CITATION: R. v. Shahin, 2019 ONSC 4480
COURT FILE NO.: CR-18-0518
DATE: 20190830

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)
	)
HER MAJESTY THE QUEEN	) *Brendan Gluckman* and *Amanda Hauk*, for the Crown
– and –	)
	) *Gary Grill*, for the Defendant Marco Maric
MARCO MARIC, GIOVANNI RAIMONDI, ETHAN ECKSTEIN, ABDUL SHAHIN, VARTEVAR ED BROUNSUZIAN and TANG HIEN QUANH	) *Greg Lafontaine* and *Carly Eastwood*, for the Defendant Giovanni Raimondi
	) *Robert Yasskin*, for the Defendant Ethan Eckstein
Defendants	) *Enzo Battigaglia*, for the Defendant Abdul Shahin
	) *Peter Zaduk*, for the Defendant Vartevar Ed Brounsuzian
	) *Leonard Hochberg*, for the Defendant Tang Hien Quanh
	) **HEARD:** September 14, 17, 18, 20, 21, 25, 27, 28, October 1, 2, 3, 4, 5, 10, 11, 12, 15, 16, 17, 18, 19, 22, 26, 29, 31, November 1, 5, 6, 7, 8, 9, 13, 15, 16, 19, 20, 21, 2018

REASONS FOR JUDGMENT

PRE-TRIAL *CHARTER* APPLICATION OF ABDUL SHAHIN

M.F. BROWN J.

BACKGROUND

[1] Five of the six defendants on this indictment (Mr. Maric, Mr. Eckstein, Mr. Shahin, Mr. Brounsuzian, and Mr. Quanh) brought pre-trial *Charter* applications before me seeking exclusion of certain evidence at trial pursuant to s. 24(2) of the *Charter*. Four of the five accused, Mr.

Maric, Mr. Eckstein, Mr. Shahin and Mr. Brounsuzian, brought *Garofoli*[1] applications before me challenging the constitutionality of various searches and the interception of private communications conducted under the authority of various wiretap authorizations, general warrants and search warrants.

[2] On November 20, 2018 I gave brief oral reasons dismissing the five defendants' *Charter* applications. At that time, I held that I was not satisfied that the evidence sought to be excluded by the various defendants should be excluded under s. 24(2) of the *Charter*. As well, I indicated that in order not to delay matters, I would provide more detailed written reasons at a later date. These are those reasons.

[3] Previously, on June 26, 2019, I released my written reasons regarding Mr. Quanh's pre-trial *Charter* application where I found there was no violation of his s. 9 *Charter* rights when he was arrested or his s. 8 *Charter* rights when the police searched Mr. Quanh incident to his arrest or subsequently obtained evidence from the search of a Toyota RAV4 motor vehicle. That decision is now reported at *R. v. Quanh,* 2019 ONSC 3887.

[4] In this case, all four defendants who brought *Garofoli* applications challenged various authorizations and warrants on both a facial and sub-facial basis. I granted leave to the four defendants to cross-examine certain affiants and, in some cases, sub-affiants of the various warrants and authorizations. I also granted the "Step Six" *Garofoli* application of the Crown to permit me to rely upon certain information that had been redacted in the original warrants and authorizations despite the inability of the four defendants to access it. See *R. v. Crevier*, 2015 ONCA 619 at para. 2.

[5] All four *Garofoli* applications were heard together by me as pre-trial applications. In order to make my reasons more manageable I am releasing four separate judgments today regarding the *Garofoli* applications of Mr. Maric, Mr. Eckstein, Mr. Shahin and Mr. Brounsuzian. I recognize that there will be some overlap in issues of fact and law given the submissions of counsel and the evidence admitted on the four applications. The citations for my reasons regarding the pre-trial *Charter* applications of the four defendants are: *R. v. Maric*, 2019 ONSC 4478; *R. v. Eckstein*, 2019 ONSC 4479; *R. v. Shahin*, 2019 ONSC 4480; and *R. v. Brounsuzian*, 2019 ONSC 4481. This judgment is in regard to Mr. Shahin's application.

OVERVIEW

[1] See *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

[6] At the commencement of this pre-trial application, the defendant Abdul Shahin (the "defendant") stood charged on an indictment before me with one count of conspiracy to traffic in cocaine and one count of possession of cocaine for the purpose of trafficking. In a separate indictment where he was the only named defendant, the defendant was also charged with several firearms related charges.

[7] On May 16, 2016 a general warrant was sought by the Toronto police and granted by the issuing justice to search 595 Proudfoot Lane unit 808 in London, Ontario. On May 26, 2016 at approximately 7:15 p.m. the general warrant was executed by officers of the Toronto police at that premises. Various items were seized by the police including drugs, a firearm and ammunition. Later that evening, at approximately 11:30 p.m., the London police obtained a warrant to search 595 Proudfoot Lane, unit 808 which was executed shortly thereafter.

[8] The defendant in this application seeks to exclude the following evidence at trial pursuant to s. 24(2) of the *Charter*:

a) Any evidence found as a result of the search of 595 Proudfoot Lane, unit 808 on May 26, 2016 pursuant to the general warrant dated May 16, 2016;

b) Any evidence found as a result of the search of 595 Proudfoot Lane, unit 808 on May 26, 2016 pursuant to the search warrant dated May 26, 2016; and

c) The evidence of the police observations on May 4, 2016 and May 26, 2016 on the eighth floor of 595 Proudfoot Lane.

A. GENERAL WARRANT OF MAY 16, 2016

[9] I will begin my analysis by dealing with the impugned general warrant of May 16, 2016.

[10] The defendant submits that there are both facial and sub-facial issues with the general warrant of May 16, 2016. In terms of the sub-facial defects, the defendant seeks to excise from the warrant certain statements of the affiant in the ITO (Information to Obtain) that the defendant submits are false and misleading as well as certain observations of the police in the hallway of the eighth floor of 595 Proudfoot Lane on May 4, 2016 that the defendant submits were unlawfully obtained. In terms of issues of facial validity, the defendant submits that the ITO on its face, with the offending portions of the ITO excised, does not provide a sufficient basis upon which the general warrant could issue. Moreover, submits the defendant, when the Crown relies upon information from a confidential informer to meet the requirement of reasonable grounds, consideration must be given to whether the information from the informer is compelling, credible and corroborated. The defendant submits that the material placed before the issuing justice does

not demonstrate that the confidential informant's information was compelling, credible or corroborated.

[11] The defendant submits that after consideration of the totality of the circumstances set forth in the ITO, after the proper excisions, there was not a proper basis upon which the issuing justice could have been satisfied that there were reasonable grounds to issue a general warrant in regard to 595 Proudfoot Lane, unit 808 in London, Ontario. Accordingly, submits the defendant, the search and seizure of evidence by the Toronto police on May 26, 2016 pursuant to the general warrant was a breach of the defendant's s. 8 *Charter* rights and the evidence should be excluded pursuant to s. 24(2) of the *Charter*.

