Citation: *R. v. Denechezhe*, 2021 YKTC 45

Date: 20211028
Docket: 19-00916
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Snell

REGINA

v.

CHRISTINE ANGELIQUE DENECHEZHE and
PAUL ADRIAN FRASER

Appearances:
Benjamin Eberhard — Counsel for the Crown
Jennifer Cunningham — Counsel for Paul Fraser
Jennifer Budgell — Counsel for Christine Denechezhe

RULING ON *CHARTER* APPLICATION

I. Introduction

[1] Paul Fraser and Christine Denechezhe have been charged with having committed 10 offences contrary to the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19, (the "*CDSA"*) and the *Criminal Code* including possession of drugs, possession of weapons, including a firearm, laundering proceeds of crime, and possession of property obtained by crime. These charges were laid following the execution, on June 6, 2019, of search warrants issued pursuant to s. 117.04(1) of the *Criminal Code* (the "public safety warrants").

[2] The public safety warrants granted authority to search for an assault-style rifle, extended magazine, and ammunition at two locations in Whitehorse − the residence occupied by Mr. Fraser and Ms. Denechezhe (at 202 - 32 Waterfront Place) and a storage locker rented by Mr. Fraser (at 2 MacDonald Road). Following the entry into the applicants' residence pursuant to the public safety warrant, that search was discontinued and a warrant was obtained pursuant to the *CDSA* (the "*CDSA* warrant") based upon observations made by the police officers in the residence. No physical evidence was seized from the residence prior to the police obtaining the *CDSA* warrant, but all the real evidence to support the *CDSA* charges and several of the *Criminal Code* charges Mr. Fraser and Ms. Denechezhe face, were seized pursuant to the *CDSA* warrant.

[3] A bolt-action rifle, which is the subject of four of the charges, was seized from the storage locker during the public safety warrant search at that location.

[4] The parties agreed that the trial should commence with a *Garofoli* application (see *R. v. Garofoli*, [1990] 2 S.C.R. 1421), which took place on October 12 to 15, 2021. The applicants have submitted that the Information to Obtain the Warrant (the "ITO") is both facially and sub-facially deficient, and that I should conclude that the public safety warrants should not have been issued.

[5] The applicants further submit that if the Court concludes that the public safety warrants should not have been issued, the searches authorized by those warrants breached their rights under s. 8 of the *Charter of Rights and Freedoms* (the "*Charter*"),

and that all observations and evidence seized as a result of the execution of those warrants should be excluded pursuant to s. 24(2) of the *Charter*.

[6] The Crown's position is that the ITO was in no way deficient but that even if the ITO must be amplified or excised to reflect the concerns of the accused, the ITO would nonetheless establish the reasonable grounds necessary to issue the warrants. The Crown further submitted that even if the Court were to determine that the public safety warrants should not have been issued, the observations of the officers at the residence, and the real evidence seized at the storage locker, should not be excluded pursuant to s. 24(2) of the *Charter*.

[7] Although the validity of the *CDSA* warrant was not argued before me, counsel advised that if the present application is successful, the prosecution cannot continue. I take that to mean that they are all agreed that if the observations which resulted from the execution of the public safety warrant at the residence are excluded, then the *CDSA* warrant will also fail and there will be no evidence to support the first six offences listed on the Information. Further, that if the real evidence obtained from the storage locker is excluded then there will also be a lack of evidence to support the remaining four offences on the Information. At the conclusion of the hearing I reserved my decision. This is that decision.

II. Was the ITO Facially Valid?

[8] The preconditions required for a public safety warrant to be issued pursuant to s. 117.04(1) of the *Criminal Code* are: A peace officer must provide information on oath to a justice to satisfy the justice that there are reasonable grounds to believe:

> (a) that the person possesses a weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance
>
> (b) in a building, receptacle or place, and
>
> (c) that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the weapon, prohibited device, ammunition, prohibited ammunition or explosive substance.

[9] If the justice is satisfied that these preconditions exist, the justice may issue a warrant authorizing a peace officer to search the building, receptacle or place, and seize any such thing, and any authorization, licence, or registration certificate relating to any such thing, that is held by or in the possession of the person.

[10] Paragraph 25 and Appendix B to the ITO contained information from a confidential informant which clearly should not have been in the ITO as it in no way met the legal test required for the admission of such evidence. The Supreme Court of Canada pronounced in *R. v. Debot*, [1989] 2 S.C.R. 1140, that information relied upon by an affiant must be credible, compelling, and corroborated. Cpl. Pompeo provided no information about the credibility of the informant and stated clearly in the ITO that the information provided by the informant could not be corroborated. As a result, this information should not have been included in the ITO.

