SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Downey*, 2017 NSSC 65

Date: 20170309
Docket: CRH No. 447536
Registry: Halifax

Between:

Her Majesty the Queen

v.

Devon Marteeko Downey

LIBRARY HEADING

Judge:	The Honourable Justice Peter Rosinski
Heard:	January 23 and 24, 2017, in Halifax, Nova Scotia
Written Decision:	March 9, 2017
Subject:	The facial and sub-facial validity of a production order issued pursuant to s. 487.012 Criminal Code for records in relation to the accused's cellular phone number.
Summary:	The accused was charged with manslaughter having caused the death of the victim by punching him, causing him to fall to the ground striking his head. The police investigation suggested that the accused was involved in the melee during which the victim died, and was seen speaking on a cell phone around the relevant time-period. Police sought production from Telus Communications of phone call, text messaging, and data communications within approximately two weeks on either side of the date of the incident. The accused challenged the sub-facial and facial validity of the production order arguing portions thereof should be excised as they included material omissions and errors that would tend to have left the JP with a mistaken understanding of the true circumstances, and that even if not excised, no JP could have issued the

production order on those grounds, because they were insufficient on their face.

Issues:

(1) What are “material” or omissions or inclusions, and were there any material omissions or inclusions in the grounds of the relevant affidavit, that individually or collectively, would likely have caused the issuing JP to be left with a mistaken impression of the true circumstances?

(2) After considering whether to excise any objectionable portions of the grounds in the affidavit, in combination with the amplification evidence, could a JP still have concluded there were sufficient grounds for issuance of the production order?

Result:

(1) There were no material, omissions or misleading inclusions, in the grounds of the relevant affidavit, nor did the amplification evidence undermine the validity of the grounds in the affidavit.

(2) On its face, the grounds contained in the relevant affidavit were such that they contain sufficient credible and reliable evidence that the JP could properly have decided to issue the production order.

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Counsel:	Rick Woodburn and Brian Cox, for the Crown Brad Sarson and Brandon Rolle for the Defence

By the Court:

Introduction

[1] Mr. Downey [hereinafter "Mr. D."] is to be tried by a judge and jury. He is charged with the manslaughter of Kaylin Diggs [hereinafter "K.D."] on August 11, 2012. In the early morning hours, a melee and fighting ensued between two groups who were unknown to each other: Mr. D. and other young males versus K.D. and his friend Cody Good [hereinafter "Mr. G."] At trial, the Crown expects to establish by evidence that Mr. D. was involved at the time that K.D. was hit by a blow that consequently led to his death.

[2] By August 29, 2012, the results of the police investigation had caused them to focus on Mr. D. Information was received that Mr. D. was present at the time of the melee, and had a cell phone (902-818-1585) which he was using around that period of time. On August 29, 2012, Detective Cst. Tyler Anstey swore an affidavit before Justice of the Peace, Elizabeth Mullally, in support of an application for a production order pursuant to Section 487.012 of the Criminal Code of Canada. The order required to Telus Communications Company to produce:

> **a.** Subscriber name, address and all billing information records pertaining to the following phone number: 902-818-1585;
>
> **b.** All phone calls, text messages, and data plan communication sent and received from August 1, 2012 to August 29, 2012 by phone number 902-818-1585; and
>
> **c.** Call details and telephone subscriber information for all incoming and outgoing calls and text messages, all cellular tower information, times, dates and locations for towers accessed for the following dates and times for the following cellular telephone; August 1, 2012 to August 29, 2012, by phone number 902-818-1585.

[3] The order was granted.

[4] Mr. D. has challenged this production order previously:

i. The Crown refused to provide greater disclosure to Mr. D. regarding information related to the confidential informant sources relied on in Cst. Anstey's affidavit – my decision declined to order further disclosure – 2016 NSSC 343;

ii. Mr. D. sought leave to cross-examine Cst. Anstey as part of a sub- facial attack on the production order granted – by oral decision January 23, 2017, I declined leave to cross-examine. As to the effect thereof on a sub-facial attack on the sufficiency of grounds of a search warrant that were presented to an issuing justice, see: *R. v. Sadikov*, 2014 ONCA 72.

[5] Mr. D. now challenges for sub-facial and facial validity of the production order granted. I conclude that the production order was properly granted.