[12] As indicated earlier, I granted the Crown's "Step Six" *Garofoli* application in regard to certain redacted portions of the ITO of Officer Chase dated May 16, 2016 that the Crown sought to rely upon in this *Garofoli* application. See Exhibit KK(4a). The defendant did not oppose the Crown's "Step Six" application. As required by *Crevier*, at paragraphs 88 and 90, in objectively assessing the ITO in this case, I have taken into account that the defendant could not see the redacted portions of the ITO and directly challenge them.

Preliminary Matter: Standing of the Defendant to Challenge Warrants

[13] Before dealing with the sufficiency of the general warrant of May 16, 2016, a preliminary matter needs to be addressed. The Crown took the position on this application that the defendant did not have a reasonable expectation of privacy in unit 808, 595 Proudfoot Lane and therefore had no standing to challenge the searches of the premises on May 26, 2016 pursuant to the general warrant of May 16, 2016 or the search warrant of May 26, 2016. On September 28, 2016, I gave brief oral reasons indicating that Mr. Shahin did have standing to challenge those warrants and I indicated that I would provide further reasons at a later date. These are those reasons. In order to deal with this issue, a brief review of the factual record will be of assistance in regard to unit 808, 595 Proudfoot Lane.

[14] On the record of this application there was some evidence of a tenancy arrangement between the defendant and Emilee Jarvis on the basis of the witness statement of Emilee Jarvis. In her witness statement of June 2016 filed at the hearing, Ms. Jarvis said that she met the defendant a few years before and got to know him then. She had an apartment at 595 Proudfoot Lane on the second floor and the defendant was paying her $1,000 a month to use it. She said she did not know that the defendant was selling drugs from the apartment. She thought that maybe he needed the apartment because he had a child and wanted to get away from his wife and child. Ms. Jarvis stated that she was making money because he was paying her way more than what her rent actually was.

[15] As of December 21, 2015, the tenancy list had Emilee Jarvis registered as a tenant in unit 217 of 595 Proudfoot Lane and Mr. Brian Lake as the tenant listed in unit 808. In December 2015, the defendant asked Ms. Jarvis to get a new apartment in the building, so Ms. Jarvis moved the apartment from the second floor to apartment 808 for him. She said the defendant did not tell her why he wanted it changed. She did it for him, but she did not actually ever go into the apartment.

[16] The Crown submits, relying on cases such as *R. v. Edwards*, [1996] 1 S.C.R. 128 and *R. v. Van Duong*, 2018 ONCA 115, that the defendant had no reasonable expectation of privacy in unit 808, 595 Proudfoot Lane. The Crown submits that at its highest, the defendant was, as was the case in *Edwards*, nothing more than an exceptionally privileged guest in the unit. See *Edwards* at para. 47. The Crown submits that the significance of the evidence that the defendant had possession and control of unit 808 was undermined by the elaborate fraud used by the defendant to obtain possession. See *Van Duong* at para. 6.

[17] In my view, on the record before me on the *Garofoli* hearing, the defendant did have a reasonable expectation of privacy in unit 808. As has often been said, the factual matrix is all important when assessing a reasonable expectation of privacy. In coming to this conclusion, I have considered the non-exclusive criteria set out in *Edwards* at para. 45. I am of the view that in assessing the totality of the circumstances, the defendant had a subjective expectation of privacy in unit 808 that was objectively reasonable.

[18] The facts in this case are different from both *Edwards* and *Van Duong*. In *Edwards*, the defendant Mr. Edwards, made use of the apartment of the tenant, Ms. Evers. In her evidence at trial, Ms. Evers stated that Mr. Edwards was just a visitor who stayed over occasionally. As well, although Mr. Edwards kept a few personal belongings at the apartment, he did not contribute to the rent or household expenses save for his alleged assistance of Ms. Evers in the purchase of a couch. In *Van Duong*, the defendants obtained possession of a secluded residential property by means of an elaborate fraud, paying a substantial premium to an intermediary to ensure that there was no paper trail connecting them to the property.

[19] In this case, unlike the situation in *Edwards*, the defendant was actually paying Ms. Jarvis for the use of the apartment. There was some form of an agreement regarding tenancy. As well, unlike *Edwards*, we do not have the evidence of Ms. Jarvis on the application indicating that the defendant was just a visitor who stayed over occasionally. In fact, Ms. Jarvis said in her statement that she did not actually ever go into apartment 808 after she changed apartments for the defendant. As to whether the defendant actually resided at unit 808, the fact that the defendant may not have resided at unit 808, is only one of several factors to be considered in deciding the question of standing. See *R. v. Vi* (2008), 239 C.C.C. (3d) 57 (BCCA) at para. 15.

[20] I also do not view the tenancy arrangement between Ms. Jarvis and the defendant as an elaborate fraud as in *Van Duong*, thereby undermining the significance of any possession and control the defendant had in unit 808. To begin with, no intermediary was enlisted, as in *Van Duong*, to ensure that there was no paper trail. The arrangement was made between the defendant and Ms. Jarvis directly. The defendant asked Ms. Jarvis for the use of her apartment and Ms. Jarvis agreed. The defendant paid her for the rent at a premium. Ms. Jarvis never went into the apartment. These circumstances do not undermine the significance of the defendant's possession and control of unit 808.

[21] In all the circumstances, I am of the view that the defendant had a reasonable expectation of privacy in unit 808, 595 Proudfoot Lane and therefore had standing to challenge the searches of unit 808 on May 26, 2016 pursuant to the general warrant of May 16, 2016 and the search warrant of May 26, 2016. That being said, for reasons I explain more fully later in this judgment, I do not believe the defendant had a reasonable expectation of privacy in the common areas of 595 Proudfoot Lane, including the eighth floor hallway.

[22] Before dealing with the sufficiency of the ITO, a review of a few general legal principles is in order regarding the standard of review on a *Garofoli* hearing and issues regarding confidential informants.

The Standard and Scope of Review on a *Garofoli* Hearing

[23] 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 validity of the warrant 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: See *R. v. Morelli*, 2010 SCC 8 at paras. 40-41; *R. v. Sadikov*, 2014 ONCA 72 at paras. 37-38; *Crevier* at para. 74; and *R. v. Araujo*, 2000 SCC 65 at para. 57.

[24] The central consideration in the review of a warrant is whether, on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there remains a sufficient basis upon which the warrant could be issued. See *R. v. Nguyen*, 2011 ONCA 465 at para. 57.

[25] Like the issuing justice, the reviewing justice is entitled to draw reasonable inferences from the contents of the ITO. That an item of evidence in the ITO may support more than one inference, or even a contrary inference to one supportive of a condition precedent, is of no moment. The inquiry begins and ends with an assessment of whether the ITO contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued. See *R. v. Nero*, 2016 ONCA 160 at para. 71.

[26] When the information to support the warrant comes from a confidential informant, the totality of the circumstances inquiry focuses on three questions. Does the material before the reviewing judge demonstrate that the confidential informant's information was compelling? Does the material demonstrate that the confidential informant was credible? And, finally, does the material demonstrate that the confidential informant's information was corroborated by a reliable, independent source? See *R. v. Debot,* [1989] 2 S.C.R. 1140 at para. 53; *R. v. Shivrattan*, 2017 ONCA 23 at para. 27.

