SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Green*, 2020 NSSC 171

Date: 2020 06 14
Docket: Hfx No. 490960
Registry: Halifax

Between:

Her Majesty the Queen

v.

Daniel Gerald Shawn Green

Restriction on Publication: Sections 517(1) and 539(1) of the *Criminal Code*

DECISION: *Voir Dire* 3 - Cross-examination of the affiant

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	May 8, 2020, in Halifax, Nova Scotia
Final Submissions:	May 15, 2020
Counsel:	Suhanya Edwards, for the Crown Paul Neifer, for the Defence

Introduction

[1] Daniel Green's home was searched under a search warrant. He intends to challenge the lawfulness of the search under the *Charter of Rights and Freedoms* on the ground that the Information to Obtain was insufficient for issuance of a search warrant by the Justice of the Peace. He seeks to cross-examine the affiant of the ITO on the *Charter* application. The request for cross-examination is the subject of this decision.

[2] On this application, Mr. Green and the Crown filed briefs and a hearing was held virtually on May 8, 2020, via video with Mr. Green and via telephone with counsel, due to COVID-19 restrictions.

Facts

[3] No *viva voce* evidence was called in this hearing, but there were facts agreed to by the Crown and the applicant. Mr. Green is charged with unlawfully possessing proceeds of crime and money laundering on October 18, 2017. The trial for those charges is scheduled to commence on December 7, 2020. He is separately charged with possession of cocaine for the purposes of trafficking on November 22, 2018, as well as other drug and firearms offences. The trial on those charges is scheduled to commence on April 6, 2021. He has therefore not yet had a trial in relation to either of these sets of charges.

[4] On October 18, 2017, Constable Phil Apa swore an ITO pursuant to s. 11 of the *Controlled Drugs and Substances Act*, for judicial authorization to search Daniel Green's residence at 24 Cockburn Drive, Sackville, Nova Scotia. The resulting warrant alleged that Mr. Green had possession of cocaine for the purpose of trafficking and authorized a search for "cocaine, cell phones, scales, packaging, money and personal records". According to the ITO, Constable Apa relied on information from four confidential informants who had been providing information to the police for nine years, six years, just over one year and just under one year, respectively. The information was collected over nine occasions from February 2017 to October 2017 (eight months). Constable Apa spoke with the various source handlers and reviewed Source Debriefing Reports.

[5] In the search, the police found $268,900 in cash in a plastic bag, bundled in elastic bands and concealed between the ceiling joists of the home that Mr. Green lived in with his grandmother. They also found plastic bags that field tested

positive for cocaine. They arrested Mr. Green, searched him incident to arrest, and seized $995 in cash and two cell phones.

Positions of the parties

[6] Expansive briefs were filed by the parties in advance of the hearing. During the hearing, Mr. Green provided a more focused position that narrowed the issues. He proposes four areas of cross-examination:

1) Constable Apa's knowledge of each confidential informant's criminal record when he swore the ITO and his standard practice in this regard as an affiant;

2) Whether Constable Apa was aware that the four referenced confidential informants were actually four separate individuals, and if so, whether they had any opportunity to collude or collaborate;

3) Whether Constable Apa confirmed that the various sources had personal knowledge of the information they provided to the source handlers; and

4) Whether the statement in the ITO that the source was aware that Mr. Green had sold cocaine within the past 24 hours was accurately recorded.

[7] The Crown objects to the proposed cross-examination at the *Charter* hearing on the ground that Mr. Green received "a wide berth" to cross-examine Constable Apa at the preliminary inquiry, stating in their brief:

> 7. ... He asked about whether Cst. Apa reviewed any Source Handler Notes; where he obtained the information that Mr. Green had trafficked cocaine "within the last 24 hours"; whether he knew how the informant learned that information – whether he knew if the informant saw anything or who he might have talked to; and finally, whether he knew the identities of the informants (though, correctly, the Court did not permit that question)

[8] The Crown says Mr. Green's cross-examination of Constable Apa at the preliminary inquiry did not reveal any material issues that would justify further cross-examination. The Crown also says that because Mr. Green was already permitted to cross-examine Constable Apa on some of the issues he says are relevant to this application, he should be barred from further pursuit of the issues on the basis of judicial economy. Mr. Green says that his ability to cross-examine

Constable Apa was restricted at the preliminary inquiry and this impacts on his request to cross-examine him at a pre-trial hearing.

[9] The preliminary inquiry transcript was placed into evidence at the hearing as Exhibit VD3-2. The transcript indicates that while Mr. Green was given some leeway to cross-examine Constable Apa, the Crown objected at various points. For instance, defence counsel put it to the affiant that the grounds for arrest were entirely as found in the ITO, and asked if he had received "confirmation that these facts were sufficient to support a search warrant." The Crown then raised the possibility of potential breach of informant privilege in the questioning. Defence counsel went on to ask the affiant about the grounds for arrest, confirming that the decision to arrest was based on the grounds set out in the ITO. Defence counsel then elicited that the affiant had spoken to the source handler regarding the information that Mr. Green had trafficked within the previous 24 hours:

> Q. You spoke to that source handler
>
> A. I read something and I spoke to that source handler.
>
> Q. The source de-briefing report, that you reviewed to form part of your grounds for arrest, specifically mentions that Green sold cocaine within the last 24 hours. Did you review anything else dealing with that source information?
>
> A. There were four sources on the ITO.
>
> MR. MACKAY: ... I don't mind if the officer wants to answer it. … I don't hold sacrosanct his idea that he had to seek leave to cross but I do … am more concerned about informer privilege. The officer is perfectly aware of what he can and cannot answer.
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> ...
>
> MR. MACKAY: So I … I … I am not going to be objecting continually here.
>
> ...
>
> MR. MACKAY: If the … officer's comfortable because we're dealing with grounds for arrest, if he's comfortable answering these questions, I … I'm not going to stand up.
>
> MR. NIEFER: And, Your Honour, I will try to be very careful. I don't want to ask any questions that will reveal information that tends to identify the identity of the source.
>
> THE COURT: Okay. Keep …
>
> MR. NIEFER: Base my questions on that and so far I have not asked any questions dealing specifically with the identity of the source.

[10] Defence counsel went on to ask about the reliability of the sources, and Constable Apa testified that he had reviewed "source qualification" documents for the sources:

> Q. Do they provide you with a summary of information about the reliability of the source?
>
> A. So … yes, they provide … I guess it's called a source qualification.
>
> Q. Is that a document?
>
> A. That is … that's provided by them, as far as how long they've known him, how many times they've been qualified, items like that.
>
> Q. And would you have read one of those source qualifications for each of the …
>
> A. I would have read four source qualifications for four sources.
>
> Q. You refer to four confidential informants in the ITO and in forming your grounds for arrest.
>
> A. Correct.
>
> Q. Using a "yes" or "no" only, do you know the identity of the confidential informants?
>
> MR. MACKAY: I'm not sure if that's …
>
> THE COURT: No.
>
> MR. MACKAY: … really an appropriate question at all, Your Honour …
>
> THE COURT: It isn't.
>
> MR. MACKAY: … I'm not sure … how could that possibly be a …
>
> MR. NIEFER: … I …
>
> MR. MACKAY: … part of what the exploration of this witness would be for purpose of the trial. I mean it's …
>
> THE COURT: Yeah. No, not going to allow it, Mr. Niefer. Move on.
>
> ...
>
> THE COURT: No, you're not going to ask that question. You're trying to identify the sources. No. Move on.
>
> ...
>
> MR. NIEFER: I'd just like to put on the record, Your Honour, that I'm not asking about the identity of the confidential informants. I'm only asking whether the witness knew ... the identity and that would lead to my following question which … just for the Court, Your Honour, my following question was, Can you say for sure that they are different people?