[11] However, I believe there was sufficient other information in the ITO on the basis of which the authorizing justice could issue the warrant. I am satisfied that there was sufficient information in the ITO to allow the authorizing justice to conclude that it was

not desirable for Mr. Fraser to possess a firearm. There was clear evidence that Mr. Fraser was, on April 28, 2019, in possession of what could reasonably be believed was an assault-style rifle and ammunition. There was also information provided in the ITO from which the authorizing justice could conclude that the police had been diligently looking for the articles in places where Mr. Fraser might have stored them between April 28 and June 3, 2019, when the ITO was presented, and that those efforts had not been successful. Further, the ITO contained surveillance information indicating that Mr. Fraser might have been involved in the drug trade during that time and expert opinion evidence that persons involved in the drug trade would keep their firearms close to them.

III. Was the ITO Sub-facially Valid?

A. Application to cross-examine Cpl. Pompeo

[12] Counsel for Mr. Fraser and Ms. Denechezhe applied for an order, which I granted, for leave to cross-examine Cpl. Pompeo (then Cst. Pompeo), the affiant of the ITO for the public safety warrants.

[13] In granting that order, I was guided by the decision in *Garofoli* where the Court stated at para. 88:

> …Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.

[14] In *R. v. Pires; R. v. Lising,* 2005 SCC 66 *("Pires")*, the Supreme Court provided guidance to lower courts regarding how to approach these applications at para. 69:

> …the threshold test for determining whether cross-examination should be allowed is separate and distinct from the ultimate question of whether the authorization is valid. Hence, in determining whether the threshold test has been met, the trial judge cannot decide the question simply on the basis that other parts of the affidavit would support the authorization. The focus, rather, must be on the likely effect of the proposed cross-examination and on whether there is a reasonable likelihood that it will undermine the basis of the authorization. If the test is met, it is only at the conclusion of the *voir dire* that the trial judge will determine whether, on the basis of the amplified record, there still remains a basis for the authorization. …

[15] The applicants provided a list of nine areas on which they proposed to cross-examine Cpl. Pompeo. I ruled that seven of them addressed proper areas of cross-examination. Specifically, the proposed areas concerned the grounds of possession by Mr. Fraser of the articles being sought and the location where those items might be found at the time the warrant was issued. In addition, I ruled that Cpl. Pompeo could be asked about why he chose to apply for a public safety warrant rather than proceeding under s. 487 of the *Criminal Code.* Crown counsel agreed during oral argument that this was an appropriate area for cross-examination.

B. The Contents of the ITO

i) The Investigation

[16] The investigation in this case was founded upon surreptitious video surveillance conducted by officers operating under the authority of the *Safer Communities and Neighbourhoods Act*, SY 2006, c. 7 ("SCAN officers"). The video clip was recorded on

April 28, 2019, but as it was not being live-monitored, it was not observed and brought to the attention of the RCMP (Cst. Lavallee) until May 7, 2019.

[17] The surveillance was of the front step of a house at 125 Hillcrest Road, Whitehorse, believed to be the residence of the accused, Paul Fraser, and Christopher McCormick at that time. It showed Mr. Fraser handing Mr. McCormick what appeared to be an assault-style rifle, along with a box of ammunition. Mr. McCormick was then seen to place the item in the back cab, behind the driver's seat of a pick-up truck belonging to Mr. Fraser. Descriptions of what is observed in the video are included in the ITO at paras. 18 and 27.

[18] Cst. Lavallee was also informed on May 7, 2019, that SCAN officers had conducted surveillance of Mr. Fraser on April 29, 2019, and had observed a Mr. Sidhu driving Mr. Fraser's truck, with Mr. Fraser as a passenger, to two storage locations – Titanium Storage and North Star Mini Storage located at 2 MacDonald Road, in Whitehorse. However, the officers were not able to observe any activities inside either storage location. The RCMP were informed that by this time Mr. Fraser had moved to apartment 202 - 32 Waterfront Place in Whitehorse. SCAN officers observed Mr. Sidhu and Mr. Fraser off-loading property at that location. However, the off-loaded property did not include the rifle Mr. McCormick loaded into the truck the night before.

[19] Cpl. Pompeo confirmed, during his cross-examination, that Cst. Lavallee was of the opinion on May 7, 2019, that there was not sufficient evidence to support an application for a warrant under s. 487 of the *Criminal* Code given the time that had

passed since the rifle had been observed in the possession of Mr. Fraser, and its being moved to an undetermined location.

[20] It is not entirely clear from the ITO when Cpl. Pompeo took over the investigation. He first viewed the video on May 30, 2019, and noted a new detail; that the rifle appeared to have an extended magazine. This additional item was included in the list of articles to be searched for in the ITO, in addition to the assault-style rifle and ammunition that Cst. Lavallee had observed during his review of the video.

ii) Information in the ITO Regarding the Location of the Firearm

a. The Search of Mr. Fraser's Truck.