[27] The first question addresses the quality of the confidential informant's information. For example, did the informant purport to have first-hand knowledge of events or was the informant reporting what he or she had been told by others? The second question examines the confidential informant's credibility. For example, does the informant have a long record which includes crimes of dishonesty, or does he or she have a motive to falsely implicate the target of the search? The third question looks to the existence and quality of information independent of the confidential informant that offers some assurance that the informant provided accurate information. The answers to each of these questions are considered as a whole in determining whether the warrant was properly issued in the totality of the circumstances. For example, particularly strong corroboration may overcome apparent weaknesses in the confidential informant's credibility: See *Crevier* at paras. 107-108; *Shivrattan* at para. 28.

(a) Issues Regarding the Content of the ITO for the General Warrant of May 16, 2016

[28] The defendant raises a number of issues regarding the content of the ITO. The defendant submits that there were statements in the ITO that require excision because they were deliberately false or misleading, or were unconstitutionally obtained. I will deal with each issue in order for the general warrant of May 16, 2016.

(i) Omitting the co-accused Elaine Rodier

[29] In the ITO, Officer Chase makes reference to a London police occurrence where the defendant was charged with possession of a Schedule II substance and possession of a Schedule I substance after his arrest on September 3, 2015.

[30] The defendant submits that even though Officer Chase had source documents clearly stating that there was a co-accused on the charges, he omitted any reference to the fact that there was a jointly charged female, Elaine Rodier. The defendant submits that it is not fair for the Crown to be able to use the arrest as a factor in support of a warrant when the issuing justice was deprived of the information that there was a co-accused who, unlike the defendant, was located inside of the premises at 600 Proudfoot Lane, unit 403 in London. The defendant submits that Officer Chase had a duty to be full, frank and fair by including information that would undermine the strength of the defendant's outstanding charges, which would in turn detract from the reasonable grounds asserted by Officer Chase.

[31] In my view, Officer Chase did not mislead the issuing justice. The fact that another person is jointly charged with the same offence does not mean that the case against the defendant is necessarily weaker. In my view, the failure to mention the defendant's co-accused was not a material omission. Nor was the issuing justice mislead by the omission. Officer Chase testified that he left out the reference to the co-accused because he was trying to be concise. I accept his evidence on this issue. The obligation on an applicant for a warrant is not to commit the error of material non-disclosure. See *Nguyen* at para. 51. The fact the defendant had a co-accused was immaterial in the circumstances of this case. Officer Chase was trying to be concise. No excision is required.

(ii) The defendant's criminal record

[32] The defendant submits that Officer Chase did not provide a copy of the defendant's criminal record in the ITO. The defendant submits that adding the half-page criminal record would not have been onerous. The defendant submits that the issuing justice should not have had to rely on Officer Chase's interpretation of the record. The defendant submits that when Officer Chase describes the defendant's criminal record as "spanning from 2007 to the present", on a plain reading, it suggests that 2016, the date of the ITO, is the last date of a conviction for the defendant. The defendant submits in fact, the defendant's record ends in 2012, four years earlier and has multi-year gaps in between convictions. The defendant submits that this misrepresentation is again repeated later in the ITO.

[33] In my view, this was not a misleading or erroneous statement. Nor was it a material omission. Officer Chase testified that what he meant by the criminal record reference was that the defendant had a current criminal record that had not been expunged or had not been deleted. I accept his evidence on this point. No excision is required.

(iii) Surveillance of Mr. Eckstein on May 4, 2016

[34] The defendant submits that according to surveillance reports which were in Officer Chase's possession when preparing the ITO, Mr. Eckstein was observed leaving 595 Proudfoot Lane with a black bag. The defendant submits that Officer Chase purposely conflated the

observations of Mr. Eckstein exiting unit 808 with Mr. Eckstein exiting the building of 595 Proudfoot Lane with a black bag, leaving the impression that Mr. Eckstein exited unit 808 with a black bag. The defendant submits that the surveillance report indicates there were no observations of Mr. Eckstein exiting unit 808 with a bag. Officer Chase testified that his intention was to give a brief description of what he could get from the police occurrence report. He said that in the occurrence report the events are stated sequentially in terms of when Mr. Eckstein left the unit and then boarded the vehicle with a bag. He said that is what he was trying to put down in the ITO. He said the time between Mr. Eckstein leaving unit 808 and then exiting the building was only three minutes so it seemed like all in one instant. That is why he put it all in one sentence. He said at no time did he say that Mr. Eckstein left the unit with a bag and then took the bag and put it in his truck. In my view, the summary of the occurrence report was not inaccurate or misleading. The police observed (1) Mr. Eckstein exit unit 808 and (2) board the vehicle carrying a black bag. There was no intention to mislead the issuing justice. No excision is required.

(iv) 2013 Arrest of Mr. Maric and Mr. Eckstein

[35] Although the defendant took no issue with the reference in the ITO of Officer Chase of May 16, 2016 in regard to the arrest in 2013 of Mr. Maric and Mr. Eckstein with other parties, I agree with the Crown's position that given that the same information was amplified in Officer Chase's ITO of May 3, 2016, it should also be amplified in Officer Chase's ITO of May 16, 2016 as well. Accordingly, for the reasons I gave in regard to this issue relating to Mr. Brounsuzian, I would amplify the ITO to read "kilogram of cocaine cut or adulterant." As well, there should be an amplification to indicate the 2013 charges were withdrawn.

(v) Unconstitutionally Obtained Evidence - Observations of Police on May 4, 2016 at 595 Proudfoot Lane

[36] The defendant, relying on *R. v. White*, 2015 ONCA 508, submits that the observations of the London police of the defendant and Mr. Eckstein on May 4, 2016 on the eighth floor of 595 Proudfoot Lane need to be excised from the ITO of May 16, 2016 because those observations were made in violation of the defendant's s. 8 *Charter* rights. As well, the defendant submits that the observations of the police need also be excluded at trial for the same reasons.

[37] A brief summary of the evidence heard in relation to this issue and the general legal principles regarding Section 8 of the *Charter* and the reasonable expectation of privacy is required to put this issue in some context. As noted earlier, at paragraph 25(g) of the ITO, Office Chase refers to the surveillance report of the London police. Officer Chase states in the ITO that on May 4, 2016 officers from the London police attended 595 Proudfoot Lane at 12:27 pm and observed Mr. Eckstein enter unit 808 empty handed. They then observed Mr. Eckstein exit unit 808 about thirty minutes later. At approximately 6:52 pm, the defendant was observed by the police exiting unit 808.

a. Officer Pavoni

[38] Officer Pavoni of the London police testified at the *Garofoli* hearing. He said a warrant was not sought or obtained by the London police for the observations made on the eighth floor at 595 Proudfoot Lane on May 4, 2016. Nor to his knowledge was any advice sought from the Crown's office as to whether the police should get a warrant for these observations. He testified that the police did not get permission from property management to gain entry into 595 Proudfoot Lane in relation to this matter and specifically gaining entry to the building on May 4, 2016 for the purpose of making observations in the hallway of unit 808.