The reviewing judge's framework

[6] In *World Bank Group v. Wallace*, 2016 SCC 15, the unanimous court stated:

> 120 As a general rule, there are two ways to challenge a wiretap authorization: first, that the record before the authorizing judge was insufficient to make out the statutory preconditions; second, that the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at paras. 50-54; *Pires*, at para. 41; see also *R. v. Grant*, [1993] 3 S.C.R. 223, on the exclusion of unconstitutionally obtained information from warrant applications). The challenge here is brought on the second basis, sometimes referred to as a subfacial challenge.
>
> 121 In view of the fact that a subfacial challenge hinges on what the affiant knew or ought to have known at the time the affidavit was sworn, the accuracy of the affidavit is tested against the affiant's reasonable belief at that time. In discussing a subfacial challenge to an information to obtain a search warrant, Smart J. of the British Columbia Supreme Court put the matter succinctly as follows:
>
> > During this review, if the applicant establishes that the affiant knew or should have known that evidence was false, inaccurate or misleading, that evidence should be excised from the [information to obtain] when determining whether the warrant was lawfully issued. Similarly, if the defence establishes that there was additional evidence the affiant knew or

> should have known and included in the [information to obtain] in order to make full, fair and frank disclosure, that evidence may be added when determining whether the warrant was lawfully issued.
>
> (*R. v. Sipes*, 2009 BCSC 612, at para. 41 (CanLII))

122 Smart J.'s comments apply equally to a *Garofoli* application (see *R. v. McKinnon*, 2013 BCSC 2212, at para. 12 (CanLII); see also *Grant*, at p. 251; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 40-42). They accord with this Court's observation in *Pires* that an error or omission is not relevant on a *Garofoli* application if the affiant could not reasonably have known of it (para. 41). Testing the affidavit against the ultimate truth rather than the affiant's reasonable belief would turn a *Garofoli* hearing into a trial of every allegation in the affidavit, something this Court has long sought to prevent (*Pires*, at para. 30; see also *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 21).

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

[7] Very recently, Justice Casey Hill has set out a helpful summary of the applicable legal principles in *R. v. Persaud*, 2016 ONSC 8110:

> 63 In a s. 8/24(2) pre-trial *Charter* motion, the court reviewing a search warrant ITO does not stand in the place of the justice of the peace who issued the warrant. The properly circumscribed limits of review were succinctly summarized by Watt J.A. in *R. v. Mahmood et al.*, 2011 ONCA 693, at para. 99 (leave to appeal refused [2012] S.C.C.A. No. 111):
>
> > A reviewing judge does *not* substitute his or her view for that of the justice who issued the warrant. Rather, the reviewing judge considers the record before the issuing justice, the ITO, trimmed of any extraneous or unconstitutionally obtained information, but amplified by evidence adduced on the hearing to correct minor technical errors in drafting the ITO, to determine whether there remains sufficient credible and reliable evidence to permit the justice to issue the warrant: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 40-42; *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, at paras. 8 and 30; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at paras. 54 and 59: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1452; and *R. v. Wiley*,[1993] 3 S.C.R. 263, at pp. 273-274.
>
> (emphasis of original)

See also: *Quebec (Attorney-General) v. Laroche* (2002), 169 C.C.C. (3d) 97 (SCC), at p. 188; *R. v. Reid*, 2016 ONCA 524, at para. 73 (appln for leave to appeal filed [2016] S.C.C.A. No. 432); *R. v. Nero and Caputo*, 2016 ONCA 160, at paras. 70-72, 79, 82, 84, 87, 116 (leave to appeal refused [2016] S.C.C.A. No. 184, 187); *R. v. Budd* (2000), 150 C.C.C. (3d) 108 (Ont. C.A.), at p. 117 (leave to appeal refused [2001] S.C.C.A. No. 57).

64 In performing its narrow role of constitutional review of an ITO, various instructive guidelines have been applied by courts including:

(1) The warrant is presumptively valid unless the challenging party establishes that there was no basis for its issuance: *R. v. Hafizi*, 2016 ONCA 933, at para. 43; *R. v. Campbell*, 2010 ONCA 588, at para. 45 (aff'd 2011 SCC 32); *R. v. Crevier*, 2015 ONCA 619, at paras. 66, 74; *Nero and Caputo*, at para. 68.

(2) The review takes a practical, common sense approach to all the circumstances (*R. v. Morelli*, [2010] 1 S.C.R. 253, at para. 129), considering the narrative of the ITO contextually without piecemeal dissection: *Hafizi*, at paras. 49-50, 56; *R. v. Sadikov*, 2014 ONCA 72, at para. 87.

(3) "[T]he review is not an exercise in examining the conduct of the police with a fine-toothed comb, fastening on their minor errors or acts or omissions, and embellishing those flaws to the point where it is the police conduct that is on trial rather than the sufficiency of the evidence in support of the application": *R. v. Nguyen*, 2011 ONCA 465, at para. 57.