[21] Paragraph 19 of the ITO references an occurrence report prepared by Cst. Smee dated May 19, 2019, of having conducted a traffic stop of Mr. Fraser's truck, to determine if Mr. Fraser was driving at the time, as he was known to be a disqualified driver. Cpl. Pompeo made an error in his description of this stop in the ITO. He stated in the ITO that Mr. Fraser was in the vehicle at the time and that he and the vehicle were searched. In fact, Mr. Fraser was not in the vehicle. Cpl. Pompeo acknowledged making this error which he said he noticed during his preparation for cross-examination.

[22] I do not believe this was a deliberate misstatement, nor do I consider it an important fact in the ITO. It was included in the ITO because Cst. Smee reported that he searched the truck for officer safety reasons, and no firearm was found. Cpl. Pompeo included this information in the ITO to show places where the firearm had not been located. He lists this at para. 40(c) as one of the factors on which he bases

his belief that the items sought will be located at either Mr. Fraser's residence or storage locker.

[23] The applicants submit that I should excise this paragraph on the basis that the search was contrary to the *Charter*. They acknowledge that the traffic stop itself was lawful, but submit that the search was not. I do not have sufficient information about the circumstances surrounding the traffic stop to permit me to draw that conclusion. The applicants were advised they could tender evidence regarding the traffic stop if they wished to pursue this argument, but they declined to do so.

[24] I consider the fact that the rifle was no longer in the truck three weeks after it had been seen being placed there to be of little assistance in providing reasonable grounds concerning where the rifle, magazine, and ammunition would be on the date of the authorization, but it is relevant information. I would not excise this paragraph from the ITO.

b. The Search of the Residence at 26 South Klondike Highway

[25] Paragraph 20 of the ITO relates to the execution of a search warrant at 26 South Klondike Highway, described as the residence of a close associate of Mr. Fraser's, without detail about that relationship other than to state it was believed he had lived with Mr. Fraser at 125 Hillcrest Road at some earlier time. It states that "Identification, mail and specifically Canada Revenue Agency documents in Mr. Fraser's name, was located in this residence", where there was also found to be 1.7 kilograms of powder and crack cocaine and related drug trafficking paraphernalia.

[26] Cross-examination about Mr. Fraser's link to this location was permitted because of the limited information provided. It revealed that Mr. Fraser was not the target of, nor was he charged with any offence as a result of this search. There was no evidence indicating Mr. Fraser had been seen attending at that residence. The search itself was not related to the firearm in question, although it is noted that no firearm was found during the search. The identification found in the residence included ski lift passes dated 2013-2014 in Mr. Fraser's name and that of a Sophia Tlen, with whom he apparently resided at that time. The Canada Revenue Agency documents were also in both those names. The one relating to Mr. Fraser was dated 2012. None of those documents were found in the vicinity of the safe in which the drugs were found, and no forensic evidence linked Mr. Fraser to the safe. Photographs of the documents found in the residence were marked Exhibit D1 on the *Voir Dire*.

[27] Paragraph 20 must be excised from the ITO. I believe it would have misled the authorizing justice in two ways. First, the ITO omitted the fact the documents relating to Mr. Fraser were at least five years old. Cpl. Pompeo testified that he did not think it was "necessary" to provide this information to the justice. That is a troubling response. It detracts from the officer's assurance that he understood the requirement that he provide to the authorizing justice "full, fair and frank" disclosure of all relevant facts.

[28] Secondly, in cross-examination, Cpl. Pompeo stated that the information about the searches was included to show "a degree of due diligence"; to show the police had been to other places that they had found were linked to Mr. Fraser and had not located the firearm at any of them.

[29] Including information about an unrelated search of the residence of a person who was believed by the police to be an associate of Mr. Fraser, which happened to occur during the time when the investigation into the rifle seen on April 28, 2019 was still outstanding, in order to show the police were diligently searching for the rifle, was also misleading. In this regard, I note that the reference to this search and the fact no firearms were located is included at para. 40(b) of the ITO among the bases for Cpl. Pompeo's belief that the articles would be found in one of the two locations to be searched.

c. The Searches of the Storage Lockers and Mr. Radatzke's Truck

[30] As a result of the search executed at 26 South Klondike Highway, searches were executed (also on May 24, 2019) at two storage lockers located at 106 Titanium Way and 27 Laberge Road, and a truck belonging to a Mr. Radatzke, who had been arrested after the search at the South Klondike Highway residence. At para. 20(a) of the ITO, Cpl. Pompeo states that Mr. Radatzke is a close associate of Mr. Fraser's and that his (Radatzke's) vehicle had been seen at Mr. Fraser's residence at 125 Hillcrest Road. However, it may be recalled that Cpl. Pompeo knew that Mr. Fraser had moved from that location by May 7, 2019. Cpl. Pompeo agreed, in cross-examination, that he had seen other people driving Mr. Radatzke's vehicle on occasion, and that he had never seen Mr. Fraser and Mr. Radatzke together at that location.