[39] Officer Pavoni testified that the London police have a universal access code that is provided to the police by the building management, so the police can access the building for an emergency. The police don't use a key or fob. They just punch in the code that is provided to them. He said he assumed that access was gained on May 4, 2016 using the universal access

code, but he said he didn't know how the officers got to the eighth floor. When asked if he personally knew of the reason why police are granted access to the building using a universal access code, he said it makes sense in a multi-unit building such as 595 Proudfoot Lane. There are four buildings in the complex that are all connected through an underground garage and there are hundreds of units. He said it makes sense that the police and emergency services can access it without a key.

[40] Officer Pavoni also testified that there was no search warrant or general warrant sought in relation to the observations on the eighth floor of 595 Proudfoot Lane on May 26, 2016. Nor was advice sought from Crown counsel with respect to whether a warrant would be required to make those observations. Nor was property management advised that the observations by the police were being done on May 26, 2016. Officer Pavoni explained that the London police had issues with property management at 595 Proudfoot Lane. He said the reason the police did not approach property management was based on two things. He testified that he learned through a previous investigation that the landlord employee knew the defendant personally. As well, on another occasion, the London police had notified the staff of a warrant that they intended to execute, and they later learned that the office staff had called the person that they were executing the warrant on and notified the person that the police were coming to execute the warrant. The apartment was emptied out before the police got there. This happened one or two years prior to 2016. Officer Pavoni testified that no inquiries were made of property management on May 26, 2016 or prior to that date as to whether that person was still employed there or not.

b. Section 8 of the *Charter* and the Reasonable Expectation of Privacy

[41] The scope of the protection afforded by s. 8 of the *Charter* was determined by the decision of the Supreme Court of Canada in *Hunter v. Southam Inc.* (1984) 14 C.C.C. (3d) 97 at pp. 108-109.

[42] In considering whether there has been an unreasonable search, it is first necessary to decide whether the police investigative technique constituted a "search". That question is answered by determining whether the person had a reasonable expectation of privacy. If the person alleging a breach of s. 8 of the *Charter* had no reasonable expectation of privacy, then whatever occurred was not a search and s. 8 could not have been violated. The factual matrix is all important when assessing a reasonable expectation of privacy.

[43] This limitation on the right guaranteed by s. 8 of the *Charter*, whether it is expressed negatively as freedom from unreasonable search and seizure, or positively as an entitlement to a reasonable expectation of privacy, indicates that an assessment must be made whether in particular situations, the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. This assessment must be made in light of the totality of the circumstances of a particular case.

[44] When deciding whether state conduct amounts to a search or seizure, the focus is not so much on the nature of the state conduct as it is on the impact of the state conduct on the privacy interests of the s. 8 claimant. It is the defendant who bears the burden of demonstrating this expectation on a balance of probabilities. See *Edwards* at para. 45.

[45] In *Edwards* at para. 45 Justice Cory enumerated several considerations that are relevant to this inquiry:

i. Presence of the accused at the time of the search;
ii. Possession or control of the property or place searched;
iii. Ownership of the property or place;
iv. Historical use of the property or item;
v. The ability to regulate access, including the right to admit or exclude others from the place;
vi. The existence of a subjective expectation of privacy; and
vii. The objective reasonableness of the expectation.

c. Analysis

[46] In my view, for the reasons I have also expressed in my reasons regarding Mr. Maric, the *White* decision does not require the police to obtain a search warrant for the type of investigative technique employed by the police in this case. *White* must be considered in light of the particular facts of that case. In *White*, the Ontario Court of Appeal found that multiple police entries into the common areas of a condominium building resulting in observations of the contents of the defendant's storage locker, and the eavesdropping of conversations inside the unit, were so intrusive that it could not be said that there was no reasonable expectation of privacy in the building's hallways and common areas.

[47] I agree with Justice Code's comments in *R. v. Brewster*, 2016 ONSC 4133 *(Brewster* #1) at para. 110 that *White* did not change the law but simply applied the pre-existing law to a set of facts where the police acted in an egregious manner. Similar sentiments were expressed by other judges of this court in *R. v. Barton*, 2016 ONSC 8003 at para. 67 and *R. v. Samuel*, [2018] O.J. No. 932 at para. 19. As Justice Huscroft said in *White* at para. 44, the lesson from *Edwards* is that a reasonable expectation of privacy is a context-specific concept that is not amenable to categorical answers. A number of considerations may be relevant in determining whether an expectation of privacy is reasonable in the context of particular multi-unit buildings, albeit none of them is dispositive. The *Edwards* factors must be considered as a whole having regard to the particular circumstances of each case.

[48] In *Brewster* #1 at paras. 110-114, Justice Code set out an extensive analysis relating to certain kinds of police observations made in the common areas of multi-unit buildings. Justice

Code's conclusion from that analysis was that the current law is that there is no reasonable expectation of privacy (or a very low privacy interest) in common areas like parking garages, lobbies, elevators, and hallways provided that police do not conduct intrusive surveillance of activities inside the apartment or condominium unit from their vantage point in the common areas. The current state of the law suggests that the warrant requirement is generally not engaged in the common areas of multi-unit buildings. See *R. v. Brewster*, 2016 ONSC 8038 (*Brewster* #2) at para. 62. I am of the view that Justice Code has accurately stated the law as it currently exists in regard to the reasonable expectation of privacy in the common areas of multi-unit apartments in both of his decisions in *Brewster*.

[49] As set out above in *Edwards*, a reasonable expectation of privacy has both a subjective and objective element. An individual must first subjectively hold an expectation of privacy in a place or thing in order for s. 8 of the *Charter* to be engaged. At the same time, however, that expectation must be objectively reasonable.

[50] In this case there was no direct evidence of a subjective expectation of privacy by the defendant. However, at the subjective stage of the test for establishing a reasonable expectation of privacy, the question is whether the defendant had or is presumed to have had an expectation of privacy. This is a low hurdle to overcome and for the purposes of the inquiry I am prepared to presume that the defendant had such a subjective expectation of privacy. See *R. v. Patrick*, 2009 SCC 17 at para. 37.

[51] As noted earlier, a person's subjective belief in an expectation of privacy in a particular case must be objectively reasonable. In the circumstances of this case I find that there was no objective basis for the existence of a reasonable expectation of privacy on the part of the defendant in relation to the observations of the police on the eighth floor hallway of 595 Proudfoot Lane.

[52] On the totality of the circumstances before me, taking into account the factors set out in *Edwards*, I am of the view that the defendant did not have a reasonable expectation of privacy in the common areas of the hallway of the eighth floor of 595 Proudfoot Lane. In particular, I rely on the following considerations:

a) The defendant was not the owner of unit 808. The evidence was that he paid Ms. Jarvis for the use of the apartment.

b) 595 Proudfoot Lane is a high-rise building of 14 stories, with roughly 250 tenants. Any number of persons could have been in the common areas at any time.

c) There was no evidence of a security system other than a key, fob or access code required to access 595 Proudfoot Lane. There was no evidence of exceptional security measures such as in *R. v. Batac* [2018] O.J. No. 383 at para. 42 to limit access to the floors of the apartment building suggesting a heightened expectation of privacy in certain areas.

d) The nature of the police observations were unobtrusive. They were naked eye observations of the eighth floor hallway by the police. There was no evidence that the observations included observations inside the apartment unit.