(4) As noted in *R. v. Cunsolo*, [2008] O.J. No. 3754 (S.C.J.), at para. 135 (affd 2014 ONCA 364):

The appropriate approach for judicial review of the facial validity of a search warrant and related ITO is scrutiny of the whole of the document, not a limited focus upon an isolated passage or paragraph. Reference to all data within the four corners of the information, a common sense review not line-by-line word-by-word dissection, provides the fair and reasonable context for the assertions in question: *R. v. Grant* (1999), 132 C.C.C. (3d) 531 (Ont. C.A.) at 543 (leave to appeal refused [1999] S.C.C.A. No. 168 (Q.L.), 150 C.C.C. (3d) vi); *R. v. Chan*, [1998] O.J. No. 4536 (Q.L.) at para. 4, 40 W.C.B. (2d) 143 (C.A.); *R. v. Melenchuk and Rahemtulla*, [1993] B.C.J. No. 558 (Q.L.) at para. 15-18, 19 W.C.B. (2d) 194 (C.A.); *Simonyi Gindele et al. v. British Columbia (Attorney General)* (1991), 2 B.C.A.C. 73 (C.A.) at 79.

(5) Police officers are not legal draftspersons and cannot, in an ITO, be expected to "spell out things with the same particularity of counsel": *Re Lubell and the Queen* (1973), 11 C.C.C. (2d) 188 (Ont. H.C.), at p.190; *R. v. Green*, 2015 ONCA 579, at para. 18; *R. v. Durling* (2006), 214 C.C.C.

> (3d) 49 (N.S.C.A.), at para. 19; *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.), at p. 364; *Re Chapman and the Queen* (1983), 6 C.C.C. (3d) 296 (Ont. H.C.), at p. 297.
>
> (6) That said, as observed by Fish J. in *Morelli*, at para. 167, police officers "should draft ITOs as precisely and clearly as possible".
>
> (7) It will not be surprising that an ITO will have some flaws -- "[f]ew applications are perfect": *Nguyen*, at para. 58. The question remains whether, following any amplification and/or excision, the core substance of the ITO *could* support the justice of the peace's exercise of discretion to issue the warrant.
>
> (8) While it is expected that an ITO will present reliable, balanced and material facts supporting the asserted grounds of belief, an ITO affiant need not attempt to replicate a Crown disclosure brief -- the document should be clear, concise, legally and factually sufficient, and "need not include every minute detail of the police investigation": *C.B.C. v. A.-G. for New Brunswick* (1991), 67 C.C.C. (3d) 544 (S.C.C.), at p. 562; *R. v. Araujo* (2000), 149 C.C.C. (3d) 449 (S.C.C.), at p. 470; *R. v. Ling* (2009), 241 C.C.C. (3d) 409 (B.C.C.A.), at para. 43 (leave to appeal refused, [2009] S.C.C.A. No. 165).

[8] Moreover, in relation to what are “material” errors or omissions, the comments of Justice Blair in *R. v. Nyguyen*, 2011 ONCA 465, are instructive:

> **48** It is trite law that an applicant for a search warrant has a duty to make full, frank and fair disclosure of all material facts in the ITO supporting the request: *Araujo*, at para. 46; *Morelli*, at paras. 44, 55 and 58-60; *R. v. Shayesteh* (1996), 31 O.R. (3d) 161 (C.A.), at p. 177. This duty includes the duty not to omit material facts. As LeBel J. said in *Morelli*, at para. 58:
>
> > In failing to provide these details, the informant failed to respect his obligation as a police officer to make full and frank disclosure to the justice. When seeking an *ex parte* authorization such as a search warrant, a police officer -- indeed, any informant -- must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present *all material facts, favourable or not*. [Italics in original.]
>
> **49** The "details" referred to in *Morelli*, however, were facts *known* to the police at the time, but not disclosed. What is complained of here is a series of "omissions of fact" not addressed in the ITO, i.e., facts that were *not known*, or matters that were not observed by D.C. Mason, and that the respondent submits should nonetheless have been put forward and countered in the ITO. The trial judge accepted this submission.

50 I disagree. Although there may be circumstances in which the duty to provide full and fair disclosure will require an applicant for a search warrant to negative something unseen or not done, I would expect such circumstances to arise infrequently. In most cases, the absence of a reference to something not seen, not heard, or not done, will lead to the sensible inference that whatever it is was not seen, not heard or not done. As Doherty J.A. observed in *R. v. Colbourne* (2001), 149 O.A.C. 132 (C.A.), at para. 43:

> Cst. Henry described the indicia of impairment that he observed. It was implicit that he did not observe any other indicia of impairment. His failure to specifically enumerate the things he did not see does not constitute non-disclosure.

