COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lowe, 2018 ONCA 110
DATE: 20180206
DOCKET: C58720 and C58721

Rouleau, Pepall and Miller JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Ishmael Lowe and Elijah Lowe

Appellants

Paul J.I. Alexander, for the appellants

David Quayat, for the respondent

Heard: November 16, 2017

On appeal from the conviction entered on November 29, 2013 by Justice Alison Harvison Young of the Superior Court of Justice, sitting without a jury, with reasons reported at 2014 ONSC 396, 118 W.C.B. (2d) 363.

Rouleau J.A.:

A. OVERVIEW

[1] The appellants were both convicted of possession of a controlled substance for the purpose of trafficking and possession of proceeds of crime over $5000. Elijah was also convicted of possession of proceeds of crime under $5000.

[2] The central issue at trial was the validity of the search warrant authorizing the search of Elijah's residence where drugs and money were found. The warrant had

been obtained using information from a confidential informant (CI). As a result, the information to obtain (ITO) had been edited by redacting information that might have revealed the informant's identity. The redacted ITO was insufficient to support the issuance of the warrant. The Supreme Court of Canada explained in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1461, what can be done in these circumstances. The Crown can apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. To assist, the accused is to be given a judicial summary of the redacted material. This is the step six procedure outlined in *Garofoli*. Using the step six procedure in this case, the trial judge upheld the validity of the warrant and determined that the search was lawful.

[3] On appeal, it is argued that the trial judge erred in both allowing the Crown to use the *Garofoli* step six procedure and in the manner she applied it. It is also argued that the CI's tip should not have been relied on as it did not satisfy the criteria for assessing reliability outlined in *R. v. Debot*, [1989] 2 S.C.R. 1140. The appellants also contend that the execution of the warrant at night was unreasonable.

[4] For the reasons that follow, I would dismiss the appeals.

B. FACTS

[5] Based partly on information from a confidential informant regarding a firearm, the police tried to obtain a warrant for the search of Elijah Lowe's residence at 10 Turntable Crescent, unit 1. After the initial warrant application was denied, a new warrant application was submitted which contained additional information regarding

possession of a handgun by Elijah, his vehicle, and the CI's reliability. The warrant was granted.

[6] On April 15, 2010 at 9:46 p.m., police executed the warrant. Emergency Task Force officers entered Elijah's home after using a distractionary device and breaching the door. The appellants were present at the scene. Police found approximately 300 grams of cocaine and $46,000 in cash, but no gun. Before trial, the appellants sought to exclude the evidence under ss. 8 and 24(2) of the *Charter*.

C. DECISION BELOW

[7] The appellants were given a heavily redacted version of the ITO. After conceding that the redacted ITO could not support the issuance of the warrant, the Crown sought and obtained consideration of the unredacted ITO by the trial judge pursuant to step six of the *Garofoli* procedure.

[8] The unredacted ITO related considerable information obtained from a CI that pointed to Elijah being in possession of a firearm. It also contained observations made by the affiant, DC Armstrong, and another police officer. They observed Elijah keying his entry to 10 Turntable Crescent, unit 1. The ITO also contained information drawn from two community information reports (CIR).

[9] Prior to testifying, the affiant advised the Crown that the summary of one of the two CIRs contained a significant error. The summary in the redacted ITO erroneously reported that Elijah had previously provided 10 Turntable Crescent, unit 1 as his

address. In fact, it was Elijah's brother, Ishmael who had given the 10 Turntable Crescent, unit 1 address as his own. The CIR was produced to the defence and the error was put to the affiant in cross-examination. The affiant confirmed the error and had no explanation as to why or how it had been made. Given this error, the trial judge excised the portion of the ITO containing this reference.

[10] The appellants also cross-examined the affiant on contradictory information contained in the redacted ITO regarding the colour of Elijah's vehicle. In portions of the redacted ITO, the affiant had stated that the CI and a police officer had reported observing Elijah's vehicle and indicated that it was blue. In other portions of the redacted ITO, however, the affiant reports that Elijah's car had been observed and was grey. Other than the difference in colour, the car was consistently reported as being a 4-door Honda Civic with licence plate ATBS 297. The trial judge noted the differences in reports as to the colour of Elijah's car but concluded that "the issue of the car colo[u]r in this case was a red herring as there was no doubt about what car was referenced due to the other descriptors and identifying details such as the licence plate number."