[53] As well, as noted by the Ontario Court of Appeal in *Saciragic*, at para. 31, in assessing whether an individual has a reasonable expectation of privacy it is necessary to look not only at the immediate information sought by the police but the further information that it ultimately reveals. A physical address does not, of itself, reveal intimate details about one's personal choices or way of life, and, ordinarily, it is publicly available information to which many people have access. On the record before me, there were no particular circumstances that would indicate a reasonable expectation of privacy in the defendant's connection to unit 808. The defendant made use of an apartment building with common areas. There was no evidence to suggest a reasonable expectation that the defendant's comings and goings would not be observed by others, or the fact of these observations divulged to the police. See *Saciragic* at para. 33.

[54] In my view, in all the circumstances, the fact that the police did not have the consent of property management to enter 595 Proudfoot Lane does not provide the defendant with a reasonable expectation of privacy in the common areas of 595 Proudfoot Lane, including the eighth floor hallway. In any event, as Officer Pavoni explained, the reason the police did not approach property management was based on the experience the police had on two prior investigations.

[55] For all these reasons, on the totality of the circumstances, I am of the view that the defendant did not have a reasonable expectation of privacy in the common areas of 595 Proudfoot Lane, specifically the eighth floor hallway. Section 8 of the *Charter* was therefore not engaged and there was no violation of the defendant's s. 8 *Charter* rights. No excision in the ITO is required.

(b) Sufficiency of the ITO of the General Warrant of May 16, 2016

[56] For the reasons I have just explained, except for some amplifications in the ITO I have just referenced, I do not see merit in the defendant's submissions regarding the requested excisions in the ITO. I must go on to consider whether, on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there remains a sufficient basis upon which the warrant could be issued. See *Nguyen* at para. 57.

[57] Regarding the general warrant, the affiant relies on information from confidential informant CHS[2]#6. In this case the information provided by CHS #6 provided important components of the ITO sworn to obtain the general warrant. See *R. v. Wiley*, (1994), 84 C.C.C. (3d) 161 at p. 170. When the information to support a warrant comes from a confidential informant, the totality of the circumstances inquiry focuses on three questions as set out previously: Does the material before the reviewing judge demonstrate that the confidential informant's information was compelling? Does the material demonstrate that the confidential informant was credible? And, does the material demonstrate that the confidential informant's information was corroborated by a reliable, independent source? See *Debot* at para. 53; See *Shivrattan* at para. 27.

[58] The defendant submits there are serious deficiencies in the information provided by CHS #6 as reflected in the judicial summary of the redacted ITO at Exhibit RR(6). The defendant submits that the information from CHS #6 falls short of being compelling. The defendant submits that CHS #6 does not identify Abdul Shahin as the defendant before the court, particularly by way of photograph or physical description. In addition, the defendant submits that there are probably hundreds of dwellings of various forms on a street called Proudfoot Lane. The defendant submits that no city is specified. The defendant submits that there is no indication of the accuracy of the information of CHS #6 respecting the phone number associated with the person Abdul Shahin. This is particularly important, submits the defendant, given that there is a lack of nexus of time between this information and September 14, 2015 when the phone number was provided by way of compliance with the defendant's bail conditions. Also, submits the defendant, the information is two times removed. It is from a handler who is not the affiant and whose identity has not been disclosed.

[59] The defendant also submits that the information only reveals knowledge of drug dealing generally, not of any direct observations of CHS #6 drug dealing or that he/she was a party to a deal involving the defendant. The defendant submits that given this lack of detail, this can only be gossip or rumour. The defendant submits that the focus for determining the sufficiency of reasonable grounds for a general warrant in this case is location specific. The defendant submits that there is no information whatsoever from CHS #6 that the defendant or anyone else used 595 Proudfoot Lane, unit 808 in London, Ontario as a stash house.

[60] The defendant submits that the corroboration relied on by the Crown in regard to CHS #6 cannot be relied upon. For reasons expressed earlier, the defendant submits that the reference to a seizure of cocaine from unit 403, 600 Proudfoot Lane should be excised. Irrespective of this excision issue, the defendant submits that this information undermines any assertion, however bald, that unit 808, located in a completely different building, is a stash house.

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[2] Confidential Human Source

[61] Also, submits the defendant, the information referring to him providing a cell number in compliance with a recognizance should be excised as this was compelled by court order. In any event, submits the defendant, there is no indication that the Abdul Shahin providing this information is the same Abdul Shahin referred to by CHS #6, particularly given that they have not identified Abdul Shahin via a photo or any other identification.

[62] In beginning the analysis, it may be useful to consider separately each of the three questions and the evidence pertaining to them before addressing the totality of the circumstances.

(i) Was the Confidential Informant's Information Compelling?

[63] The judicial summary of the redacted Appendix X6 of the ITO of May 16, 2016 at Exhibit RR(6) indicates the following information was provided by CHS #6: (1) in relation to certain information, the affiant has expressly stated the source of CHS #6's knowledge (e.g. firsthand observation) (2) CHS #6 has firsthand knowledge of Shahin's drug dealing (3) in 2016, CHS #6 identified Abdul Shahin as a male who partners with Marko Maric (4) CHS #6 advised Shahin and Maric sell cocaine (5) further details concerning Shahin's drug dealing (6) Shahin lives on Proudfoot Lane (7) Shahin sells cocaine and marijuana (8) Shahin lived with his parents on Philbrook (9) Shahin uses mobile telephone number 519-702-3855 (10) Shahin and Maric use stash houses to keep their drugs. At paragraph 25(a) of the ITO, it is indicated that CHS #6 advised that a male by the name of Marco Maric is a large scale cocaine supplier in London and is capable of selling in the kilogram level. The unredacted version of paragraph 25 (c) of the ITO which now appears at Exhibit KK(4a) was summarized indicating that CHS #6 advised that Marco Maric obtains his cocaine in Toronto where he spends considerable time. On balance and considered as a whole, I am satisfied that the material in the ITO demonstrates that the information from CHS #6 was compelling.

(ii) Was the Confidential Informant Credible?

[64] As set out in the judicial summary at Exhibit RR(6), CHS #6 is carded and/or registered as an informant with the police service handling him/her. The identity of the handler of CHS #6 is provided. This provides some degree of comfort with respect to the confidential informant's credibility in the sense that he/she was not an anonymous informant. See *R. v. Choi*, 2013 ONSC 291 at paragraph 34. As set out in the judicial summary, CHS #6 has provided information to his/her police handler in the past, which has led to several seizures of controlled substances. The seizures are summarized. On the occasions that the source has provided information to the police it has been corroborated and found to be reliable. The source of CHS #6's knowledge is stated. The judicial summary indicates that CHS #6 is immersed in the drug culture, which is relevant to his/her character. Whether or not CHS #6 has a criminal record and the nature of any conviction is provided. Additionally, CHS #6's motivation for providing information to the police is provided including whether consideration or compensation was sought or arranged. On balance and considered as a whole, I am satisfied that the material in the ITO demonstrates that CHS #6 was credible.

(iii) Was the Information Corroborated?