[31] Paragraph 21 of the ITO states that no firearm was found during the searches of the storage lockers and Mr. Radatzke's truck. The concern about this paragraph is even greater than with respect to para. 20, since there is not even the connection of

dated documents in Mr. Fraser's name to connect him to the search of the two storage lockers and truck.

[32] The information about all the searches described in paras. 20 and 21 was irrelevant given the absence of any connection to Mr. Fraser except the weak or tenuous connection of the dated documents in Mr. Fraser's name found at 26 South Klondike Highway. Crown counsel acknowledged that para. 21 might be excised but submitted that excising that paragraph would not affect the validity of the public safety warrant.

[33] It is important to note here, however, that I believe the information in both paragraphs was included, if not intentionally for the purpose of misleading the justice into believing that the police had been actively searching, without success, for the firearm in locations connected to Mr. Fraser, then certainly negligently. I note that the Court commented in *R.* v. *Morelli*, 2010 SCC 8, at para. 59, that the relevant question was whether the ITO was misleading, not whether it was intentionally misleading.

[34] The justice was clearly being invited to draw the inference from the information about the firearm not being found in the listed searches that it was therefore "probable" that the articles sought would be found at Mr. Fraser's residence or storage locker. The actual words Cpl. Pompeo used was "reasonably likely" that the articles would be found there (see para. 40(f) of the ITO) after recounting these searches in para. 40(b) of the ITO as bases for his belief that the items sought would be located at either Mr. Fraser's residence or the storage locker. This may have just been careless

language on Cpl. Pompeo's part. Of more concern is the misleading nature of the information about the searches, as noted above.

iii) Information in the ITO Relating to the "Public Safety" Ground

a. Previous Criminal History

[35] I turn now to the section of the ITO described as "Previous History". Included in this review about Mr. Fraser's criminal background is his criminal record, which is clearly relevant. Paragraph 29 of the ITO outlines the details of one conviction in 2012 for possession for the purposes of trafficking, and three convictions for offences involving violence. This information is repeated in the section entitled "Public Safety" at para. 41(a). In addition to the fact that Mr. Fraser has been prohibited for life from possession of any firearms since 2010, his previous convictions clearly provide sufficient information to allow a judicial officer to conclude that it would not be in the interests of public safety for Mr. Fraser to ever be in possession of a firearm.

[36] However, the description of Mr. Fraser's "history" continues in para. 30 of the ITO (and is repeated at para. 41 (b)) to outline offences that he was charged with which were ultimately stayed or dismissed. Cpl. Pompeo admitted, in cross-examination, that he would not have included these offences had the application been for a s. 487 warrant, but that he felt it was appropriate since this warrant was based on "public safety" and he believed this information was relevant to that issue.

[37] Similar evidence was included in the ITO at issue in the case of *R. v. Corbeil*, 2013 ONSC 7411. At para. 25 of that decision, the Court stated as follows: "In my

view, references to charges which have been dismissed, withdrawn or otherwise stayed, without some further information making them probative, have no place in an ITO and ought to be excised. …" The Court went on to find that there was no bad faith on the part of the affiant officer in that case on the basis that he included it in order to provide full and frank disclosure of all aspects of his investigation, but the Court further found that the officer was misguided in this respect. I am also inclined to give Cpl. Pompeo the benefit of the doubt and conclude that it was not bad faith which led him to include stayed or dismissed charges in the ITO.

[38] However, even more objectionable, in my view, are the contents of paras. 31 to 33 (which are repeated at para. 41(c)) which describe offences involving the amputation of three persons' fingers for failure to pay drug debts that the police "suspect" Mr. Fraser may have been involved in, either by committing them himself, or by having ordered another person to commit them. This speculative information can only have been included for the purpose of presenting Mr. Fraser in the worst possible light to the authorizing justice. I expect the authorizing justice recognized this information was of no evidentiary value, but I believe its inclusion in the ITO was for the purpose of prejudicing the authorizing justice against Mr. Fraser.

[39] I reach this conclusion because the only possible relevance Mr. Fraser's criminal history could have on the grounds required for the issuance of the s. 117.04(1) warrant is in relation to the public safety ground that Mr. Fraser should not be in possession of a firearm. Including the information about the violent offences the police suspected him of being involved in was unnecessary and prejudicial.

[40] I hasten to note that the ITO for a public safety warrant will usually, and properly, include reports from individuals which will not be scrutinized in the same way as those provided by confidential informants for a s. 487 warrant, and often will include hearsay accounts of possible criminal or violent behaviour. I will return to this area when I discuss the differences between the s. 117.04(1) warrant and the s. 487 warrant later in this decision.