[11] Another issue at trial was the content of the second CIR. The portion of the ITO in which that CIR had been summarized was heavily redacted. A judicial summary of that portion had been provided and stated as follows:

> The redacted information discloses more background details regarding the location/circumstances of the observations of the firearm which bear on Lowe's modus

> operandi and of details given by the source which were subsequently corroborated in the course of the investigation.

[12] At the end of the hearing on the s. 8 challenge, the trial judge invited the Crown to tender the second CIR. Because it contained information that might reveal the identity of the CI, it was tendered under seal and not disclosed to the defence. Following the production of the CIR itself, the trial judge determined that the judicial summary should be amended. After exchanges with the Crown, the following sentence was added to the judicial summary:

> Part of this corroboration consisted of a "C.I.R.", where an independent police investigation corroborated information which the affiant had received from the CI.

[13] The trial judge ultimately concluded that the warrant should be upheld and she dismissed the appellants' *Charter* application.

[14] The parties then tendered an agreed statement of facts and the appellants were found guilty.

D. ISSUES

[15] The appellants raise four issues:

1. Did the trial judge err by allowing the Crown's step six application and relying on redacted portions of the ITO that the appellants were not able to challenge in argument or by evidence;
2. Did the trial judge err by inviting the Crown to produce new undisclosed evidence during the *Garofoli* hearing;

3. Did the CI's tip meet the *Debot* criteria and was it sufficient to justify the issuance of the warrant; and
4. Was the night search unreasonable?

E. ANALYSIS

[16] In cases such as the present where it is conceded by the Crown that an authorization cannot be supported by the ITO as edited, the Crown may ask the judge to apply for step six of the *Garofoli* procedure. This final step in the *Garofoli* procedure allows the trial judge to consider so much of the unredacted version of the affidavit as necessary to support the authorization. The Supreme Court explained that the trial judge may only consider the redacted information "if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence": *Garofoli*, at p. 1461.

[17] The judicial summary plays an important role in providing sufficient information to the accused about the nature of the redacted information. However, its function is not to reveal all the details as to what was redacted, but to communicate only the nature of what has been redacted.

[18] As this court noted in *R. v. Crevier*, 2015 ONCA 619, 330 C.C.C. (3d) 305, at para. 72, the trial judge must ensure that the accused's awareness gained through the judicial summary and other available information is:

> sufficient to allow the accused to mount a challenge of the redacted details both in argument *and by evidence*.… In

> other words, the accused must, through the judicial summary, cross-examination of the affiant, or the leading of evidence, be in a position to mount both a facial and sub-facial attack on the warrant, including a challenge to those parts of the ITO that are redacted, but relied on by the trial judge. [Emphasis in original.]

[19] In *Crevier*, at para. 83, this court explained that: “the summary must provide the accused with a meaningful basis upon which to challenge whether the affiant made full and frank disclosure regarding the reliability of the informer and his or her tips, as required by *Debot*.” In assessing whether sufficient detail is provided by the summary, the trial judge should examine whether it contains information that could be relevant and does not risk revealing the identity of the informer: *Crevier*, at para. 84. Examples of this are the source’s information, the source’s relationship with the accused, whether the source previously provided information to the police, etc.

[20] In the present case, the appellants mounted a sub-facial challenge to the ITO. As explained in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 50, a sub-facial challenge is where the accused goes behind the ITO to “attack the reliability of its content”. As part of that challenge, the appellants cross-examined the ITO affiant. They sought to demonstrate that the information supporting the issuance of the warrant received from the CI was neither compelling nor corroborated, and that he/she was not credible.