[65] It is clear that to constitute corroboration of a source's allegation of criminal conduct, it is not necessary that what is offered relate specifically to the criminality of the allegation. See *R. v. Lewis,* (1998) 38 O.R. (3d) 540 (C.A.) at paragraph 22. At the same time, it is important to keep in mind that the confirmation of innocuous, general information is only of limited value in this analysis. Such information could be easily gathered by anyone familiar with the target of the investigation and provides no confirmation that the target has been engaged in the criminal activities alleged. See *R. v. Zammit,* (1993), 81 C.C.C. (3d) 112 (Ont. C.A.) at paras. 117 and 121. The question is whether it strengthens a belief in the credibility or reliability of the confidential informant. Whether it does is to be determined on a consideration of the totality of the circumstances.

[66] In this case, there is some corroboration of the confidential informant's information. As noted in the judicial summary of the redacted Appendix X6 of the ITO at Exhibit RR(6), the police subsequently confirmed, at least in part, the accuracy of some of the information provided by the confidential informant. For example: (1) According to MTO records, the defendant resided at 1629 Philbrook Drive, London. (2) On September 3, 2015, members of the London police executed search warrants in relation to 600 Proudfoot Lane, unit 403, London and 1629 Philbrook Drive, London. Officers placed the defendant under arrest after he was observed leaving 600 Proudfoot Lane. The defendant was found to be in possession of a quantity of currency. Officers searched Proudfoot Lane and located approximately 125 grams of cocaine and 40 grams of marijuana. Officers searched Philbrook Drive and located an electronic money counter and (3) On September 14, 2015 the defendant attended London Police Headquarters and provided his cellular telephone number of 519-702-3855 in compliance with his recognizance.

[67] In my view the police discovery of the accuracy of at least some of the information provided by the confidential informant adds some credibility and reliability to the information provided to the police by CHS #6. On balance and considered as a whole, I am satisfied that the material in the ITO demonstrates that some of the information from CHS #6 was corroborated by the police.

[68] I do not find merit in the submissions of the defendant that the information referring to the defendant providing a cell number to the police in compliance with his recognizance should be excised and not relied upon because it was compelled by court order. The defendant has provided no authority to me, nor am I aware of any, that indicates that evidence of a defendant complying with the terms of a recognizance that he entered into as a term of his bail, cannot be used subsequently as part of an ITO in support of a warrant. In my view, in the circumstances of this case, neither section 7 or 13 nor any other section of the *Charter* precludes the police from using such information in an ITO.

[69] Because information relied upon in the ITO emanated from a confidential informant, I must carefully consider whether the information was compelling, whether the confidential informant was credible and whether the information the confidential informant provided was corroborated by a reliable, independent source. As noted in *Debot* in para. 53, these are not separate tests. Weaknesses with respect to one may be compensated by strengths in relation to the others. In this case the material before me in the ITO demonstrates that the confidential informant's information was compelling, the confidential informant was credible and the confidential informant's information was to some extent corroborated by the police. After considering the totality of the circumstances set forth in the ITO, as corrected on the review, I am satisfied that the information provided by CHS #6 was relevant and reliable and was properly taken into account by the issuing justice in determining whether the general warrant of May 16, 2016 should issue. See *Wiley* at p. 171.

[70] As well there is the information from confidential informant CHS #1. The judicial summary of the redacted Appendix X1 of the ITO of May 16, 2016 at Exhibit RR(5) states that CHS #1 was shown an MTO photograph of Marco Maric. CHS #1 positively identified the male in the photo as the male known to him/her as Marco. CHS #1 advised of further details regarding Marco and Kevin Er. I have already indicated when dealing with CHS #1 regarding the first wiretap authorization relating to Mr. Maric that in the totality of the circumstances the information provided by CHS #1 was relevant and reliable. The material before me in the ITO regarding the general warrant of May 16, 2016 also demonstrates that CHS #1's information was compelling and that CHS #1 was credible. While there was no direct corroboration of the information provided by CHS #1 regarding Marco there was a basis for the issuing justice to evaluate the credibility and reliability of CHS #1. After considering the *Debot* factors and the totality of the circumstances set forth in the ITO, I am satisfied that the information provided by CHS #1 was relevant and reliable and was properly taken into account by the issuing justice in determining whether the general warrant of May 16, 2016 should issue. See *Wiley* at p. 107. In addition, the information of CHS #6 and CHS #1 mutually corroborates each other. See *R v. Abdirahim*, 2013 ONSC 7420 at para. 62. Although I have reviewed all the information provided by confidential informants CHS #2, 3, 4, 5, and 7, given my findings in regard to CHS #1 and CHS #6, in my view it is unnecessary for me to determine whether the information provided by CHS #2, 3, 4, 5, and 7 corroborates the information of CHS #1 or CHS #6 or strengthens a belief in the reliability or credibility of CHS #1 or CHS #6. Nor have I relied on the information from CHS #2, 3, 4, 5 and 7 for that or any other purpose. I will note, however, that nothing in the information provided by CHS #2, 3, 4, 5, and 7 undermines or contradicts the information provided by CHS #1 or CHS #6.

[71] In addition to the information provided by CHS #6, there was also other evidence in the ITO. Mr. Eckstein was connected to Mr. Maric through a prior arrest as referenced in the London police occurrence report in 2013. In the three weeks prior to the application of the general warrant of May 16, 2016, the police saw Mr. Eckstein on April 26, 2016 engage in several counter surveillance techniques while the police followed Mr. Eckstein back to London. The police monitored a tracking device that was previously installed on Mr. Eckstein's vehicle

and determined that his vehicle attended 595 Proudfoot Lane, London. It was unknown what unit he attended at the building. On May 4, 2016, the police observed Mr. Eckstein enter unit 808 at 595 Proudfoot Lane empty handed. About 30 minutes later, Mr. Eckstein exited the unit. He boarded his vehicle carrying a black bag. Approximately six and a half hours later, the police observed the defendant exit unit 808 at 595 Proudfoot Lane.

[72] The general warrant in this case is presumptively valid. The onus is on the defendant to establish that the information relied upon to obtain the general warrant did not provide a basis upon which the issuing justice could have concluded that there were reasonable grounds for its issuance. In my view, the defendant has not met his onus on this application.

[73] In my view, in all the circumstances, on the record as it existed before the issuing justice and as amplified at the hearing, with any offending portions of the ITO excised, there was a basis upon which the issuing justice could have been satisfied that there were reasonable grounds to believe that the offence of possession of cocaine for the purpose of trafficking had been or would be committed and that information concerning the offence would be obtained through the covert search of 595 Proudfoot Lane, unit 808. The combined force of the circumstantial evidence provided a basis upon which the issuing justice could be satisfied the general warrant should issue. The general warrant of May 16, 2016 in regard to 595 Proudfoot Lane was valid.

[74] Accordingly, I find that there has been no breach of the defendant's s. 8 *Charter* rights in the search of 595 Proudfoot Lane on May 26, 2016 pursuant to the general warrant of May 16, 2016. Nor, for the reasons I have explained, was there a breach of the defendant's s. 8 *Charter* rights in the observations the police made on the eighth floor hallway of 595 Proudfoot Lane on May 4, 2016.