[41] I would emphasize, however, that given the *ex parte* nature of these applications, it falls to those who are making the application to exercise discretion and fairness with respect to what information they include (see *R. v. Araujo*, 2000 SCC 65, at para. 46 to 58). I believe Cpl. Pompeo's inclusion of police speculation about offences Mr. Fraser might have been involved in reflects a failure to exercise that discretion and fairness.

[42] It would make no difference to the validity of the warrant if paras. 30 to 33, and 41(a) to (c) of the ITO were excised. As mentioned earlier, the only relevance of these paragraphs is with respect to the public safety precondition which is clearly present in this case on the evidence available without those paragraphs.

b. Information from a Confidential Informant Regarding Possession of Firearms

[43] As mentioned earlier, Appendix B, referred to in para. 25 of the ITO, must be excised since it recounts observations from a confidential informant about whom there is no evidence of credibility and which cannot be corroborated. While Cpl. Pompeo asserts in the ITO that he is including this in the interests of "full, frank and fair disclosure", in my view, he must have been aware this was of no value and should not have been presented to the authorizing justice. The information, which asserted that

Mr. Fraser had handguns and rifles kept in his residence out in the open, despite the fact the informant apparently did not know where Mr. Fraser lived, must have been included by Cpl. Pompeo to show Mr. Fraser routinely had possession of firearms; this is something that had not otherwise been shown.

c. The Opinion Evidence that Drug Dealers Keep their Firearms Close

[44] The most significant information provided in the ITO to establish the grounds to believe Mr. Fraser would still be in possession of the rifle on June 3, 2019, and that it would be either at his place of residence, or his storage locker at that time, was Cpl. Pompeo's statement of opinion, which he said (at paras. 5 and 38) was shared by a "court qualified drug expert" as follows:

> …that those involved in the drug trade who possess firearms often keep their firearms on their person or at their place of residence, and do not normally dispose of them because they have acquired them for the following reasons:
>
> a. Protection of their person, associates, money and drugs;
>
> b. Intimidation of others;
>
> c. To settle and/or collect drug debts; and
>
> d. To shoot rival drug dealers.

[45] In order for this opinion to be of any assistance in establishing the grounds for the warrant, it must be shown that Mr. Fraser falls into the category of offenders referred to. That is, there must be evidence that Mr. Fraser is currently involved in the drug trade and that he also is someone who would likely keep their firearms close, for the nefarious purposes outlined above. In connection with this opinion I note the concerns expressed by the Supreme Court of Canada in *Morelli*, at para. 4, a child pornography

case, where the Court cautioned against reliance on broad generalizations about loosely defined classes of people, and stated that the ITO in that case "… invoked an unsupported stereotype of an ill-defined 'type of offender' and imputed that stereotype to the appellant."

[46] On May 30, 2019, Cst. Lavallee provided Cpl. Pompeo with information that SCAN officers had, on that date, observed Mr. Fraser in the company of Mr. McCormick, in Mr. McCormick's truck, and that they saw Mr. McCormick involved in what they believed was a drug transaction with an individual at a park in downtown Whitehorse. While this is some evidence, as pointed to by the Crown, of recent involvement in the drug trade by Mr. Fraser, I note that the information seems to be as much, or more relevant regarding Mr. McCormick than Mr. Fraser.

[47] Although it does not detract from the validity of information relating to Mr. Fraser, it is correct, as the applicants pointed out, that there was at least as much, and possibly more, evidence to direct the police attention to Mr. McCormick's possession of the rifle in question. It appeared that they both resided at 125 Hillcrest Road and at 202 - 32 Waterfront Place, it was Mr. McCormick who put the rifle in the truck on April 28, 2019, and it was Mr. McCormick who was observed conducting what might have been a drug transaction.

[48] Cpl. Pompeo agreed that Mr. McCormick also had a criminal record involving violence and that he may have been under a firearms prohibition order as well. Cpl. Pompeo acknowledged that it was Mr. Fraser's history that gave the police more significant concern about public safety; therefore they focussed on him rather than

Mr. McCormick. I accept that Cpl. Pompeo was sincerely and legitimately concerned that Mr. Fraser's possession of a firearm would present a more significant danger to the public, so I would not ascribe any bad faith on his part in focussing his attention on Mr. Fraser rather than Mr. McCormick.

[49] Other information concerning Mr. Fraser's "recent" involvement in the drug trade is in para. 35 (and repeated at para. 41(d)) of the ITO, where Cpl. Pompeo states that Child and Family Services workers had concerns about vulnerable girls associating with Mr. Fraser. There is an allegation that a youth had reported that Mr. Fraser had provided her with methamphetamine and that she owed him money. Although the report was made on May 13, 2019, there is nothing to indicate when Mr. Fraser was alleged to have provided the drug to the youth. Accordingly, while I would not excise this paragraph, it is not of much assistance in relation to the assertion that Mr. Fraser was currently involved in the drug trade.