> THE COURT: I'm not allowing the question. You're trying to identify the sources. Move on. Ask your next question. It's on the record. Move on.

[11] Following the preliminary inquiry, Mr. Green was provided further disclosure that the Crown says addressed all reasonable questions. The Crown argues that there must be a limit on disclosure requests, as many of their responses have led to additional questions, and the relevance of such further inquiries has become suspect. In its brief the Crown says:

> 8. Following the preliminary inquiry, the Defence asked the Crown for disclosure of any documents that the affiant relied on in support of his statement about the source of information they provided in the ITO, and asked specifically whether the SDRs contained information supporting the affiant's assertions in the ITO regarding how the sources knew the information that they provided. The Crown responded to the requests in writing on December 19, 2019 by including a Can Say from Cst. Apa addressing his process for drafting the informant qualifications, and providing the Crown's response to the questions regarding the vetted content of the SDRs.
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> 9. On February 11-12, 2020, the Defence application for disclosure of vetted SDRs commenced. Ultimately, the applicant abandoned the SDR application when the Crown provided the applicant an additional Can Say dated February 13, 2020 re-stating the same information in the Crown's letter dated December 19, 2019. By this time, the Crown had obtained intercepted communications in which Mr. Green was guessing at the identity of the informants who had provided information about him and saying that he would "beat the fuck".

[12] The Crown also objects to Mr. Green being permitted to cross-examine the affiant because they believe that he is "source hunting", putting the safety of the confidential informants at risk:

> 16. Proposed cross-examination of affiants is often focussed on probing informant information. Here, the harm is obvious. In the fluid circumstances of *viva voce* evidence, informant information is more vulnerable to accidental or inadvertent disclosure than in an Information to Obtain a Search Warrant. The ITO benefits from the greater control and opportunity for reflection available in written expression, as well as the second collaborative review by Crown counsel prior to providing it as disclosure...

[13] The Crown argues that some of the subjects on which Mr. Green wishes to cross-examine (the details of the informant's criminal records) are not material to the ultimate issue on the *Garofoli* application. It says that Mr. Green has provided no foundation for any suspicion about the basis for the informant's knowledge. It

also says that he has provided no foundation for any suspicion as to whether or not the four informants are actually four different people.

The Law

[14] When challenging the constitutionality of a search conducted under the authority of a search warrant, the accused must obtain leave before cross-examining the affiant on the underlying ITO. In seeking leave, the accused must show a reasonable likelihood that the proposed cross-examination will assist the reviewing judge in deciding whether there is a basis upon which the authorizing judge or justice could have issued the search warrant. In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, [1990] S.C.J. No. 115, the majority set out the essential analysis for leave to cross-examine on an affidavit filed in support of an authorization:

> 88. With respect to prolixity, I am in favour of placing reasonable limitations on the cross-examination. Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.
>
> 89. When permitted, the cross-examination should be limited by the trial judge to questions that are directed to establish that there was no basis upon which the authorization could have been granted. The discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised. While leave to cross-examine is not the general rule, it is justified in these circumstances in order to prevent an abuse of what is essentially a ruling on the admissibility of evidence.

[15] In *R. v. Pires; R. v. Lising*, 2005 SCC 66, [2005] 3 SCR 343, the court discussed the basis of the threshold requirement, resting on the principles of relevance and materiality. Justice Charron said:

> 3 There is no question that the right to cross-examine is of fundamental significance to the criminal trial process. However, it is neither unlimited nor absolute. The extent to which it becomes a necessary adjunct to the right to make full answer and defence depends on the context. The *Garofoli* threshold test requires that the defence show a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge. It is grounded in two basic principles of evidence: relevance and materiality. It is also born out of concerns about the prolixity of proceedings and, in many cases, the need to protect the identity of informants. The rule does

> not infringe the right to make full answer and defence. There is no constitutional right to adduce irrelevant or immaterial evidence. Further, the leave requirement strikes an appropriate balance between the entitlement to cross-examination as an aspect of the right to make full answer and defence, and the public interest in the fair, but efficient, use of judicial resources and the timely determination of criminal proceedings.
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> …
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> 33 When properly applied, the only thing that the leave requirement precludes the defence from eliciting through cross-examination is evidence that is unlikely to assist either the reviewing judge or the defence on the determination of admissibility. Why then, the appellants ask, is cross-examination not simply allowed as of right with proper limitations on its scope instead? The answer lies in the recognition, through the lens of judicial experience, of two important countervailing interests -- the concern over the prolixity of proceedings and, in many cases, the need to protect informants.
>
> …
>
> 40 As discussed earlier, the *Garofoli* leave requirement is simply a means of weeding out unnecessary proceedings on the basis that they are unlikely to assist in the determination of the relevant issues. The reason that the test will generally leave just a narrow window for cross-examination is not because the test is onerous -- it is because there is just a narrow basis upon which an authorization can be set aside. Hence, in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focussed on the question to be determined on a *Garofoli* review -- whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. Such a strict standard was rejected in *Garofoli.* A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown. [Emphasis added]

[16] In *Lising*, Charron J. discussed the distinction between the threshold test for determining whether cross-examination should be allowed and the ultimate question of whether the authorization is valid:

> 69 Although the likely effect of the proposed cross-examination must be assessed in light of the affidavit as a whole, I also agree with Finch C.J.B.C. that the threshold test for determining whether cross-examination should be allowed is separate and distinct from the ultimate question of whether the authorization is valid. Hence, in determining whether the threshold test has been met, the trial judge cannot decide the question simply on the basis that other parts of the

> affidavit would support the authorization. The focus, rather, must be on the likely effect of the proposed cross-examination and on whether there is a reasonable likelihood that it will undermine the basis of the authorization. If the test is met, it is only at the conclusion of the *voir dire* that the trial judge will determine whether, on the basis of the amplified record, there still remains a basis for the authorization...