51 The obligation on applicants for a search warrant is not to commit the error of material non-disclosure. "Materiality" is something that bears on the merits or substance of the application rather than on its form or some other inconsequential matter: *R. v. Land* (1990), 55 C.C.C. (3d) 382 (Ont. H.C.), per Watt J., at p. 417. There is no obligation on applicants to anticipate, and to explain away in advance, every conceivable indicia of crime they did not see or sense and every conceivable investigative step they did not take at the time in order to counter the creative arguments of able defence counsel on a review hearing many months or years after the event. Here, for the most part, the impugned "omissions of fact" relied upon by the trial judge fall into the latter type of category, or they are simply immaterial, or were not omissions at all.

[9] Justice Watt, as he then was, commented in *R. v. Land*, (1990) 55 CCC (3d) 382:

> 3. The Second Step: Materiality
>
> a. Introduction
>
> The second step looks to the relationship between the errors and/or omissions in the supportive affidavit and the conditions precedent of which adequate proof must be made to permit authorization to be given. **This requirement, shortly described as "materiality"**, ensures that the matter of the error and/or omission is one which bears upon the merits or substance of the application, rather than its form or some other inconsequential matter. It **must be a matter of such significance as to be likely to influence the determination of the dual conditions precedent of probable cause and investigative necessity or to alter the character of the supportive affidavit.** The essence of the materiality requirement, in other words, is the nexus which the applicant must demonstrate between the facts which were not or wrongly disclosed and the dual requirements of probable cause and investigative necessity.
>
> [My emphasis added]

The evidence

[10] By agreement, counsel provided me with true copies of the original production order (which includes the original affidavit), and numerous further production orders, which Mr. D. argues must also be deficient if the original production order upon which they are premised could not have been properly issued. To amplify the record beyond that available to the JP, I also had the benefit of three exhibits on the *voir dire*: a surveillance videotape of the relevant time period showing a view in front of the so-called "Liquor Dome" group of bars; a similar surveillance videotape showing a view in front of the "Durty Nelly's" bar; and the August 15, 2012, handwritten notes of Detective Cst. Penny Hart regarding an earlier suspect, D.T., which included that there was "source info that he was involved, Crime Stoppers tip that he threw "the" punch, video of him leaving The Dome and video of altercation appears he is involved in the altercation".

Mr. D.'s position

A-*The sub-facial attack*

[11] Mr. D. claims that the material before the JP did not accurately reflect what Cst. Anstey knew or ought to have known, and that if it had, the authorization could not have been issued.

[12] Specifically, he argues that the affidavit was deficient because:

> **i.** It contained material errors – "the affiant exaggerated his ability to recognize [Mr. D.] in order to lend strength to his request… Based on the poor quality of the video, the affiant knew or at least ought to have known that such a statement would be misleading… The JP had no information about the quality of the video viewed by the affiant, the affiant's prior involvement, if any with, [Mr. D.], the angle at which the affiant was able to view the person being identified, or whether cross- racial identification was involved" [paras. 97 and 102 defence brief] – and therefore any reference to Cst. Anstey's video surveillance tape identification of Mr. D. must be excised [para. 108, defence brief];

ii. It contained a material omission that Cst. Anstey was aware of or ought to have been aware of - the affidavit should have included a reference to D.T. as a suspect on August 15, 2012, as per the notes of Cst. Penny Hart; the failure to refer thereto in para. 21 of the affidavit would have left the JP with the impression that the only Crime Stoppers tip was one that identified Mr. D. as responsible for K.D.'s death [para. 109, defence brief – which sought to have the record amplified to include this item and was part of the basis for the application for leave to cross-examine Cst. Anstey];

iii. It contained other non—material omissions that cumulatively caused the JP to be misled as to the accuracy and sufficiency of the grounds presented by Cst. Anstey, such that paras. 7, 26, 27 and 28 should be excised from the affidavit [paras. 117 – 125 defence brief]:

a. Para. 7 reads:

> Information has been learned that [Mr. D.] born [1990] was also present during this altercation. This information has been confirmed through viewing of multiple surveillance camera angles. Mr. D. has been observed on those video angles talking on a cellular phone moments before the altercation took place. A confidential source has provided a phone number that is consistently used by Mr. D., and it is that phone number, that this affidavit is in support of securing.