[21] On appeal from a reviewing judge’s decision, the court must be mindful of the test that a reviewing judge applies when considering the record for the authorization of the search warrant and mindful of the deference owed to the reviewing judge’s

decision. The reviewing judge's role is to assess whether there was at least some or sufficient evidence, as may be amplified on review, that might reasonably be believed and on the basis of which the authorization of the search warrant could have issued: *Araujo*, at para. 51*; R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421, at para. 38 and *R. v. Lising*, [2005] 3 S.C.R. 343, at para. 8. The reviewing judge's decision is entitled to deference and, absent an error of law, misapprehension of evidence, or a failure to consider relevant evidence, an appellate court should not interfere: *Sadikov*, at para. 89.

[22] I turn now to the four grounds of appeal raised by the appellants.

(1) Did the trial judge err in allowing the Crown to use the step six procedure?

[23] The ITO in this case was heavily redacted. The trial judge provided the appellants with a judicial summary of the redacted information. The summary tracked the redactions from the ITO but, in four instances, stated that no summary of what had been redacted could be provided to the appellants.

[24] The appellants argue that, after acknowledging that certain portions of the redacted ITO could not be adequately summarized and disclosed, the trial judge nonetheless relied on these portions in confirming the validity of the warrant.

[25] This, they submit, clearly contravened the direction in *Crevier*, at para. 87, that when assessing the validity of the warrant, the trial judge should "disregard those

redacted portions the nature of which could not be summarized and provided to the accused".

[26] In support of this submission, the appellants point to paras. 44 and 45 of the trial judge's reasons where she agreed with and cited *R. v. Browne*, 2013 ONSC 5874, 294 C.R.R. (2d) 57, at para. 37: "[t]he reviewing court should not set aside the search warrant unless the applicant establishes *on the whole of the material presented* that there was no basis upon which it could have been issued" (emphasis added). This, the appellants maintain, demonstrates that the trial judge relied on all of the unredacted ITO in reaching her decision to confirm the warrant, including the parts that were not summarized.

[27] I would reject this ground of appeal for two reasons. First, the trial judge was satisfied that the content or nature of the four passages where she stated that "nothing more can be released" were adequately disclosed by other parts of the judicial summary to allow for a sub-facial challenge. In fact, at para. 45 of her reasons, she explained that:

> The unredacted text surrounding the redacted paragraphs of the ITO about which the judicial summary states "nothing more can be released" does and can appropriately be relied upon to provide the defence with sufficient information as to the nature of the redacted information. As I have stated above, I am satisfied that the redacted ITO as well as the judicial summary (and the evidence from the agreed statement of fact and cross examination of DC Armstrong) did make the defence sufficiently aware of the nature of the redacted information.

As this passage shows, the trial judge did not say that the information could not and had not been summarized, despite the appellants' contention to the contrary.

[28] Second, the trial judge's comment has to be read in the pre-*Crevier* context. Had the trial judge been assisted by the *Crevier* decision, she likely would have used slightly different language in these four instances. *Crevier* instructs that a trial judge should provide a summary that, where possible, tracks the redactions in the ITO. The judicial summary should "inform the accused not only of what was redacted but also where in the ITO the redacted information is contained. As well, the judicial summary should say if the nature of a redaction in a specific paragraph of the ITO cannot be summarized": *Crevier*, at para. 85. This was the context for the quotation from *Crevier* relied on by the appellants to the effect that redacted portions, the nature of which could not be summarized, should be disregarded. The trial judge did not say that the nature of what was redacted in those four instances could not be summarized, but rather that "nothing more can be released". Nor did the trial judge state that she would rely on the redacted parts even if they could not be summarized.

[29] This court having reviewed the unredacted ITO, it is apparent that there was no prejudice to the appellants' ability to challenge the redacted information in those four instances in argument or by evidence. In two of the instances, the information consisted largely of information already summarized in other parts of the judicial summary. In the third instance, the redacted text relates to information received by the CI. The affiant inquired into that information, but it proved to be of no assistance.

Had the trial judge had the benefit of *Crevier*, she may well have summarized it in this way even though this would have added nothing useful. In any event, this portion of the unredacted ITO would have been essentially disregarded or ignored by the issuing justice and by the trial judge.