[17] In *Lising*, the court discussed the reasons for not allowing cross-examination as of right in these circumstances, including the need to protect the informer's identity:

> 36 The second countervailing interest against allowing cross-examination as of right is the need to protect the identity of informers. As McLachlin J. (as she then was) noted in *Garofoli* (dissenting, but not on this point), cross-examination of the affiant increases the risk that the identity of informers might be revealed:
>
> > Cross‑examination is much more likely to reveal the details of investigative operations and the identity of informers than affidavits, which can be carefully drafted to avoid such pitfalls. How can one cross‑examine an officer on the reliability of an informant without probing details that might reveal that informant's identity, for example? Once a damaging statement is made in answer to a question in cross‑examination, editing is to no avail. [p. 1485]
>
> McLachlin J. further noted how difficult it is for the trial judge to restrict the scope of cross-examination:
>
> > Attempts to restrict the scope of cross‑examination are notoriously fallible. Since effective cross‑examination usually depends on considerable latitude in questioning, a restricted cross‑examination may be of little value. Moreover, it is often difficult to predict when a particular question will evoke a response that trenches on a prohibited area. [p. 1485]

[18] In *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 SCR 207, the court summarized the reasons for the leave requirement, as described in *Pires*:

> 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... The threshold primarily ensures that the cross-examination will be relevant... Second, cross-examination creates a risk of inadvertently identifying confidential informants... 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"...

[19] In *R. v. Shivrattan*, 2017 ONCA 23, leave to appeal denied, [2017] S.C.C.A. No. 93, the court remarked that the trial judge on an application of this kind "is only concerned with whether there is a reasonable likelihood that the proposed cross-examination would assist in determining whether the grounds existed for the issuance of the warrant. The defence is not required to show that the cross-examination will succeed in demonstrating that unreliability..." (para. 49). In that case, Doherty J.A. said:

> 53 I know of no basis upon which the defence can be obligated to accept cross-examination at the preliminary inquiry as a substitute for cross-examination at trial. It is one thing to encourage counsel to agree to use preliminary inquiry transcripts to expedite trial proceedings, and quite another for a trial judge to foreclose cross-examination based on his or her assessment of whether cross-examination at trial will add anything to the cross-examination conducted at the preliminary inquiry.
>
> 54 When the defence shows a reasonable likelihood that cross-examination of the affiant on the s. 8 application at trial will generate evidence tending to discredit the existence of one or more of the grounds for the issuance of the warrant, the defence is entitled to conduct that cross-examination as part of the s. 8 application at trial regardless of whether that cross-examination will add to the cross-examination conducted at the preliminary inquiry.

[20] Additionally, in *Shivrattan*, Doherty J.A. expanded on the nature of a challenge to a search warrant:

> 26 Challenges to the validity of a warrant are described as facial or sub-facial. On a facial challenge, counsel argues that the ITO, on its face, does not provide a basis upon which the issuing justice, acting judicially, could issue the warrant. A sub-facial validity challenge involves placing material before the reviewing judge that was not before the issuing justice. On a sub-facial challenge, counsel argues that the material placed before the reviewing judge should result in the excision of parts of the ITO that are shown to be misleading or inaccurate. The warrant's validity must then be determined by reference to what remains in the ITO. On a sub-facial challenge, counsel may also argue that the augmented record placed before the reviewing judge demonstrates that the affiant deliberately, or at least recklessly, misled the issuing judge, rendering the entire ITO unreliable as a basis upon which to issue a warrant...
>
> 27 The reviewing judge, when determining whether the warrant should have been granted, must consider the totality of the circumstances as set out in the ITO and as amplified by any additional material placed before him or her. When, as in this case, the information to support the warrant comes almost entirely from a CI, the totality of the circumstances inquiry focuses on three questions. Does the material before the reviewing judge demonstrate that the CI's information was compelling?

> Does the material demonstrate that the CI was credible? And does the material demonstrate that the CI's information was corroborated by a reliable independent source?... [Citations omitted.]

[21] In summary, if the applicant establishes a reasonable likelihood that the proposed cross-examination will assist the court in deciding whether the issuing judge could grant the search warrant, cross-examination will be permitted.

[22] The Crown says that because Constable Apa was cross-examined at the preliminary inquiry and has provided Can-Says in response to various of Mr. Green's issues, no further cross-examination should be permitted. They cite the court's comments about the scope of Crown disclosure in *Lising*:

> 25 ... Under s. 187(1.4) of the *Criminal Code*, the defence has access to all the documents relating to the authorization. Access is granted on the simple assertion that the admissibility of the evidence is challenged and that access to the material is required in preparation for trial... The material includes the affidavit filed in support of the application for an authorization. Subject to any necessary editing for the protection of informants, the affidavit will usually provide a comprehensive account of the investigation leading up to the wiretap application, an articulation of the grounds relied upon in support of the application, and information relevant to the reasonable believability of material gathered from informants...
>
> 26 In addition, under the principles established in *Stinchcombe*, the defence is entitled to all material in the possession or control of the Crown that is potentially relevant to the case, whether favourable to the accused or not. The defence can therefore compare the contents of the investigative file received from the Crown to the authorization's supporting material to ascertain whether anything throws doubt on the reasonable believability of the latter. Further, the disclosure material may also provide the defence with possible third-party avenues of inquiry.
>
> 27 Hence, the defence does not arrive empty-handed at the evidentiary hearing. More importantly, if no basis can be shown for questioning the validity of the authorization on the strength of the disclosed material, it is generally unlikely that cross-examination of the affiant will provide further material information. I say it is unlikely because of the narrow focus of the inquiry on this evidentiary hearing...

[23] The ultimate reliability of the information in the ITO is not in issue on a motion to cross-examine the affiant and the applicant is not required to show that the cross-examination will succeed in demonstrating that unreliability. The court in *Lising* elaborated about the distinction between the right to test evidence on the

merits at trial and the threshold evidentiary hearing to determine the admissibility of that evidence:

> 29 At trial, the guilt or innocence of the accused is at stake. The Crown bears the burden of proving its case beyond a reasonable doubt. In that context, the right to cross-examine witnesses called by the Crown "without significant and unwarranted constraint" becomes an important component of the right to make full answer and defence... If, through cross-examination, the defence can raise a reasonable doubt in respect of any of the essential elements of the offence, the accused is entitled to an acquittal. Likewise, defence evidence, as a general rule, is only subject to exclusion where the prejudicial effect substantially outweighs its probative value...
>
> 30 However, the *Garofoli* review hearing is not intended to test the merits of any of the Crown's allegations in respect of the offence. The truth of the allegations asserted in the affidavit as they relate to the essential elements of the offence remain to be proved by the Crown on the trial proper. Rather, the review is simply an evidentiary hearing to determine the *admissibility* of relevant evidence about the offence obtained pursuant to a presumptively valid court order. (I say "relevant" evidence because, if not relevant, its inadmissibility is easily determined without the need to review the authorization process.) As indicated earlier, the statutory preconditions for wiretap authorizations will vary depending on the language of the provision that governs their issuance. The reviewing judge on a *Garofoli* hearing only inquires into whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed... Hence, there is a relatively narrow basis for exclusion. Even if it is established that information contained within the affidavit is inaccurate, or that a material fact was not disclosed, this will not necessarily detract from the existence of the statutory pre-conditions. The likelihood that the proposed challenge will have an impact on the admissibility of the evidence will depend on the particular factual context. In the end analysis, the admissibility of the wiretap evidence will not be impacted under s. 8 if there remains a sufficient basis for issuance of the authorization.
>
> 31 It is in this narrower context that the right to cross-examine, as an adjunct to the right to make full answer and defence, must be considered. There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. The *Garofoli* threshold test is nothing more than a means of ensuring that, when a s. 8 challenge is initiated, the proceedings remain focussed and on track. Even on the trial proper, the right to cross-examine is not unlimited. In *Lyttle*, the Court reiterated the principle that counsel are "bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value" (para. 44 (emphasis added in original)). The *Garofoli* threshold test is all about relevancy. If the proposed cross-examination is not relevant to a material issue,

> within the narrow scope of the review on admissibility, there is no reason to permit it.
>
> 32 The accused remains free to make submissions and elicit relevant evidence on whether the interception constitutes an unreasonable search or seizure within the meaning of s. 8. [Emphasis added]

[24] (On the significance of cross-examination to an accused person facing criminal charges, see also *R. v. Osolin*, [1993] 4 S.C.R. 595, at para. 157).