[50] Paragraph 34 of the ITO refers to a police report dated June 1, 2019, which relates to an investigation in October 2018, during which phones were seized from Dakota Blackburn who was charged with possession for the purposes of trafficking heroin and fentanyl. Appendix C of the ITO contains text messages between Mr. Fraser and Mr. Blackburn from which it could be gleaned that Mr. Fraser had access to firearms through a "gun guy" and that he would leave a gun at a designated place for Mr. Blackburn to keep at a designated place. Although it is acknowledged this is dated information, as the applicants pointed out, this is some evidence that Mr. Fraser does not fall within the category described by Cpl. Pompeo of drug dealers who keep their firearms close, since this demonstrates a time when he directed a firearm be kept at a

location other than his residence. Cpl. Pompeo included this text message as a basis for his belief that Mr. Fraser was in possession of the articles being sought at the time of the ITO at para. 37(d).

[51] In his oral argument, Crown counsel attempted to explain the apparent inconsistency between the expert opinion evidence regarding drug dealers keeping their firearms close in para. 5 and the inclusion in para. 37(d) of the text messages showing he kept firearms at other locations on the basis that the context was different. He explained this by stating that the latter reference was to show that Mr. Fraser was a person who routinely had access to firearms in the context of the precondition that there be reasonable grounds to believe Mr. Fraser would, at the time of the search, be in possession of the firearm seen in the video, whereas the expert opinion evidence related to the place where the firearm would be located. While Cpl. Pompeo may have had a different reason for including the texts in the ITO, I cannot see that it detracts from the applicants' argument that this is in conflict with the expert opinion.

[52] I consider it of great significance that Cpl. Pompeo acknowledged, in cross-examination, that it was also true that drug dealers will often buy and sell, get rid of firearms, and pass firearms around. He refused to accept that this statement was contrary to the generalization in his opinion that drug dealers keep their firearms close, and simply stated "I stand by what I said in the ITO". He testified that he did not include this in the ITO because he thought this information would be known to the justice.

[53] In light of this additional information from Cpl. Pompeo, I cannot accept the opinion that drug dealers keep their firearms close, as set out in paras. 5 and 38 of the

ITO, as being of any assistance in establishing the grounds that the rifle, magazine, and ammunition would still be in Mr. Fraser's possession, and located at his residence or storage locker on the date of the authorization. While there was some, albeit weak, information in the ITO suggesting Mr. Fraser was recently involved in the drug trade, the opinion that drug dealers keep their firearms close is a generalization which has no evidentiary value, when coupled with the admission by Cpl. Pompeo that it is also common for drug dealers to pass them around and keep them at other locations than those that are close.

[54] When scrutinized, all this opinion evidence establishes is that when people involved in the drug trade have firearms they either keep them close or move them around to various persons and places. This cannot provide the grounds for believing the articles in question would be in Mr. Fraser's possession, at his residence or storage locker, on the date of the authorization.

[55] In *R. v. Liu,* 2014 BCCA 166, the Court accepted the argument that the search of the residence of the accused was based on the proposition that because they were believed to be trafficking in drugs there must be drugs in their home. The Crown in that case had admitted there must be more than evidence of trafficking in drugs to justify the search of a residence, but argued, as here, that by the process of elimination, the drugs had to be stored at the accused's residence. The Court of Appeal ruled there was a gap in the information such that there was no reasonable probability that drugs were being stored in the residence. In the present case, there was a gap related to the "currency" of the information as it relates to the grounds of possession and location, which will be explored fully below.

C. The Decision to Apply for a Public Safety Warrant pursuant to s. 117.04(1)

[56] Although the original version of s. 117.04(1) was ruled unconstitutional (see *R. v. Hurrell* (2002), 60 O.R. (3d) 161 (Ont. C.A.)), Parliament responded by redrafting the provision to ensure the present section requires preconditions for obtaining the public safety warrant which comply with constitutional requirements. Accordingly, there is nothing objectionable about the police applying for a warrant under this provision, in appropriate cases.

[57] Cpl. Pompeo readily agreed that the public safety warrant was primarily used in relation to domestic violence situations, or cases where there is a concern about the mental health of a person who has access to firearms. It is clear that its focus is on persons who are lawful gun owners, as evidenced by the inclusion in the provision that documentation relating to lawful gun ownership as well as the firearm(s) in question may be seized. It is preventative in nature and because of that, and the circumstances under which the warrant is often sought, the concern about the reliability of information provided by informants relating to the "public safety" concern may be lower than where information is provided by confidential informants regarding criminal behaviour for the purposes of a warrant sought pursuant to s. 487 of the *Criminal Code*. Often the information for a public safety warrant is provided to the police by family members or members of the public who have observed behaviour which caused them to have a concern about the target of the warrant.

