information [i.e. the vetted SDRs is related to Sources A and C] will impair the right of the accused to make full answer and defence to the presumptively validly issued Production Order herein.

[68] Is the content of the SDRs "irrelevant" to the determination of whether sufficient grounds existed to permit issuance of the Production Order, or regarding the sub- facial attacks that D.M.D wishes to pursue?

[69] The evidence of Sgt. McDonald, which I fully accept, is to the effect that the content of the vetted SDRs, and the information provided by Source A and C as recited in the affidavit of Detective Constable Tyler Anstey, are no different – there are no omissions or inconsistencies of note between them.

[70] Therefore, I am satisfied that the Crown has established by evidence, it is more likely than not that there is no reasonable possibility that withholding the information content of those vetted SDRs will impair the right of D.M.D. to make full answer defence to the charge against him, and specifically to the presumptive validity of the Production Order, herein.

[71] The actual content of the SDRs is necessarily irrelevant to an attack on the *facial* validity of the grounds that led to the issuance of Production Order, because they were not placed before the Justice of the Peace. They are also clearly irrelevant to an attack on the sub- facial validity of the grounds that led to the issuance of the Production Order, because there is no reasonable possibility that withholding them will impair the right of D.M.D. to make full answer and defence in the context of this *Garofoli* application. To go on in the face of this evidence, and order that they be provided to the court, so it can assess their usefulness on the anticipated *Garofoli* application, would be an undue use of judicial resources, and amount to "random virtue testing of the police [here, specifically Sgt. MacDonald, whose evidence I have found credible] by the judiciary "- per *McKay*, supra, at para. 134, citing *MacKenzie*, who cited Goldstein J. in *R. v. Grant*, 2013 ONSC 7323.

## Conclusion

[72] Therefore I find that there is no obligation on the Crown in this case to disclose to the defendant, the vetted SDRs relating to Source A or C.

Rosinski, J