Analysis

[25] As noted above, the applicant raises four areas of proposed cross-examination. I will consider them in turn.

1) Constable Apa's knowledge of each confidential informant's criminal record when he swore the ITO and his standard practice in this regard as an affiant

[26] Mr. Green wants to explore whether Constable Apa was actually aware of the informants' criminal records when he swore to the ITO, or only confirmed that information for accuracy after the ITO was sworn and the warrant was executed. During the hearing defence counsel indicated that they have no intention of inquiring into the confidential informants' criminal records or outstanding charges, but only Constable Apa's state of knowledge:

> ... There's no need, in our submission, to ask any questions about the particulars of the criminal records, if any. The Crown mentioned ... that there's no basis to conclude that the affiant reviewed the informant's criminal records or has any knowledge beyond what is stated in the ITO, and My Lord, that is exactly what we propose to confirm. Specifically that Constable Apa had no knowledge of the informants' criminal records or outstanding charges beyond what is stated in the ITO, and that he did not make any inquiries for additional information, and furthermore, that that's his standard practice as an affiant. After we submitted our brief, the Crown spoke with Constable Apa about the admission of fraud for Source "C" in paragraph 8(c) of the ITO. The Can Say that was provided on April 20, 2020, which is marked as Exhibit VD3-3, showed that Constable Apa had to speak with the handler to confirm that Source "C" did not have a conviction for fraud. We submit that there's a reasonable inference that he did not know that information prior to swearing the ITO, and so this, we also note that this area of concern with respect to the criminal records could potentially be addressed through agreed facts, but otherwise we would seek to cross-examine Constable Apa on those specific issues.

[27] Mr. Green is required to provide some evidentiary support for his request to cross-examine and must also show that the cross-examination is relevant to an issue on the *Garofoli* application. The ITO references criminal records of the confidential informants as follows:

> 6. c. Source "A" does not have any convictions for credibility related offences such as perjury, fraud or obstructing justice;
>
> …
>
> 7. c. Source "B" does not have any convictions for credibility related offences such as perjury, fraud or obstructing justice;
>
> …
>
> 8. c. Source "C" does have a criminal record but does not have any convictions for credibility related offences such as perjury or obstructing justice;
>
> …
>
> 9. c. Source "D" does not have any convictions for credibility related offences such as perjury, fraud or obstructing justice; …

[28] Subsequent to the filing of briefs, when Mr. Green's position was explained in more detail, the Crown forwarded a "Can Say" from Constable Apa, dated April 20, 2020 (Exhibit VD3-3), which states that Constable Apa can say the following:

- he did not intend to convey any significant difference in Source C's record by using different wording (that did not include "fraud" as an example of a credibility-related offence) than the wording he used for Sources A, B and D.
- as a result of the Crown's inquiry, he spoke with D/Cst John Mansvelt and confirmed that Source C does not have a conviction for fraud.

[29] Mr. Green has shown that Constable Apa relied on different wording in the ITO in the clause referencing Source C's criminal record from that of Source A, B and D.

[30] Mr. Green also says the Can Say allows a reasonable inference that Constable Apa was not aware of the various informants' criminal records prior to swearing the ITO. Following the hearing, the Crown forwarded the following additional Can Say (dated May 14, 2020) to Mr. Green:

- When drafting my ITO, in respect of each informant, I asked the handler whether the informant has convictions for credibility related offences such as perjury, fraud or obstructing justice.

- I did not ask the handlers about outstanding charges. Because of the narrow timeframe involved in outstanding charges, information about outstanding offences is highly sensitive and may tend to identify informants.
- I trust the source handlers in this case and their assessment of whether their sources have convictions for credibility related offences. If I had concerns, I would have asked them more questions. In this case, I did not have any concerns and so I did not ask any further questions.

[31] The Crown submits that there is no basis to conclude that the affiant reviewed the informants' criminal records or has any knowledge beyond what appears in the ITO. Based on the ITO, the affiant is not the handler for any of the informants, and the Can Say indicates that he received the information by speaking to the handlers, and did not recall receiving any documents from them.

[32] Both counsel refer to *R. v. Rocha*, 2012 ONCA 707, where Rosenberg J.A. dealt with similar language in ITOs:

> [6] There is some odd wording in the ITOs. For example, they describe the informer as having no convictions for perjury or public mischief. The ITOs do not set out whether the informer otherwise has a criminal record. They indicate that the informer has previously provided information to the police that led to persons being "arrested/charged" and illegal narcotics and stolen property seized. The ITOs do not clearly indicate that any person was convicted as a result of the information provided by the informer.
>
> The Trial Judge's Reasons
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> [7] The trial judge dealt first with the sufficiency of the information to obtain the warrant to search the house. She pointed out that this ITO contained no information about the informer's source of knowledge of the existence of drugs in the house. She considered the evidence relating to the house to be "scant"; there was "no information as to when the informant received the information, no information placing a time on when the drugs were being stored at the house". In short, there was [at para. 38] "nothing in the information that compels the belief that the drugs would be located at the house at the time of the search".
>
> [8] The ITO did not indicate whether the informer had a criminal record for crimes of dishonesty besides perjury and public mischief and did not state the informer's motivation for providing the information to the police.

[33] In considering whether to exclude the evidence in accordance with s. 24(2) of the *Charter*, Justice Rosenberg stated:

> [33] First is the failure to disclose the criminal record of the informer. The entire record was not placed before the justice of the peace; rather, there was the oddly

> worded statement that the informer did not have a record for perjury and public mischief. This paragraph was drafted by D.C. Naidoo and was obviously intended to leave the impression of honesty on the part of the informer. But, perjury and public mischief are not the only types of offences that would fairly bear on the honesty and hence credibility of a confidential informer. The preliminary inquiry evidence of D.C. Naidoo shows that this was a deliberate decision. It was also a decision rooted in a systemic practice on the part of D.C. Naidoo, at least where he was the sub-affiant. As the respondent points out, D.C. Naidoo gave conflicting and inconsistent explanations for why the record was not placed before the justice of the peace. But, the officer made it clear that it was his practice not to disclose the informer's full criminal record to the justice of the peace.