[13] Notably, para. 19 reads in part:

> On August 29, 2012, I reviewed a source debrief submitted by Cst. Jody Allison of the Royal Canadian Mounted Police. For the purposes of this affidavit I will refer to this information as gathered from Source "C". On August 29, 2012, I spoke personally with Cst. Allison to confirm this information and to obtain a qualification of his source. The following is a synopsis of what I learned:
>
> a. Source "C" states [Mr. D.] was involved in an altercation with [K.D.] on the night of his death;
>
> b. Source "C" states [Mr. D.] has told people he was responsible for [K.D.'s] death;
>
> c. Source "C" states Mr. D. is presently in Toronto, Ontario as he fears he'll be arrested;
>
> d. Source "C" states [Mr. D.'s] phone number is 902-818-1585.

[14] Mr. D. has argued that the confidential source referred to in para. 7 must be the same as Source "C" referred to in para. 19 [paras. 119 – 121, defence brief], and that "the *only* information regarding the phone number of [Mr. D.] is set out as follows – "Source "C" states [Mr. D.'s] phone number is 902-818-1585."

b. Mr. D. argues that the entirety of paras. 26 and 27 in the affidavit are not based on any evidentiary foundation within the affidavit and are potentially misleading leaving the issuing JP with the impression that the requested evidence is of a particularly high value due to these unsubstantiated investigative difficulties [para. 123, defence brief].

[15] Those paragraphs read:

> This investigation is still in its preliminary phases. Several witnesses have been interviewed with both positive and negative outcomes coming from those interviews. The downtown core of Halifax is known for excessive alcohol, random fights, and violent acts. These violent acts have become so regular, that they are no longer the spectacle that they once were. In saying that, people do not pay attention to these fights as might be expected. Add to this dismissive outlook, a level of intoxication, and it is very difficult to obtain suspect descriptions and detail as to who specifically threw a single punch among a mass of punches.
>
> As these types of events have become so frequent, several establishments have taken it upon themselves to install video surveillance equipment. It is with the viewing of this video footage, combined with source information that has led investigators to [Mr. D.] being involved in the fight that ultimately led to the death of [K.D.], and quite possibly being the person responsible for his death.

c. In para. 28 of his affidavit, Cst. Anstey *mistakenly* refers to "the telephone records of [K.D.'s] phone will offer information that will support this investigation. Specifically… looking to obtain subscriber information, telephone tolls including subscriber information of persons contacting the phone number given by Source" C" as 902-818-1585, text message, internet data, contact information and tower information indicates the area in which the cellular phone is being used.

d. Regarding the reliability of confidential Sources "A", "B", and "C", Mr. D. argues that their information is not sufficiently credible, compelling or corroborated. Consequently, the production order could not have been issued by the JP if she had properly analysed its contents (and that I should arrive at that conclusion by using the framework of analysis used by Justice Arnold in *R. v.*

MacDonald, 2014 NSSC 218). If I agree, such conclusions would require that I must excise from the affidavit:

> Paragraphs 15 – 16: Source "A"
>
> Paragraph 17 : Source "B"
>
> Paragraphs 19 – 20: Source "C"

B- *The facial attack*

[16] Section 487.012(3) of the Criminal Code, extant in 2012, read:

> Before making an order, the justice or judge must be satisfied, on the basis of an *ex parte* application containing information on oath in writing, that there are reasonable grounds to believe that:
>
> (a) An offence against this Act or any other Act of Parliament has been or is suspected to have been committed;
>
> (b) The documents or data will afford evidence respecting the commission of the offence; and
>
> (c) The person who is subject to the order has possession or control of the documents or data.

[17] Mr. D. argues that:

i. The statutory preconditions in s. 487.012(3) extant in 2012, were not met because "there is no logical nexus between the conclusions drawn by the affiant… and the statutory preconditions that the documents or data being sought was in Mr. D.'s possession or control, and further that the documents or data from Mr. D.'s phone would afford evidence respecting the commission of an offence pursuant to s. 487.014[sic] of the Criminal Code." [Para. 69, defence brief];

ii. Para. 2(b) of the Production Order is overly inclusive, which production is not sufficiently supported by the grounds provided;

iii. The information provided each of Source A, B and C, are not sufficiently compelling, credible or corroborated to have been relied on by the J.P.

[18] He says that the JP failed to distinguish between impermissible speculation, and the drawing of permissible reasonable inferences, which inferences may only be drawn if based on an evidentiary foundation contained within the affidavit.