[30] With respect to the fourth instance of redacted text where the trial judge indicates that nothing more could be released, specific information from the CI is reported. That information cannot be disclosed without running the risk of disclosing the CI's identity. A generic description might have been formulated, although it would have added little to the generic descriptions provided in other parts of the judicial summary. The addition of generic information in lieu of saying "nothing more can be released" would not, however, have assisted the appellants in their sub-facial challenge. They were not prejudiced by the trial judge's failure to do so.

[31] As for the appellant's submission that the trial judge's comment in her reasons that the right to full answer and defence was attenuated at the pre-trial stage constituted an error, this comment must be viewed in its context. The trial judge referenced Code J.'s similar statement in *R. v. Learning*, 2010 ONSC 3816, 258 C.C.C. (3d) 68, a pre-*Crevier* decision. As explained in *Crevier*, at para. 102, the cases using the "attenuated" phrase did not use it in the sense of lessening the right but rather as an acknowledgment that the right is of necessity "adapted taking into account that it is an admissibility hearing and because of the need to maintain [the

informer] privilege". I view the trial judge's reference to the right to make full answer and defence being "somewhat attenuated" in the same sense.

(2) Did the trial judge err by inviting the Crown to produce a CIR that was not disclosed to the accused?

[32] The ITO contained the summary of a CIR. The information it contained corroborated critical information provided by the CI. This CIR was viewed by the trial judge as being important to her corroboration analysis.

[33] The appellants maintain that the trial judge was not content to rely on the summary of the information from the CIR reproduced in the ITO. As a result, she requested that the CIR itself be produced by the Crown and provided to her. Because it contained information that could serve to reveal the CI's identity, it could not be provided to the accused.

[34] The appellants argue that this was an unprecedented expansion of the use of secret evidence in a criminal court. It was, in their view, both inappropriate for the judge to embark on an evidence-gathering process and to have done so in circumstances where that evidence is not disclosed to the accused.

[35] The appellants also maintain that, even if new secret evidence could be introduced, the judicial summary of that evidence was inadequate. The accused had no idea as to the nature of the information in the CIR, its source, whether it was dated, gathered unconstitutionally, or if the affiant had taken any steps to confirm its accuracy.

[36] I would dismiss this ground of appeal. Admittedly, the circumstances in which the CIR was produced were quite unusual. The affiant had made reference to two CIRs in the ITO. He had realized prior to testifying that the summary he had included in the ITO for one of the CIRs contained a significant mistake. He advised the Crown of the mistake. As noted by the trial judge, the CIR was provided to the appellants and they cross-examined the affiant quite effectively on the error as well as on other issues.

[37] The trial judge took the unusual step of asking that the second CIR itself be provided to her. Contrary to the appellants' submission, I do not see this as the trial judge taking steps to supplement the record. Rather, it was to ensure that information contained in the ITO, the nature of which had been disclosed in the judicial summary, was an accurate summary of the CIR. It does not constitute amplification in the usual sense, as no new information of significance was obtained by the trial judge having access to the CIR itself.

[38] In any event, even if it were considered as amplification evidence, in the unusual circumstances of this case I do not consider that the trial judge acted improperly in ensuring that the information found in the ITO was an accurate summary of the CIR. Amplification evidence may be used to correct good faith errors of the police in preparing the ITO, as long as it was available at the time of the warrant application: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 41-43. In this case, the CIR was available to police when it applied for the warrant.

[39] The trial judge considered it appropriate to have the Crown produce the second CIR itself. This was due in part to the fact that the affiant had made an error in summarizing the first CIR and because much of the detail from this second CIR was redacted. Further, the second CIR could not be disclosed to the appellants so that they could confirm the accuracy of the summary. Had it been unable to support the information contained in the ITO, the reference to the CIR would have been excised. As it did support the information contained in the ITO, the trial judge was satisfied that the summary could be relied on. The additional relevant information drawn from her review of the CIR was added to the judicial summary.

[40] I turn now to the appellants' concerns regarding the nature of the information in the CIR, their inability to cross-examine the affiant on it, its source, whether it was dated, gathered unconstitutionally, or if the affiant took any steps to confirm the accuracy of the CIR.