[34] The Crown refers to *R. v. Omar* (2007), 84 O.R. (3d) 493 (Ont. C.A.), which reiterates the proposition that the identity of confidential informants must be carefully protected by the courts. Sharpe J.A. said:

> [40] In my view, in the circumstance of this case, the trial judge erred by concluding that her edited version of the documents would not tend to identify the informer. The informer had provided the police with very detailed information about where the respondent would be found, what he would be wearing, the very car he would be driving, and the precise location in the car where a gun would be found. The pool of people who would be privy to that precise and detailed information must necessarily be very small. The individuals in that pool are likely known to the respondent. Even the slightest piece of information about the informer gleaned from the police files could serve to eliminate some members of the pool or identify the informer. This point was made in Detective Heaney's testimony and has been recognized in the case law on informer's privilege.
>
> [41] In *Leipert*, *supra*, the Supreme Court of Canada affirmed the decision of McEachern C.J.B.C. ..., who stated at para. 35:
>
> > Lastly, in my opinion, judges should be exceedingly cautious about ordering the production of even a carefully edited tip sheet or report for which informant privilege is claimed. Judges should recognize that any confidence they may have about their ability to edit out information that might disclose the identity of an informant is probably misplaced, and possibly dangerously so. The court cannot step into the shoes of the accused and decide, on the basis of his knowledge, that an informant will not be identified. I need only mention that the accused may know that only some very small circle of persons, perhaps only one, may know an apparently innocuous fact that is mentioned in the document. The privilege is a hallowed one, and it should be respected scrupulously.
>
> [42] Other courts have recognized that even the smallest details may provide an accused person with all he or she needs to identify the informer... In *Leipert*,

> *supra*, McLachlin J. quoted a portion of the passage from McEachern C.J.B.C.'s reasons quoted above and observed at para. 16 that "[a] detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords to them."
>
> [43] I do not agree with the suggestion that because *Leipert* dealt with anonymous informers it has limited application to the facts of this case. An anonymous informer could be anyone. Given the precise details given to the police by the informer in the present case, the pool of potential informers is very limited. In my view, this called for heightened caution when it came to editing. *Leipert* does not eliminate the possibility of editing, but holds, at para. 32, that where
>
> > it is impossible to determine which details of the information provided by an informer will or will not result in that person's identity being revealed, then none of those details should be disclosed, unless there is a basis to conclude that the innocence at stake exception applies. [Some citations omitted.]

[35] In *R. v. Szilagvi*, 2018 ONCA 695, the court reviewed another ITO where the informants' criminal record was not included. The court outlined the relevant facts on this issue:

> [10] On November 29, 2011, the police obtained a telewarrant to search the appellant's residence in London, Ontario for an unlicensed firearm and ammunition. A justice of the peace authorized the warrant to search the appellant's residence based on an ITO submitted by the police. The grounds set out in the ITO for the warrant were founded almost entirely on tips provided by two confidential informants ("CI").
>
> [11] The ITO described CI #1 as an unproven confidential informant, who was motivated by civic duty and immersed heavily in the drug subculture. The informant was currently providing information in relation to several drug investigations, which had been corroborated by other means but "not acted upon". The ITO did not disclose whether CI #1 had a criminal record, and only stated that "Source #1 has not been convicted of mislead police or perjury".
>
> [12] Officer Adam Steele, the affiant of the ITO, later testified at the appellant's trial that at the time the ITO was drafted, it was his systematic practice not to "blanketly disclose" to an issuing justice all the information pertaining to a CI's police record. He also testified that the problematic nature of this practice has since been brought to his attention, and although he no longer applies for search warrants, if he were to do so now, he would attach the informant's criminal record. Officer Steele confirmed that he conducted inquiries into the informant, including his police record, and not all of that information was included in the ITO.

> [13] The ITO described CI #2 as someone who was not involved in the drug subculture and who had provided information out of civic duty.

[36] In underscoring the significance of the police clouding the details of an informant's criminal record in an ITO, the court stated:

> [60] In *Rocha*, Rosenberg J.A. focused on the "oddly worded language" used to describe the criminal record of the informant. In this case, the trial judge identified and properly criticized similar language (regarding no record for perjury or mislead police). Rosenberg J.A. also focused on the fact that the officer deliberately used that language to leave the impression that the informant was honest, again similar to this case. Finally, like Officer Steele in this case, the officer in *Rocha* had a practice of not disclosing the informant's full criminal record.
>
> [61] Although the ITO in *Rocha* featured additional deficiencies (it was not sworn, for example), the problems with the disclosure regarding the informant's criminal antecedents were the main reason Rosenberg J.A. concluded that the conduct by the officers fell at the serious end of the continuum for the purposes of the first branch of the s. 24(2) analysis. The seriousness of police conduct favoured exclusion of the evidence.
>
> [62] Nor was *Rocha* a case of first impression. Because the law was not unclear when it was decided, the police conduct was deliberate and serious, causing the court to set aside the trial judge's analysis and ultimately, to exclude the evidence.

[37] The Crown in *Szilagvi* further submitted that the ITO was not misleading because disclosing that the informant was involved in the drug trade would inform the issuing justice that the informant "had criminal involvement that could undermine his/her credibility" (para. 69). The court said:

> [70] I would reject this submission. It was not referred to by the trial judge nor should it have been. The purpose and effect of disclosing an informant's police involvement is to give the issuing justice a full picture of the credibility and reliability of the informant, particularly when the entire warrant is based on that person's information. It is not to say one thing but expect the justice to infer another.
>
> [71] To conclude on this point, in my view, the trial judge erred in law by treating the officer's negligent investigation of the informant's tip and negligent preparation of the ITO as demonstrating good faith, mitigating the seriousness of the police conduct.

[38] As a result of the vague wording in the ITO, Mr. Green has provided some basis for cross-examination of Constable Apa's knowledge of each confidential informant's criminal record when he swore the ITO and his standard practice in

this regard as an affiant. Whether or not each confidential informant is credible is relevant and material to the ultimate analysis. Cross-examination will be permitted on this issue.

[39] Mr. Green also points out that Constable Apa does not reference any of the sources' outstanding charges. There is no requirement that the sources' unproven, outstanding charges be included in an ITO, and therefore such a failure to reference is not relevant. Constable Apa said that referencing outstanding charges might lead to identification of the sources. While the issuing authority has to consider the reliability of each confidential informant, Mr. Green has not provided any foundation for his request to cross-examine Constable Apa on that specific issue, nor has he shown that this discrete complaint has any relevance to the *Garofoli* application.

2) Whether Constable Apa was aware that the four referenced confidential informants were actually four separate individuals, and if so, whether they had any opportunity to collude or collaborate

[40] Mr. Green seeks to cross-examine Constable Apa as to whether he knew the identity of the sources, to confirm that they were four separate people and that they were independent of each other, with no opportunity to collude. He says that where confidential sources are used to corroborate another confidential source, the affiant should swear that the sources have had no opportunity to collude and are independent. Mr. Neifer said variously during the hearing:

> So, My Lord, there's two aspects to this, one is knowledge that those sources are, in fact, different individuals, and secondly that there's no relationship or connection between those sources such that there would be concern that they're collaborating in any way. So at times on wiretaps, based on my reading, the affiants will swear to the independence of the sources if they're going to be used in a corroborative manner, and so, what we are seeking to confirm is that Constable Apa did not know the identities of the sources and that he did not know whether there was any relationship or connection between the sources. And again, this area of concern could be addressed through agreed facts if there's concerns with respect to informer privilege. But that would be the extent to which I would seek to question Constable Apa about that area.
>
> …
>
> With respect to independent corroboration I would ask to confirm that Constable Apa did not know the identities of the source informants and that he did not know whether there was any relationship or connection between the sources.