[19] He relies on Chief Justice Drapeau's words in *R. v. Kelly*, 2010 NBCA 89, at paras. 39 – 40:

> (2) The search pursuant to the warrant
>
> (a) *The applicable standards*
>
> 39 Under s. 11(1) of the *CDSA*, the issuing judge must be satisfied that the thing to be searched for is in the place to be searched. In the case at bar, the issuing judge had to be satisfied the ITO demonstrated: (1) the deponent believed an offence had been committed; and (2) evidence of that offence would be found in Mr. Kelly's residence. The ITO also had to demonstrate this belief was based upon reasonable grounds. In contrast, the question for the trial judge was whether "there was sufficient credible and reliable evidence to permit [the issuing judge] to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place" [emphasis added] (see *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40). Clearly, the trial judge applied an impermissibly low standard when she concluded the search warrant had been lawfully issued because "it was reasonable to conclude that the possibility and probability of the 'things to be searched for' as outlined in the warrant could be found at 120 Cassidy Circle" [emphasis added].
>
> 40 Contrary to the trial judge's assertion, a probability, perforce a possibility, that incriminating evidence could be found at Mr. Kelly's residence did not constitute a legally sufficient basis for the issuance of the contested warrant. The statements in *Morelli*, at para. 40, eliminate any doubt that might have persisted on point and recall to center stage the celebrated case of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, where the Court emphasized that a belief in the possibility of finding evidence at the specified place, even if reasonable, was not sufficient for the principled issuance of a search warrant:
>
> The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. *To associate it with an applicant's reasonable belief that relevant evidence may be uncovered by the search, would be to define the proper standard as the possibility of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude.* It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most

> egregious intrusions. *I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure. [p. 167]*
>
> *[Emphasis added in original]*

[20] I should note here that the Crown and defence disputed the correctness of Justice Drapeau's reasoning that "the trial judge applied an impermissibly low standard when she concluded the search warrant had been lawfully issued because 'it was reasonable to conclude that the possibility and probability of the 'things to be searched for" as outlined in the warrant *could* be found at 120 Cassidy Circle. Contrary to the trial judge's assertion, a probability, perforce a possibility, that incriminating evidence *could* be found at Mr. Kelly's residence did not constitute a legally sufficient basis for the issuance of the contested warrant."

[21] Writ large, the disagreement may be reduced to the following difference of opinion: the Crown argues that a proper interpretation of the statutory preconditions in Section 487.012(3) extant in 2012, reflects a "reasonable suspicion" standard, relying on the Alberta Court of Appeal majority decision in *R. v. Fedossenko*, 2014 ABCA 314, leave denied [2014] SCCA 516; whereas the defence relies upon Justice Drapeau's words in *Kelly* to argue for an interpretation thereof that reflects a "credibly based probability" standard – which I note was also articulated by the dissenting Justice O'Ferrall in *Fedossenko.*

[22] However, it is important to appreciate that the subsections of s. 487.012(3) reflect more than one standard. Both the majority and dissent in *Fedossenko* recognize this reality – at paras 3-5 and 39. As Justice O'Ferrall summarized at para. 39:

> Without reference to any case law, Section 487.012 (3), at the very least, requires *reasonable grounds to believe that an offence is suspected* of having been committed, *reasonable grounds to believe the documents or data will afford evidence* with respect to that suspected offence, and reasonable grounds to believe that the named third party has possession or control of the document or data. So, it is clear that the suspicion that an offence has been committed must be founded on a belief based on reasonable grounds.
>
> [my italicization]

[23] Justice O'Ferrall noted that "the critical issue on this appeal is how the phrase 'reasonable grounds to believe that… an offence… is suspected to have been committed' in s. 487.012 (3)(a) is to be interpreted", and went on to conclude that the "reasonable suspicion" standard in s. 487.012(3) is only constitutionally

valid for “minimally intrusive” searches – paras.43-56. Notably, he found the production order for a blood sample seizure from a hospital in that case, required a credibly based probability standard because it was a “more intrusive” form of search – paras. 51-52.

[24] Ultimately, he concluded that whatever test was applied, “the production order this case could not withstand scrutiny because once the RCMP blood-alcohol analysis had been conceded by the Crown to have been obtained in violation of the Charter, there was no admissible evidence, or insufficient evidence, to support a reasonable belief that an offence had been or was suspected of having been committed” - at para. 58.