B. SEARCH WARRANT OF MAY 26, 2016

(a) Sufficiency of the ITO

[75] The defendant also challenges the search warrant of May 26, 2016 that was issued on May 26, 2016 and executed shortly thereafter. As set out in the ITO of the May 26, 2016 search warrant, the Toronto police entered 595 Proudfoot Lane, unit 808 at approximately 7:15 p.m. on May 26, 2016 pursuant to the general warrant of May 16, 2016. Two Toronto police officers made a quick search of the apartment in approximately one minute. They located a series of items including cocaine, marihuana, a firearm and ammunition which they subsequently turned over to the London police.

[76] The Toronto police officers did not have time to search unit 808 properly given the circumstances of their entry into unit 808. The Toronto police officers had to force the door

open to unit 808 and given the noise that was made, and the fact that they did not wish to disclose that they were police officers, the police made a quick search of the apartment.

[77] In the ITO of the search warrant, the affiant, Officer Jeff Brown of the London police, indicated that the Toronto police had to be quick in the apartment to maintain the guise of their entry and exit before being confronted. Accordingly, they did not have time to search the apartment in its entirety. The Toronto police officers indicated that there were further items in the apartment which would provide evidence that the drugs were possessed for the purpose of trafficking. They also indicated that there were areas of the apartment which had not been searched.

[78] Officer Brown also indicated that it was believed that other evidence of drug trafficking remained in the apartment including currency, debt lists, scales, packaging and documents indicating occupancy. He also indicated the apartment may also contain more cocaine sequestered in areas that could not be located by such a brief search as was conducted by the Toronto police officers. In the initial search by the Toronto police, a .40 calibre handgun was located along with .40 calibre ammunition. While .38 calibre ammunition was also located in the search by the Toronto police, no .38 calibre handgun was recovered. Officer Brown indicated in the ITO that it stood to reason that another handgun may be present in the apartment.

[79] The defendant submits that the ITO for the search warrant is based entirely on the search of unit 808 earlier in the evening pursuant to the general warrant of May 16, 2016, as well as observations made earlier on May 26, 2016 by the London police of the eighth floor hallway of 595 Proudfoot Lane. On May 26, 2016, the London police made observations of the defendant enter unit 808 at 3:53 p.m. using a key. At 4:37 p.m. another male person arrived and entered unit 808 after knocking on the door. He was not carrying anything. At 4:41 p.m., that person left unit 808 carrying a black reusable shopping bag. At 5:59 p.m., the defendant exited unit 808 and locked it with a key. At 6:00 p.m., the defendant got into his vehicle and drove away from the building.

[80] The defendant submits all of this information must be excised from the ITO for the search warrant. The defendant submits that the information from the search of unit 808 on May 26, 2016 pursuant to the general warrant of May 16, 2016 must be excised because it was unconstitutionally obtained. The defendant submits that the observations of the London police in the eighth floor hallway on May 26, 2016, must also be excised from the ITO because that evidence too was unconstitutionally obtained. The defendant submits the observations of the London police on May 26, 2016 were a violation of the defendant's s. 8 *Charter* rights. Once again relying on *White*, the defendant submits that the defendant had a reasonable expectation of privacy in the eighth floor hallway of 595 Proudfoot Lane.

[81] For the reasons I have already explained, in my view the general warrant of May 16, 2016 regarding unit 808, 595 Proudfoot Lane was lawful and therefore the search of unit 808 on May 26, 2016 by the Toronto police was not a violation of the defendant's s. 8 *Charter* rights. No excision of the information regarding this search is required in the ITO. Also, for the reasons I have already explained regarding the observations of the police on the eighth floor hallway of 595 Proudfoot Lane on May 4, 2016, I am of the view that on the record before me, the defendant did not have a reasonable expectation of privacy in the eighth floor hallway of 595 Proudfoot Lane when the London police made the observation they did on May 26, 2016. Section 8 of the *Charter* was therefore not engaged and there was no violation of the defendant's s. 8 *Charter* rights. No excision of this information is required in the ITO for the search warrant.

[82] No confidential informant information is relied upon by Officer Brown in the search warrant ITO. Given my view that there should be no excisions from the ITO in support of the search warrant, I am of the view that, in all the circumstances, on the record as it existed before the issuing justice there was a basis upon which the issuing justice could have been satisfied that there were reasonable grounds for the issuance of the search warrant. Officer Brown sought the search warrant pursuant to s. 11 of the *Controlled Drugs and Substances Act*. I am of the view that there was a basis upon which the issuing justice could have been satisfied that there were reasonable grounds to believe that 595 Proudfoot Lane, unit 808 contained, among other things, any thing that would afford evidence in respect to of an offence under the *Controlled Drugs and Substances Act.* The combined force of the circumstantial evidence provided a sufficient basis upon which the issuing justice could be satisfied the search warrant should issue.

[83] The search warrant in this case is presumptively valid. The onus is on the defendant to establish that the information relied upon to obtain the search warrant did not provide a basis upon which the issuing justice could have concluded that there were reasonable grounds for its issuance. In my view, the defendant has not met his onus on this application regarding the search warrant of May 26, 2016.

[84] Accordingly, I find no breach of s. 8 of the *Charter* in the search of unit 808, 595 Proudfoot Lane on May 26, 2016 pursuant to the search warrant. Nor do I find there to be any breach of s. 8 of the *Charter* in the observations made by the police on the eighth floor hallway on May 26, 2016.

SHOULD THE EVIDENCE BE EXCLUDED UNDER S. 24(2) OF THE *CHARTER*?

[85] As I indicated in my oral reasons of November 20, 2018, even if I was wrong and there was a violation of the defendant's s. 8 *Charter* rights, in all the circumstances, I was not satisfied that the evidence obtained from the searches of unit 808, 595 Proudfoot Lane on May 26, 2016 or from the observations of the police in the eighth floor hallway of 595 Proudfoot Lane on May 4, 2016 and May 26, 2016 should be excluded under s. 24(2) of the *Charter*. As counsel addressed s. 24(2) in their submissions and I indicated that even if a s. 8 *Charter* breach

occurred, I would not have excluded the evidence under s. 24(2), I will give my reasons regarding the s. 24(2) issue.

[86] The proper considerations under s. 24(2) of the *Charter* were established in *R. v. Grant*, 2009 SCC 32 at paras. 71-82. In determining whether evidence should be excluded under s. 24(2), the court considers (i) the seriousness of the *Charter*-infringing state conduct, (ii) the impact of the breach on the defendant's *Charter*-protected interests, and (iii) society's interest in an adjudication of the case on the merits. This requires the court to assess and balance the effect of admitting the evidence in light of these three factors. The party seeking to exclude the evidence bears the burden of proving its exclusion is required. See *R. v. Fearon*, 2014 SCC 77 at para. 89.