[41] As noted earlier, at the preliminary inquiry Constable Apa was questioned about his conversations with the source handlers, and described being provided with a "source qualification" for each source, dealing with such information as how long the handler had known the source and how many times they had been qualified. Again, after the hearing, the Crown produced the following Can Say:

> - When I drafted the ITO, I checked the SDRs to make sure the four sources each had different alphanumeric identifiers. They also had different handlers and different qualifications. Based on these facts, I was satisfied that they are four different people.

[42] In *R. v. Beck*, 2018 ABQB 900, Renke J. dealt with a similar issue. There were multiple confidential informants in the ITO, who each "appeared to corroborate the other, to the extent that their claims aligned" (para. 45). Justice Renke went on:

> 46 The probative value of this sort of corroboration, though, turns on the unlikelihood that two independent persons would make the same sort of observations unless they had both observed the same thing. See *R v U (FJ)*, [1995] 3 SCR 764 at paras 40-43; *R v Handy*, 2002 SCC 56 at para 104, not by way of a doctrinal analogy, but as confirming aspects of the practical logic of corroboration.
>
> 47 The ITO is silent on the issue of the Informants' independence from one another. I grant that reasonable inferences can be drawn. An inference might be that because no connection between the two was mentioned, independence can be inferred and the suggestion of connection is only speculation. But the absence of evidence can be telling too. The ITO should provide frank disclosure, not rely on unstated implication to confirm an important point. I note that it would have been easy to establish a foundation for the finding of independence in the ITO. The Affiant would simply have described the Informants as independent of one another.
>
> 48 The Affiant would have required information from the Handler to make this claim about independence. The Handler would have been able to provide this information, since both Informants had the same Handler.
>
> 49 In my view, this is not an instance of an innocent inference that could properly be ignored. Rather, the issue goes to whether one Informant could properly corroborate the other at all, whether there were two separate claims about Mr. Beck or in reality only one.

[43] The Crown has included information for my consideration in its brief on this issue for which there has been no evidentiary foundation, such as the following:

> 63. The Human Source units alone would have access to the identities of all of the informants. The applicant himself acknowledges that Cst. Apa would not be able to know the identities of the four informants in this case. In his SDR Brief of Law he stated:
>
> > It would not have been necessary for Officer Apa to know the identity of the source informants or information that might tend to identify them. Indeed, without the consent of the source informants, their identities could not be disclosed to Officer Apa without breaching informer privilege (see *R v B.(A.)*, 2015 ONSC 5541 at Tab 2, paras 109-110).
>
> 64. Again, the applicant has provided nothing to show that cross-examination of the affiant will assist the Court in determining the *Garofoli* application, and by his own admission, Cst. Apa would not know the identities of the sources in any event.
>
> 65. The applicant apparently seeks to cross-examine the affiant to probe whether or not he took steps to ensure that the four informants were different people. This ignores the context in which informant handlers operate. The affiant in this case is an informant handler himself and has received training in informant management. Of course there are police systems in place to avoid sources surreptitiously providing information to more than one handler. Both the Halifax Regional Police and the RCMP have Human Source Units tasked with the oversight of the Human Source Program. Members of these units were prepared to testify in the applicant's SDR application that he abandoned. [Emphasis added]
>
> 66. The applicant's approach originates again from a single outlier case, *R v Beck*, where the trial judge makes a number of suggestions about what else the affiant could have done to provide more information. That is not the test. In the case at bar, there is nothing in the record to suggest that the informants are not different people – indeed, every indication is that they are different people, having been working with different handlers for significant periods of time. Permitting cross-examination in this case would amount to inviting cross-examination in every ITO where there is more than one source and no express statement that they are different people. This approach would significantly erode the leave requirement contrary to the express direction of the Supreme Court.

[44] I do not rely on any of the unproven assertions. Nonetheless, I agree with the Crown on this issue. If the affiant of an ITO listed multiple sources, and if there was some evidentiary foundation suggesting an inaccuracy as to the number of actual informants (i.e. that multiple informants were actually a single informant), or the possibility of collusion between the informants, then that could be relevant such that permission would likely be granted to cross-examine the affiant of the ITO. However, that is not the situation here. Mr. Green has provided no foundation beyond speculation for cross-examining Constable Apa on this point.

3) Whether Constable Apa confirmed that the various sources had personal knowledge of the information they provided to the source handlers

[45] At subparagraph (g) of each of the source qualification paragraphs detailed in the ITO is the statement that the source "has personal knowledge of the information contained herein, based upon conversations and observations with the persons involved, unless otherwise stated..." Mr. Green says that subparagraph (g) is too generic, and wants to know if Constable Apa actually received the information from the various source handlers.

[46] At the preliminary inquiry, Constable Apa was questioned about the form of the information he received from the source handlers. In each instance he said he had spoken to the source handler and reviewed source debriefing reports, but did not see source handler notes:

> Q. Did you review … so it is Cst. Harding's source de-briefing report that you had reviewed with respect to this information.
>
> A. Correct.
>
> Q. Did you review his source handler notes for that date?
>
> A. I did not.
>
> Q. But you did talk with Cst. Harding on October 17, 2017?
>
> A. Yes.
>
> Q. Did he provide you with any information that was not within the source de-briefing report?
>
> A. I don't recall. Just that Mr. Green had trafficked cocaine within the last 24 hours and if he wanted to write a search warrant, write a search warrant.
>
> Q. That was the extent of what he told you. He basically trafficked within the last 24 hours, here's the source de-briefing report.
>
> A. Here's the source de-briefing report. I called him. That's confirmed. It's …
>
> Q. Okay. Did you know, in forming your grounds for arrest, the circumstances of that alleged cocaine transaction?
>
> A. Absolutely not.
>
> Q. And did you know whether the source was involved in that transaction?
>
> ...
>
> Q. Or how the source learned that information?

...

THE COURT: That's a "no"?

CST. APA: That's a "no". Sorry.

...

MR. NIEFER: And did you know what the source personally observed?

A. No, I don't.

Q. Do you know whether the source actually saw any cocaine at all?

A. No.

Q. Do you know who the source talked to?

A. Who the source talked to?

Q. In acquiring the information.

A. No, I don't know.

Q. In forming your grounds for arrest, as part of the ITO, which was also included in the ITO, you reviewed a source de-briefing report by D/Cst. Mansvelt, which was also in October.

A. Right.

Q. And that's mentioned at … I'm in the ITO at paragraph 22.

...

THE COURT: That's a "yes"?

CST. APA: Yes. Sorry.

...

MR. NIEFER: ... Did you review the source handler notes for that information?

A. I did not review any source handler notes for any of the sources that I used in this ITO.

Q. And for any of the source information that you used for the grounds for arrest and placing in the ITO, did you speak with the respective handlers to get further details?