[25] There are few cases beyond *Fedossenko,* dealing with s. 487.012(3) extant in 2012. This may be because the provision which was effective September 15, 2004 to March 18, 2015, was amended substantially and since then has read:

> Section 487.014
>
> (1) Subject to sections 487.015 to 487.018, on an ex parte application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they received the order, or to prepare and produce a document containing data that is in their possession or control at that time.
>
> (2) Before making the order, the justice or judge must be satisfied by information on oath in form 5.004 that there are reasonable grounds to believe that
>
> (a) an offence has been or will be committed under this or any other Act of Parliament; and
>
> (b) the document or data is in the person’s possession or control and will afford evidence respecting the commission of the offence.

[26] Interestingly, I did locate a recent decision relating to the subsection in dispute here: *R. v. Grandison*, 2016 BCSC 1712 per Justice JK Bracken. He concluded that “the information [blood sample alcohol content] in *Fedossenko,* while intrusive, did not seek core biographical information” –para 96. He went on to find that the content of text messages in *Grandison* is however “information that reveals “core biographical information” about the accused as well as those he sends messages to or from whom he receives messages.” - para 93. Consequently, he found it necessary to read down s. 487.012, “to require the standard that there are reasonable and probable grounds to believe that an offence has been committed and that the documents or data will afford evidence respecting the commission of that offence as at July 2013 when the order was made... therefore [I] find that s.

487.012 of the Criminal Code as it was, violates the s. 8 Charter Rights of the accused. No submissions were made to suggest that the section is saved by s. 1 of the Charter."

[27] Between September 15, 2004 and March 8, 2015, there have been no reported cases in Nova Scotia which address the constitutionality of s. 487.012 Criminal Code. It is presumed valid legislation. No argument to the contrary has been made before me.

[28] Therefore, I conclude that a proper articulation of the statutory requirements for a production order issued under s. 487.012(3) on August 29, 2012 is, as suggested by Justice O'Ferrall, at para. 39 in *Fedossenko*:

> Without reference to any case law, s. 487.012 (3), at the very least, requires reasonable grounds to believe that an offence is suspected of having been committed, reasonable grounds to believe the documents or data will afford evidence with respect to that suspected offence, and reasonable grounds to believe that the named third party has possession or control of the document or data. So, it is clear that the suspicion that an offence has been committed must be founded on a belief based on reasonable grounds.

[29] The upshot of the foregoing is that Chief Justice Drapeau's reasoning in *Kelly,* is of no assistance to me.

[30] The Crown and defence also disagreed about the application of the Supreme Court of Canada's comments in *CanadianOxy Chemicals Ltd. v. Canada (Atty. Gen.)* [1999] 1 S.C.R. 743, to the wording in s. 487.012(3)(a) .

[31] In *CanadianOxy,* a chlorine chemical spill into Burrard Inlet killed fish and was consequently investigated by the Department of Fisheries and Oceans. Frustrated by the lack of information provided by *CanadianOxy,* in pursuit of a search warrant a fisheries officer swore an information to obtain from *CanadianOxy*, a range of documents relating to process records plant maintenance, employee training, discipline, and general plant operations. *CanadianOxy* brought a motion to quash the warrants which effectively had been issued pursuant to s. 487 of the Criminal Code.

[32] At para. 13, the court stated:

> At issue is whether search warrants issued pursuant to s. 487(1) of the Criminal Code are limited only to evidence relevant to an element of the offence which is part of the Crown's *prima facie* case, or whether such warrants encompass

evidence that may relate to potential defences, such as due diligence, which may or may not be raised at trial. The relevant section of the Code provides:

> 487(1) A justice who is satisfied by information on oath in form one that there are reasonable grounds to believe that there is in a building, receptacle or place…
>
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,… may at any time issue a warrant under his hand, authorizing a person named therein or a peace officer,
>
> (d) to search the building, receptacle or place for any such thing and to seize it…

[33] The unanimous seven members of the court concluded that:

> …both the plain reading of the relevant section and consideration of the role and obligations of State investigators support the conclusion that s. 487(1) authorizes the granting of the warrants at issue. – para. 30.

[34] The court also made general statements about the use of investigative techniques such as search warrants:

> 15 On a plain reading, the phrase 'evidence with respect to the commission of an offence' is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.
>
> 19 While s. 487(1) is part of the Criminal Code, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that *all* relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the Criminal Code and the demands of a fair and expeditious administration of justice.
>
> 20 … the point of the investigative phase is to gather all the relevant evidence in order to allow a responsible and informed decision to be made as to whether charges should be laid.
>
> 21 At the investigative stage the authorities are charged with determining the following: what happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing the issuance must be interpreted in that light.