[41] In my view, the trial judge was careful to provide a useful judicial summary of the information drawn from the CIR that had been redacted from the ITO. She supplemented it after the CIR was provided to her. The amended judicial summary disclosed that the impugned CIR was obtained in an independent police investigation. The affiant testified that he played no role in that investigation nor did he follow up with the officers who did. The appellants were therefore able to argue that the affiant took inadequate steps to confirm the information contained in the CIR, but there would have been little, if any, ability to cross-examine the affiant on the contents of

the impugned CIR. As for the other concerns, a review of the unredacted information clearly demonstrates that it was obtained in a constitutional manner during the relevant time period.

[42] The appellants also argue that, had the CIR not been provided, the trial judge would have been left with a doubt as to the accuracy of the summary contained in the unredacted ITO. The appellants then explain that because this information was critical to the corroboration element of *Debot* and but for its inappropriate production, the trial judge would have found the corroboration element to be weak and would have struck the search warrant.

[43] I disagree. It is apparent to me that the trial judge, conscious that an error occurred with respect to the one CIR, felt it was prudent and in the accused's interest to verify the accuracy of the summary of the second CIR referenced in the ITO. But for its confidential nature, the CIR may well have been provided to the accused who could have verified the accuracy of the summary themselves.

[44] The trial judge's request that the CIR be produced does not signal disbelief in the affiant or in the summary. In fact, the trial judge specifically found that the affiant was a credible witness, had not failed in his duty to make full and frank disclosure, and had provided reliable information. Given that prior to testifying, the affiant had himself identified the error in the first CIR, there was no reason to reject his sworn testimony regarding the second CIR even in the absence of the supporting document.

[45] In all of the circumstances, I do not consider it to have been improper for the judge to have sought production of the CIR and, in any event, the appellants were not prejudiced by its production.

(3) Did the CI's tip meet the *Debot* criteria?

(a) Did the redactions make it impossible to mount a proper challenge?

[46] The appellants' first argument with respect to the *Debot* criteria is that the ITO relied heavily on the CI's tip and that the redactions made it virtually impossible to mount a proper challenge to it. In *Crevier*, at para. 70, this court explained that to give effect to the right to make full answer and defence, "the accused must be able to mount an effective challenge to the ITO and, in particular, challenge in argument or by evidence whether the *Debot* criteria of compellability, credibility and corroboration have been met".

[47] In the present case, the focus of the appellants' sub-facial challenge of the ITO was on whether, in the totality of the circumstances, the CI's tip upon which the ITO affiant relied was compelling, credible and corroborated: *Debot*, at p.1168.

[48] At the outset, it is important to recall, as this court noted in *Crevier*, at para. 65, that the ultimate issue in a sub-facial challenge is

> not the truth of a confidential informer's tips …. The fact that an informer provided inaccurate or false information to police will be relevant only to the extent the ITO affiant knew or should have known it was false, because then one of the preconditions for issuing the warrant would not have been

> met: reasonable belief in the existence of the necessary statutory grounds.

[49] In my view, the nature of the information redacted is sufficiently clear in the judicial summary so as to allow the appellants to pursue their challenge. It, together with the redacted ITO, revealed:

> a. That the information was based on the informant's own observations;
>
> b. The currency of the information (i.e., 2010);
>
> c. That the informant had previously provided information to the Toronto Police Service (in cross-examination it was revealed that the informant had provided information twice before);
>
> d. That the informant had a criminal record;
>
> e. That the informant had identified a photograph of Elijah Lowe shown by the informant's handler; and
>
> f. The degree of detail of the information provided by the informant (i.e., particulars regarding the locations/circumstances of the observation of a firearm as well as description of the nature of the firearm). The summary ultimately characterized the information as providing great detail.

[50] The judicial summary also helpfully points out not only what was contained in the redacted information, but also what was absent. For example, it advises that the unredacted ITO did not disclose whether the criminal record included crimes of dishonesty, nor whether other tips received by the CI had proved useful. In cross-examination, the affiant also revealed that he did not make any inquiries of the officer who prepared one of the CIRs that served to corroborate the informant's tip.

(b) Did the CI's tip satisfy the *Debot* factors?