A. My sole reliance for this ITO was the source debriefing reports.

[47] Mr. Green also says there is confusion over how Constable Apa actually received the source qualification information. As noted earlier, at the preliminary inquiry, Constable Apa was questioned about his conversations with the source handlers, and described reviewing a "source qualification" for each source, including such information as how long the handler has known the source and how many times they have been qualified. Following the preliminary inquiry, on

December 19, 2019, the Crown sent Mr. Green a Can Say from Constable Apa which states:

> - After reviewing the prelim transcript pp 49-54, I advised the Crown that the information for the source qualifications was obtained by speaking with each of the handlers. I do not recall obtaining any documents from the source handlers about source qualifications.

[48] Mr. Green says that this Can Say directly contradicts Constable Apa's testimony at the preliminary inquiry that he received information about the source qualifications by reading the SDRs, not by speaking with the source handlers. He submits that these apparent inconsistencies suggest the possibility that Constable Apa did not actually receive the source qualification information from the source handlers, noting that the Crown brief states that Constable Apa received source qualifications, but did not include details of what the sources observed, from the handlers.

[49] Mr. Green further argues that the Can Say adds additional confusion to this issue, in that Constable Apa says that he cannot recall if he reviewed the information with the source handlers:

> - It is my practice to ask source handlers about items in paragraph (g) and note same in my ITO, however due to the length of time that has passed since authoring the ITO, I cannot say with certainty that I reviewed it with them. If information is noted in the SDR that is not based on personal knowledge from conversations and observations with persons involved, if I rely on it, I note that in the ITO. It is also my practice as a source handler to not include information in an SDR that is not based on personal knowledge from conversations and observations with persons involved and note information that is not.

[50] Mr. Green says that the Can Say suggests that Constable Apa may not have reviewed the information with the source handlers prior to swearing the ITO. Paragraph four of the Can Say states:

> - After meeting with the Crown, I spoke with the 4 source handlers who confirmed that the information they provided in the SDRs is consistent with paragraph (g). They also advised they have the same practice as above.

[51] The Crown submits, in their brief, that distinguishing "between reliable information and rumour or gossip is built-in to the process of gathering

information from informants." They go on to review Constable Apa's explanations in the Can Say:

> 57. ... In his December 19, 2019 Can Say, the affiant explained the basis for subparagraph (g) as follows: that he obtained the information from the informant handlers; that it is his practice to (g) with each handler [sic], but he could not recall if he had done so in this case because of the amount of time that had gone by (the ITO was sworn October 2017; the Can Say is dated December 19, 2019); that his practice as a informant handler is not to rely on information that is not based on personal knowledge but to note that if he does include such information in an SDR; and that after meeting with the Crown (after the warrant had been executed), he confirmed the informant handlers in this case have the same practice of conforming with subparagraph (g).
>
> 58. In his February 13, 2020 Can Say, the affiant stated that there were some statements in the SDRs that expressly confirmed his assertion in subparagraph (g) of the informant qualifications, and there are no statements in the SDRs that contradict it. In other words, the affiant – who is himself trained in informant management – relied on a system in place to ensure that only reliable information is related in SDRs unless otherwise specified. There is no basis to doubt that system in this case.

[52] Mr. Green suggests that Constable Apa may have made assumptions about the source qualifications and only later, after the ITO was sworn, actually confirmed the information with the source handlers, and seeks to cross-examine on this point. The Crown says the origin of the information is irrelevant, as the only issue is whether it is accurate, and argues that his confusion about the source of the information will not make any difference to the ultimate validity of the search warrant.

[53] There is a great deal of confusion about how Constable Apa derived his information about the source qualifications. What information in an ITO comes from a confidential sources' personal knowledge is relevant and material to the validity of a search warrant. I am satisfied that Mr. Green has provided the requisite foundation to allow for cross-examination of Constable Apa about each source's personal knowledge and how he received the source qualifications. Cross-examination on this issue will be permitted.

4) Whether the statement in the ITO that the source was aware that Mr. Green had sold cocaine within the past 24 hours was accurately recorded

[54] In paragraph 23 of the ITO, Constable Apa states that he read a source debriefing report by Constable Harding, who had spoken with Source "A" on October 17, 2017, and learned the following:

> a. Green sold cocaine within the last 24 hours
>
> b. Green's work/dope number for customers is 902-233-5620
>
> c. Green is living on Cockburn with his grandmother
>
> d. Green keeps all his stash at his grandmothers

[55] At the preliminary inquiry Constable Apa was questioned about the recency of the information and whether he received any information directly from the source handlers about that point, and stated variously:

> A. Yes. So, Your Honour, on October 18, 2017, I received confidential informant information from another officer regarding Mr. Green, who … the information was that he had trafficked cocaine within the past 24 hours. I drafted a CDSA search warrant, which was authorized.
>
> …
>
> Q. Okay. And can you review a source de-briefing report without asking permission from the handler?
>
> A. It was … it's always been my practice to call the handler and speak to the handler and have them provide the source de-briefing report. And then if I have any questions later on, I would contact them after that.
>
> Q. Okay. Do you recall … for this instance, when you received the information that Mr. Green had trafficked within the past 24 hours …
>
> A. I spoke to that source handler.
>
> Q. You spoke to that source handler.
>
> A. I read something and I spoke to that source handler.
>
> Q. The source de-briefing report, that you reviewed to form part of your grounds for arrest, specifically mentions that Green sold cocaine within the last 24 hours. Did you review anything else dealing with that source information?
>
> A. There were four sources on the ITO.
>
> …
>
> MR. NIEFER: Based on my questions on that and so far I have not asked any questions dealing specifically with the identity of the source.
>
> Did you review … so it is Cst. Harding's source de-briefing report that you had reviewed with respect to this information.

A. Correct.

Q. Did you review his source handler notes for that date?

A. I did not.

Q. But you did talk with Cst. Harding on October 17, 2017?

A. Yes.

Q. Did he provide you with any information that was not within the source de-briefing report?

A. I don't recall. Just that Mr. Green had trafficked cocaine within the last 24 hours and if he wanted to write a search warrant, write a search warrant.

Q. That was the extent of what he told you. He basically trafficked within the last 24 hours, here's the source de-briefing report.

A. Here's the source de-briefing report. I called him. That's confirmed. It's …

Q. Okay. Did you know, in forming your grounds for arrest, the circumstances of that alleged cocaine transaction?

A. Absolutely not.

Q. And did you know whether the source was involved in that transaction?

...

Q. Or how the source learned that information?

...

THE COURT: That's a "no"?

CST. APA: That's a "no". Sorry.

...

MR. NIEFER: And did you know what the source personally observed?

A. No, I don't.

Q. Do you know whether the source actually saw any cocaine at all?

A. No.

Q. Do you know who the source talked to?

A. Who the source talked to?

Q. In acquiring the information.

A. No, I don't know.

Q. In forming your grounds for arrest, as part of the ITO, which was also included in the ITO, you reviewed a source de-briefing report by D/Cst. Mansvelt, which was also in October.