[58] The public safety warrant allows the police to act quickly to seize firearms where they have reasonable grounds to believe the person has possession of a firearm at a

specified location, and where they have information leading to a reasonable belief that this constitutes a danger to public safety. Following seizure, the authorities must then apply for an order for disposition of the firearms seized pursuant to s. 117.05 of the *Criminal Code* which will allow the target of the warrant to present argument, if they wish, that their possession of firearms should not be prohibited and the seized articles should be returned to them, as lawful firearm owners.

[59] Cpl. Pompeo provided a reasonable explanation for his decision to apply for a public safety warrant in the present case. He testified he had received information during an educational session from a respected member of a national enforcement team that the police in British Columbia were now applying for these warrants to seize firearms from people who, based on their criminal history, posed a danger to the public.

[60] It appears, however, that Cpl. Pompeo was either provided with incorrect information, or he misunderstood the information he received during that training. He testified that he believed the difference between the two warrants was that it was not necessary to have the same “currency” of information about possession by the target at the place where the article was believed to be for the public safety warrant as is required for the s. 487 warrant.

[61] However, and this is significant in the present case, the requirement for “current” reasonable grounds to believe the article being sought is in the possession of the subject, and at the place to be searched, is the same for both types of warrants. Crown counsel agreed that this is the law during oral argument.

[62] With respect to the need for "currency" of the information in the context of public safety warrants, see *R. v. Dagenais,* 2015 SKQB 104, at para. 32. With respect to s. 487 warrants, Trotter, J. (as he then was), summarized the law on this topic in *R. v. Chen*, 2007 ONCJ 177, at para. 18:

> In determining whether reasonable grounds exist to search a location, the currency or freshness of the evidence is important. Numerous courts have held that an Information to Obtain a search warrant must contain information that is recent enough to satisfy the issuing justice that it is *probable* that the things sought will still be at the location, and not that it is merely *possible* that they are still there: *Regina v. Turcotte* (1988), 39 C.C.C.(3d) 193 (Sask.C.A.), *Regina v. Adams*, [2004] N.J. No. 105 (Prov.Ct), and *Regina v Jamieson* (1989), 48 C.C.C.(3d) 287 (N.S.C.A.). …

[63] Although Crown counsel agreed that Cpl. Pompeo was wrong about there being a difference regarding the requirement that information be "current" for a public safety warrant, he submitted that, despite the error, there was new information available to Cpl. Pompeo, contained within the ITO, to satisfy the "currency" requirement for that warrant. This new information, he argued, was the opinion regarding the fact that drug dealers will keep firearms close, coupled with the evidence that Mr. Fraser was recently involved in the drug trade, and at some time earlier, was in possession of a firearm. However, without the expert opinion, which I have concluded cannot be relied upon, there is nothing left to provide the necessary "currency" regarding the grounds to believe Mr. Fraser had possession of the articles sought, or that they would be found in the places proposed to be searched.

D. The Legal Principles Applicable to this Review

[64] Where a challenge pursuant to s. 8 of the *Charter* is made to the validity of a search executed pursuant to a warrant, there are certain legal principles which must be applied and which must be kept in mind. First, the warrant is presumed to be valid (*Pires* at para. 30). Second, the applicants bear the burden of demonstrating that the warrant was not validly issued because the minimum standard required for the search was not established by the ITO.

[65] As stated by the Supreme Court of Canada in *Garofoli*, at para. 56:

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

[66] The Supreme Court made it clear that the review is not a rehearing of the application. The test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued (see *Araujo*). Does the evidence presented in the ITO give rise to a “credibly-based probability” as opposed to a suspicion or possibility that the objects to be searched for will be found in the place to be searched (*Morelli*, at paras. 127 to 129)?

E. Analysis

[67] I have determined that the expert opinion must be excised as well as the evidence of the various searches which were included to show probable cause to believe the articles sought were in Mr. Fraser's possession and would be found in the locations to be searched.

[68] After so excising, I find that the ITO did not contain sufficient information to show a credibly-based probability that the articles sought were in Mr. Fraser's possession and at one of the locations to be searched at the time the ITO was presented to the justice. To hold otherwise would permit the police to obtain a public safety warrant to search Mr. Fraser's residence or any other location he controlled or had access to on a perpetual basis, so long as they also had some relatively recent evidence he was involved in the drug trade and that he had been in possession of a firearm at some earlier time.