[51] Alternatively, the appellants argue that the CI's tip did not meet the three *Debot* factors. As a result, the trial judge erred in concluding that the issuance of the search warrant was supported by the unredacted ITO.

[52] As I will explain, I agree with the trial judge's findings that the information was highly compelling and corroborated, and that this overcame the weakness in the CI's credibility. Her conclusion that in the totality of the circumstances the warrant could have issued is well supported: *Canada (Commissioner of Competition) v. Falconbridge Ltd.* (2003), 173 C.C.C. (3d) 466 (Ont. C.A.), at para. 35; *R. v. Reid*, 2017 ONCA 430, 139 W.C.B. (2d) 115, at para. 28 and *Debot*, at p. 1168.

(i) Was the tip compelling?

[53] It was not seriously contested that the tip provided by the CI was compelling. As explained by the trial judge:

> The CI provided specific information that set out first-hand knowledge indicating that he/she had recently observed a firearm. The firearm was described with precision. The CI provided a very detailed account regarding the date(s), circumstances, location(s) and timing of the observation(s). The CI also provided various background particulars about the applicant, including his description, and information about the vehicle he drove (a blue four-door Honda Civic). The CI also identified or recognized Elijah Lowe from a RICI photo that he was shown as the person about whom he/she was providing information and stated that he supplied cocaine to bars near Dupont Street and Lansdowne Avenue in Toronto.

(ii) Is the informant credible?

[54] The judicial summary explained that the informant had a criminal record. The summary did not, however, disclose whether the criminal record included crimes of dishonesty. The summary also revealed that the confidential informant provided the information in hopes of receiving some consideration.

[55] The record was amplified to include information that the CI had been used twice in the past. The amplification did not, however, give any indication as to how the reliability of these additional tips had been assessed.

[56] Given the limited information regarding the CI, the trial judge acknowledged that this element of the *Debot* analysis was weak.

(iii) Has the information been corroborated?

[57] Given the weakness of the second *Debot* criteria, corroboration was of particular importance. Here, the appellants' attack centered on two points. The first is the affiant's error in summarizing the CIR. As explained earlier, the affiant indicated in the ITO that a CIR revealed that on August 8, 2008 Elijah had given 10 Turntable Crescent, unit 1, as his address. However, under cross-examination, the affiant acknowledged that it was Ishmael and not Elijah who had given this address. This, the appellants argue, constituted a significant error and as a result, it was not safe to rely on other details in the unredacted ITO which were insulated from challenge.

[58] The trial judge was aware of this error and the fact that the affiant had drawn it to the Crown's attention after realizing the error had been made. The trial judge correctly determined that the reference to the CIR should be excised from the ITO. She determined, however, that this was an inadvertent error by the affiant which did not raise issues as to the affiant's credibility or reliability. This was her assessment to make and I see no basis to interfere with it.

[59] The trial judge also considered the second major concern raised by the appellants. That concern was that the ITO contains conflicting references to the colour of Elijah's car. The registration for Elijah's vehicle shows that it is silver in colour. The CI and a police officer who reported observing Elijah's car both described it as blue.

[60] Again, I would not interfere with the trial judge's conclusion that little weight should be placed on this discrepancy in colour. In her view, the affiant properly included all of the details reported to him concerning the car even though there were inconsistencies. The discrepancy in colour, however, did not undermine the central corroborative claim that Elijah drove a four-door Honda Civic with licence plate number ATBS 297.

[61] Moreover, the trial judge relied on the fact that the details of the CI's tip about the circumstances of the observation of Elijah with a firearm were corroborated by a CIR. The contents of that CIR were summarized in the judicial summary. As noted earlier, the CIR related information obtained from an independent police

investigation. Although the details of the CIR were redacted, the nature of its contents was disclosed.

[62] As mentioned above, the appellants were not prejudiced by their inability to cross-examine the affiant on the CIR's content. The affiant indicated that he played no role in the investigation related to that CIR nor had he followed up with the officers who prepared it. As a result, there was virtually no basis for cross-examination of the affiant on the contents of the CIR. The appellants could, however, argue that less weight should be placed on it because of the affiant's failure to make enquiries of the officers involved.