> A. Right.
>
> Q. And that's mentioned at … I'm in the ITO at paragraph 22.
>
> ...
>
> THE COURT: That's a "yes"?
>
> CST. APA: Yes. Sorry.
>
> ...
>
> MR. NIEFER: Sorry. Thank you, Your Honour. Did you review the source handler notes for that information?
>
> A. I did not review any source handler notes for any of the sources that I used in this ITO.
>
> Q. And for any of the source information that you used for the grounds for arrest and placing in the ITO, did you speak with the respective handlers to get further details?
>
> A. My sole reliance for this ITO was the source debriefing reports.

[56] Counsel confirmed that the SDRs do not contain any reference to Mr. Green selling cocaine within the last 24 hours. The Crown agrees that although in the ITO Constable Apa swore that the information came from the SDRs, the disclosure actually reveals that this information was not derived from an SDR, but came from his speaking with a source handler.

[57] As with the other three issues, the Crown maintains that the applicant has not shown a basis for leave to cross-examine to be granted on this issue, and that another "exploratory cross-examination of the affiant will serve no proper purpose." The Crown takes exception to the suggestion that this was a deliberate deception, submitting that the apparent inconsistency in Constable Apa's preliminary inquiry testimony was an inconsequential "sourcing error." Counsel made reference to *Shivrattan* where the court states:

> 54 When the defence shows a reasonable likelihood that cross-examination of the affiant on the s. 8 application at trial will generate evidence tending to discredit the existence of one or more of the grounds for the issuance of the warrant, the defence is entitled to conduct that cross-examination as part of the s. 8 application at trial regardless of whether that cross-examination will add to the cross-examination conducted at the preliminary inquiry.

[58] The Crown maintains that the Can Says and the preliminary inquiry transcript provide a significant amount of disclosure about what Constable Apa's evidence will be, including previous cross-examination, without providing any

basis on which to cross-examine him. The Crown accuses the defence of isolating "one or two words", such as the question about whether Constable Apa solely relied on the Source De-briefing Report, where (the Crown says) the defence "seems to ignore when he very clearly says that he's had a conversation with the handler, that the handler told him that the information about the 24 hours came from the handler himself." The Crown continues, in oral argument:

> ... We can't just parse testimony and pick and choose the pieces we like, it has to be read as a whole, and I submit to you that when you read the testimony of Constable Apa at the prelim there is no confusion over how he learned the information regarding the last 24 hours. It is very clear. ...[I]f you read the entire transcript you can see it and it's a similar approach to this question of, you know, did the information about the source qualifications come from a document or from a conversation. You have to read the whole section. You can't just zero in on a couple of words, and I would submit to you that it's not unclear from the preliminary inquiry transcript where Constable Apa receives this information, and then he also had the opportunity to do further reflection, provide a Can Say and again reiterates, look there's no document, there's no document, I got this information from the handler. ...

[59] The Crown goes on to submit that the law recognizes that affiants can reasonably receive information from source handlers:

> ... It's reasonable for him to expect when he speaks to another handler and he says, for example, is this first hand information, the handler says yes, he doesn't need to ask how does he know, did he have a conversation, was he there, he doesn't need to ask those questions. It's safe for him to rely on the handler's information and indeed despite all of the exploration that we have had on all of these minor issues, nothing has ever come out that has caused us to be concerned or to disclose a discrepancy that would suggest that Constable Apa was on notice of a need to make further inquiries, but he didn't do so. All those instances in which he relies on the information from handlers are reasonable... Constable Apa receives information from another handler that Mr. Green has sold cocaine within the last 24 hours, so he's got to get writing right away, right, he sits down and starts writing his ITO, and you've got to put it all together and he's got to act quickly because once a person selling cocaine, selling the supply they just got, they're going to sell until they run out and ideally the police are going to intercept them before they run out, so they start writing right away, and it's not surprising that when we take a second look at an ITO we find a few things that we could have written a little differently ... or that might have been expressed differently, but that's not the standard...

[60] The Crown says that affiants are not held to a standard of perfection, and that no confusion arises out of the ITO. In oral argument, Crown counsel

distinguished between areas of interest and areas where an applicant has laid a proper foundation for cross-examination:

> So if you go back and, if you look at the ITO itself you see that Constable Apa has a bit of a pattern in his language, and so all of his clauses are sort of stated as, I read a Source De-briefing Report authored by X who spoke with Source "A", "B", "C" or "D" in months near and learned the following. It's that kind of opening clause that he uses all of the time and he uses it in every instance and including the last one which is the tip that ultimately leads him to search, to request for an obtain a search warrant, and we discover at the preliminary inquiry because he is given the opportunity to examine on this issue, that in fact that information came from the handler, right. So what we have here is really inconsequential. It doesn't matter where Constable Apa got the information, it matters that he got it and it's true, right, and the fact that it came from the handler verbally instead of the SDR is not a basis on which to invalidate the ITO. It's just a sourcing error. So what is cross-examination going to produce? It's going to give us an opportunity to criticize Constable Apa for being a little sloppy, but it's not going to result in some revelation that ... it turns out I completely made that up.

[61] Crown counsel maintained that whether the affiant received the information directly from the handler or from the SDR was immaterial, since it was all originating with the source, and there is therefore "no prospect that probing this issue further is going to result in a conclusion that he deliberately misled or that in any way he misled the issuing judge because in both cases the information clearly came from that source..." According to the Crown, nothing in the Can Says or the preliminary inquiry transcript suggests that Constable Apa's evidence on further cross-examination will be different from what he said before. Any differences, the Crown says, are not material, and the Crown adds that the source handler system provides its own safeguards, and that further confirmation could be produced, for instance, that the sources were four separate individuals, but that this would probably only give rise to yet more questions.

[62] Considering the apparent inconsistency in the evidence, Mr. Green says cross-examination of Constable Apa could address a relevant issue, was the information provided by the confidential informants compelling? He says that cross-examination would therefore assist in determining the validity of the warrant. Constable Apa swore in the ITO that the information came from the SDR's. He swore at the preliminary inquiry that the information came from the source handlers. He then confirmed this in a Can Say. The Crown says the origin of the information is irrelevant as long as the information is true. I am not satisfied that this inconsistency can simply be ignored as the Crown argues. Mr. Green has

provided an evidentiary foundation to cross-examine Constable Apa on this point since the recency of the source information is a material issue. He will be permitted to cross-examine Constable Apa on this topic.

Conclusion

[63] Mr. Green will not be permitted to cross-examine Constable Apa on the following area:

1) Whether Constable Apa was aware that the four referenced confidential informants were actually four separate individuals, and if so, whether they had any opportunity to collude or collaborate.

[64] Mr. Green will be permitted to cross-examine Constable Apa on the following three areas:

1) Constable Apa's knowledge of each confidential informant's criminal record when he swore the ITO and his standard practice in this regard as an affiant;

2) Whether Constable Apa confirmed that the various sources had personal knowledge of the information they provided to the source handlers; and

3) Whether the statement in the ITO that the source was aware that Mr. Green had sold cocaine within the past 24 hours was accurately recorded.

Arnold, J.