[69] In the result, the searches conducted under the authority of the public safety warrants breached the applicants' rights under s. 8 of the *Charter.*

IV. Section 24(2) Analysis

[70] The Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, outlined what the courts must consider, and how to approach the question of whether to exclude evidence seized as a result of a breach of an accused person's constitutionally- protected rights. The Court stated at para. 71:

> …whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s.

> 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. …

[71] The first line of inquiry concerns the seriousness of the state conduct. I consider the state conduct here to have been very serious. Cpl. Pompeo undertook to apply for a warrant in circumstances which he knew were novel and unusual. He did not take proper care to ensure he understood the legal requirements for obtaining such a warrant. He included in the ITO information which was irrelevant, prejudicial, and misleading. While I accept he was sincere in his belief that the public safety warrant was a valid police procedure and that Mr. Fraser would present a serious threat to public safety should he be in possession of a firearm, he believed that it provided an "easier" route to obtaining authority to search Mr. Fraser's residence than a s. 487 warrant, which he knew he did not have proper grounds to obtain.

[72] Crown counsel referred me to a number of cases which note that obtaining a search warrant shows good faith on the part of the police, and where a search warrant is ruled to be invalid for technical reasons, the seriousness of the state conduct is far less, which he argued should be my finding in this case (see *R. v. Rocha*, 2012 ONCA 707; *R. v. Hines*, 2009 ONCA 703; *R. v. Kitaitchik* (2002), 161 O.A.C 169). In light of my conclusions above, however, the present case is distinguishable from those cases.

While the application for the public safety warrant was pursued in good faith, the preparation of the ITO was misleading and careless and the affiant did not have either the subjective or objective grounds required for the application. This was not a technical breach, but rather conduct which demonstrated at least a reckless disregard for *Charter* rights and therefore more serious state conduct (see *Grant*, para. 75). Accordingly, I find that this factor supports exclusion of the evidence.

[73] The second line of inquiry concerns the impact on the accused of the *Charter*-infringing conduct. I find that in this case the impact is very serious. The search of a residence is a profound interference with a person's right to privacy. While a person is considered to have a lesser expectation of privacy regarding property contained in a storage locker, there is still an expectation that such property will not be interfered with by the state without reasonable grounds (see *R. v. Buhay*, 2003 SCC 30).

[74] It may be noted that while the public safety warrant is preventative, and is not directed towards obtaining evidence of a criminal offence, it is clear that in the present case, a charge against Mr. Fraser for breaching his firearms prohibition order was clearly possible, and in fact was a result of the search of the storage locker. In light of that, I cannot accept the Crown's argument (at para. 49 of their written submissions) that s. 117.04(1) attracts a lesser degree of *Charter* scrutiny because the operation of impugned criminal legislation may result in the imprisonment of a person whereas this legislation is "entirely" preventative and not offence-based, in the present circumstances.

[75] The third line of inquiry concerns society's interest in adjudication of the case on the merits. There can be no doubt that the offences the accused persons face are serious and the evidence is necessary for the prosecution. The observations of the officers at the residence when they executed the s. 117.04(1) warrant provided the grounds for the *CDSA* warrant and the seizure of real evidence required to prove six of the charges on the Information. The execution of the warrant at the storage locker led to the seizure of real evidence of serious firearms offences. As is often the case, this line of inquiry favours inclusion of the evidence.

[76] The final balancing objective of the s. 24(2) analysis essentially involves a cumulative assessment of the effect of admission, as opposed to exclusion of the evidence, on the repute of the administration of justice. Mr. Justice Fish says this in *Morelli,* at paras. 108, 110, and 111:

> 108 In balancing these considerations, we are required by *Grant* to bear in mind the long-term and prospective repute of the administration of justice, focussing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused.
>
> …
>
> 110 Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants. But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices.
>
> 111 The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. To admit the evidence in this case and similar cases in the future would undermine that confidence in the long term.

V. Decision

[77] I have carefully considered the Crown's argument that in this case, since it is only observations of the police at the residence and not real evidence that is in issue, the analysis should be different and that excluding the evidence would extract too great a toll on the truth seeking object of the criminal trial. However, applying the principles set out in *Grant*, as outlined above, I believe it is necessary in this case for the Court to disassociate itself from the conduct of the police in obtaining the public safety warrant to search the residence, and it was in executing that warrant that the observations were made. The same applies to the real evidence seized as a result of executing the warrant at the storage locker. I am satisfied that admitting the illegally obtained evidence in this case would bring the administration of justice into disrepute.

[78] In the result, I conclude that the observations made by the police when they entered the home of Mr. Fraser and Ms. Denechezhe pursuant to the public safety warrant on June 6, 2019, must be excluded from the evidence to be presented at their trial. Similarly, the real evidence obtained as a result of the search of Mr. Fraser's storage locker pursuant to the public safety warrant on the same date must also be excluded.

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SNELL T.C.J.