[63] When the trial judge weighed all of the factors, she concluded as follows:

> In this case, the tip was compelling. While the credibility of the informant was not strongly established in the ITO, the investigation corroborated a number of details, some significant, which, particularly when considered cumulatively, compensate for the weakness in the credibility of the CI as evidenced by the ITO.

The trial judge's conclusion in this regard is supported by the record and I see no basis to interfere.

(4) Was the night search unreasonable?

[64] Where police seek to conduct a night search, s. 488 of the *Criminal Code* provides that the ITO is to include reasonable grounds for the search to be executed by night. In the absence of any basis being provided in the ITO for the night search, the appellants submit that the search was unreasonable and in violation of the s. 8

Charter rights. A night search is only meant to be invoked exceptionally: see *R. v. Sutherland* (2000), 150 C.C.C. (3d) 231 (Ont. C.A.), at para. 25.

[65] The appellants argue that the ITO provided no basis upon which a night search of the premises could be authorized. Under the heading “request for night grounds” in the ITO, there is only one basis listed in support of the request. That basis is the belief that evidence is currently located in the premises and that delay could result in the potential loss of that evidence. Nothing in the rest of the redacted ITO or judicial summary, however, gave any reason to believe that the evidence would in fact be lost. As a result, the trial judge ought to have found the search to have been unreasonable.

[66] I disagree. The trial judge acknowledged that the record did not support the concern that the evidence may be lost if it was not seized in a timely manner. She went on, however, to find that the ITO clearly showed that there was a basis for the police being concerned about public safety. Although those concerns were not specifically articulated as the basis for the request for night entry, the circumstances described in the ITO as a whole were sufficient to support and justify a night time entry into the targeted address on the basis of public safety. As found by the trial judge:

> The imminence related not to any evidence that the firearms were going to be disposed of or moved, but to the imminence of a threat to public safety arising from the firearms as described in the ITO. The ITO set out the grounds for believing that there was a firearm in the

> residence. The ITO specifically requested night time authorization and it was granted. The requirements of s. 488 were met.

[67] Therefore, in my view, when the circumstances are viewed in their totality, there existed reasonable grounds justifying the warrant being executed by night, and the trial judge's conclusion that the requirements of s. 488 were met is supported by the record: *Sutherland*, at para. 27. That conclusion is also owed deference by this court, which should decline to interfere with the reviewing judge's decision absent an error of law, misapprehension of evidence, or failure to consider relevant evidence: *Sadikov*, at para. 89.

F. CONCLUSION

[68] As explained in *Crevier*, the Supreme Court of Canada clearly contemplated that an accused would not be privy to all of the information contained in the unredacted ITO when it provided for the sixth step of the *Garofoli* procedure. This, despite the fact that the information contained in the unredacted ITO would be reviewed and relied on by the reviewing judge. This is permissible when the summary of the redacted material "allows the accused to be 'sufficiently aware of the nature of the excised material to challenge it by argument or by evidence'": *Crevier*, at para. 97. In the present case, the nature of the redacted information was adequately summarized in the judicial summary.

[69] Where step six is followed, the accused's sub-facial challenge to the ITO is inevitably less focused than if the accused had access to all of the details contained

in the redacted ITO. It is, however, important not to lose sight of the fact that a sub-facial challenge attacks the reasonableness and honesty of the affiant's belief as to the existence of reasonable and probable grounds, and not the ultimate accuracy of the information relied on by the affiant. In other words, did the affiant know or ought to have known that the information in the ITO was false or misleading?

[70] Taking the contested CIR as an example, the challenge is not to the truth of its contents, but to the reasonableness of the affiant's reliance on it. Here, the affiant admitted that he did not follow up on the accuracy of the CIR. The appellants can and did argue that the failure to follow up rendered the affiant's reliance on the contents of the CIR unreasonable. It is then up to the trial judge who has access to the unredacted ITO to consider those submissions.

[71] In conclusion, therefore, I see no basis to interfere with the trial judge's decision and would dismiss the appeals.

"Paul Rouleau J.A."
"I agree S.E. Pepall J.A."
"I agree B.W. Miller J.A."

Released: February 6, 2018