(a) The Seriousness of the *Charter*-Infringing State Conduct

[87] Dealing with the first factor, the seriousness of the *Charter*-infringing state conduct, this factor focuses on the actions of the police. The court's task in considering the seriousness of *Charter*-infringing state conduct is to situate that conduct on a scale of culpability. See *R. v. Paterson*, 2017 SCC 15 at para. 43. The court must consider whether admitting the evidence would send the message to the public that courts condone deviations from the rule of law by failing to dissociate themselves from the fruits of unlawful conduct. Accordingly, the more severe or deliberate the state misconduct is leading to the *Charter* violation, the greater the need for courts to disassociate themselves from that misconduct by excluding the evidence. Minor or inadvertent violations of the *Charter* fall at one end of the spectrum of conduct, while wilful or reckless disregard of *Charter* rights falls at the other end. Good faith will also reduce the need for the court to disassociate itself from the police conduct. However, neither negligence nor wilful blindness by the police can properly be characterized as good faith. Deliberate, wilful, or flagrant disregard of *Charter* rights may require exclusion of the evidence. Even a significant departure from the standard of conduct expected of police officers will lean this aspect of the inquiry in favour of exclusion of the evidence. Further, if the *Charter*-infringing police misconduct was part of a pattern of abuse, such conduct would support the exclusion of the evidence. See *Grant*, at paras. 72-75; *R. v. Taylor*, 2014 SCC 50 at para. 39.

[88] In terms of the first *Grant* factor, in my view, the police were acting in good faith in regard to the searches of 595 Proudfoot Lane, unit 808 on May 26, 2016 and in their observations of the eighth floor hallway of 595 Proudfoot Lane on May 4, 2016 and May 26, 2016. The police observations in the eighth floor hallway were not a flagrant violation of the defendant's s. 8 *Charter* rights. The police in this case sought and obtained warrants before searching the apartment. The affiants were full, frank and fair in their disclosure to the issuing justices. If there was any violation of the defendant's s. 8 *Charter* rights, the gravity of the *Charter* infringing state conduct was at the lower end of the spectrum. This first *Grant* factor favours admission of the evidence.

(b) The Impact of the *Charter* Breach on the Defendant's *Charter*-Protected Interests

[89] As to the impact of any *Charter* violation on the defendant's *Charter*-protected interests, the second factor of the governing legal test under s. 24(2) of the *Charter*, the court must assess the extent to which a breach undermines the *Charter*-protected interests of the defendant. The impact of the *Charter* violation may range from "fleeting and technical to profoundly intrusive." Of course, the more serious the impact on those protected interests, the greater the risk that admitting the evidence may signal to the public that *Charter* rights are of little value to citizens. The courts are expected to examine the interests engaged by the infringed *Charter* right and consider the degree to which the violation impacted those interests. The more serious the state incursion on these protected interests, the greater the risk that the admission of the evidence would bring the administration of justice into disrepute. See *Grant* at paras. 76-78.

[90] As to the second *Grant* factor, the *Charter* interest infringed was the privacy of the home which attracts a high expectation of privacy compared to other places. A search of a private residence, without reasonable grounds, indicates that the violation was serious from the perspective of the defendant's *Charter* interests. See *Grant* at paras. 78, 113 and 137. If there was a violation of the defendant's s. 8 *Charter* rights, this second *Grant* factor favours exclusion of the evidence.

(c) Society's Interest in the Adjudication of the Case on the Merits

[91] Under the third factor in *Grant*, the court must determine whether the truth-seeking function of the trial is better served by admission of the evidence, or by its exclusion. The court must consider the impact of the admission of the evidence as well as the impact of failing to admit the evidence. The reliability of the evidence is, of course, an important factor in this step of the analysis. If the *Charter* violation has undermined the reliability of the evidence, this will support its exclusion. However, the exclusion of reliable evidence undermines the accuracy and fairness of the trial from the perspective of the public and may tend to bring the administration of justice into disrepute. The importance of the evidence to the Crown's case is also a factor to be considered under this aspect of the inquiry. The exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively terminates the prosecution. See *Grant*, at paras. 79-84.

[92] The third factor acknowledges that the public has a keen interest in seeing cases adjudicated on their merits. With regard to this factor, the court looks to the truth-seeking function of the criminal trial and the impact of admitting or excluding the impugned evidence on the trial. A breach that undermines the reliability of evidence will point toward exclusion because the admission of unreliable evidence cannot enhance truth seeking. On the other hand, excluding reliable evidence that is key to the prosecution's case is a relevant consideration militating against exclusion. See *R. v. Spencer*, 2014 SCC 43 at para. 80; *Taylor* at para. 38.

[93] The third *Grant* factor relates to society's interest in the adjudication on the merits. The firearm, ammunition, and drugs seized were real evidence. The observations of the police in the hallway were reliable evidence. All of this evidence was important to the Crown's case. Society has a strong interest in a trial on the merits where reliable evidence is obtained by the police in respect of serious offences. This third *Grant* factor favours admission of the evidence.

(d) Overall Balancing

[94] The trial judge must consider each of the *Grant* factors and determine whether, having regard to all the circumstances, the admission of the evidence obtained as a result of the *Charter* breach would bring the administration of justice into disrepute. There is no overarching rule that governs how to balance these three factors in ultimately determining the admissibility of the evidence under s. 24(2) of the *Charter*. The three factors are designed to encapsulate considerations of all of the circumstances of the case. Mathematical precision is obviously not possible, but consideration of these factors provides a helpful and flexible type of decision tree. See *Grant* at paras. 85-86.

[95] Balancing the three factors considered under *Grant*, I am of the view that in all of the circumstances, the admission at trial of the evidence obtained from the searches of 595 Proudfoot Lane on May 26, 2016 and the observations of the police on the eighth floor hallway of 595 Proudfoot Lane on May 4, 2016 and May 26, 2016 would not bring the administration of justice into disrepute.

CONCLUSION

[96] For all of these reasons, I am of the view that the general warrant of May 16, 2016 and the search warrant of May 26, 2016 in regard to 595 Proudfoot Lane, unit 808 were valid. Accordingly, there was no violation of the defendant's s. 8 *Charter* rights in the searches of 595 Proudfoot Lane, unit 808 on May 26, 2016. Nor was there a violation of the defendant's s. 8 *Charter* rights in the police observations of the eighth floor hallway of 595 Proudfoot Lane on May 4, 2016 or May 26, 2016. However, even if I am wrong and there was a violation of the defendant's s. 8 *Charter* rights in either of the searches or in the observations by the police of the eighth floor hallway of 595 Proudfoot Lane, I am of the view that the admission at trial of the evidence obtained from the searches or from the police observations would not bring the administration of justice into disrepute.

[97] The defendant's application under s. 24(2) of the *Charter* to exclude any evidence obtained from the search of 595 Proudfoot Lane, unit 808 on May 26, 2016 pursuant to the general warrant of May 16, 2016 and the search of 595 Proudfoot Lane, unit 808 on May 26, 2016 pursuant to the search warrant of May 26, 2016 and the observations of the police on the eighth floor hallway of 595 Proudfoot Lane on May 4, 2016 and May 26, 2016 is dismissed.

M.F. Brown J.

Released: August 30, 2019

CITATION: R. v. Shahin, 2019 ONSC 4480
COURT FILE NO.: CR-18-0518
DATE: 20190830

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

MARCO MARIC, GIOVANNI RAIMONDI, ETHAN ECKSTEIN, ABDUL SHAHIN, VARTEVAR ED BROUNSUZIAN and TANG HIEN QUANH

Defendants

REASONS FOR JUDGMENT

PRE-TRIAL *CHARTER* APPLICATION OF ABDUL SHAHIN

M.F. Brown J.

Released: August 30, 2019