> 22 The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out – that decision is the role of the courts.… To that end an unnecessary and restrictive interpretation of 487(1) defeats its purpose…
>
> 23… Everyone, including accused persons, who lacks the means of obtaining and preserving evidence prior to trial has an interest in seeing that these facts are brought to light…
>
> 24 It is important that an investigation unearth as much evidence as possible…
>
> 26 The dissenting reasons of Southin J.A. are persuasive on both the purpose and meaning of s. 487(1). At paragraph 63 she stated:
>
> '… I would translate the words in issue to mean "touching upon whether a breach of the law involving a penal sanction has occurred'…
>
> 27 In addition… denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system.… This reciprocal fairness demands that the Crown be able to fairly seek and obtain evidence rebutting the accused's defences.… This narrow interpretation would frustrate the basic imperative of trial fairness and the search for the truth in the criminal process.

[35] I keep in mind that the court was conducting an exercise of statutory interpretation, the accused was a corporation not an individual, and it was a quasi-criminal regulatory statute that was allegedly breached. On the other hand, *CanadianOxy* was decided in 1999, a full 15 years after *Hunter v. Southam*, [1984] 2 S.C.R. 145 (see pp. 167-8).

[36] Of particular significance to the case at Bar, is the Supreme Court's endorsement that the words "evidence with respect to the commission of an offence" should be broadly construed to mean " anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability "or anything "touching upon whether a breach of the law involving a penal sanction has occurred".

[37] The court's comments are applicable to s. 487.012(3)(b) Criminal Code, which section has been analogized to s. 487(1) in various decisions (see para. 49 in *R. v. AJB*, 2015 BCCA 126; para. 56, per O'Ferrall J.A., in *R. v. Fedossenko*)

[38] With those thoughts in mind, I turn to the proper questions I must ask myself in reviewing the issuance of this production order by the JP.

[39] As succinctly stated by the Ontario Court of Appeal recently in *R. v. Hafizi*, 2016 ONCA 933:

> 43 That said, the reviewing judge must also be mindful of his or her narrow role in reviewing an authorization. The reviewing judge plays a constitutionally vital role in guarding against potentially unjustified invasions of privacy authorized in *ex parte* proceedings. But warrants and authorizations are presumptively valid, and the reviewing judge must not conduct a *de novo* hearing of the *ex parte* application: *R. v. Sadikov*, 2014 ONCA 72, 314 O.A.C. 357, at paras. 83 - 84.
>
> 44 The test a reviewing judge is to apply is whether, in light of the record amplified on review, the ITO "contained sufficient reliable evidence that might reasonably be believed on the basis of which the authorizing justice *could* have concluded that the conditions precedent required to be established had been met": *R. v. Nero*, 2016 ONCA 160, 345 O.A.C. 282, at para. 70. If on the amplified record the reviewing judge "concludes that the authorizing judge could have granted the authorization, then he or she should not interfere": *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1452. 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": *Garofoli*, at p. 1452; *R. v. Hall*, 2016 ONCA 13, 128 O.R. (3d) 641, at paras. 47 - 48.

[40] In spite of citing the appropriate framework, the court pointed out that the application of the proper principles is also fraught with potential error:

> 48 Despite stating the proper standard of review at the outset of his analysis, the trial judge's reasons disclose he made two closely-connected errors of law in concluding insufficient grounds existed to include the respondent's cellphone communications in the authorization:
>
> (i) He took a piecemeal approach to individual items of evidence shorn of their context, instead of conducting a contextual analysis of the affidavit material as a whole: *Beauchamp*, at paras. 85-87; *Nero*, at para. 68; *R. v. Spackman*, 2012 ONCA 905, 300 O.A.C. 14, at para. 223; and
>
> (ii) Instead of assessing whether the ITO, as amplified, contained reliable evidence that might reasonably be believed on the basis of which the order *could* have issued, the reviewing judge substituted his view of some of the evidence for that of the issuing justice: *Beauchamp*, at paras. 85-87; *Nero*, at para. 70.

[41] I turn next to an examination of the persuasiveness of Mr. D.'s attacks on the sub-facial validity of the grounds upon which the production order was issued.

Why Mr. D.'s sub-facial validity arguments fail

i. *The claimed exaggerated ability to identify Mr. D. in the video surveillance from the Liquor Dome and Durty Nelly's bar*

[42] Whether Cst. Anstey was right or wrong in identifying Mr. D. is not the proper question. What is significant is Cst. Anstey's actual knowledge and what he should have reasonably known at the time he swore the affidavit (para. 121, *Wallace*). Mr. D. has not satisfied me that it is more likely than not that Cst. Anstey knew or at least ought to have known that his statement to the JP in the relevant paragraphs referencing his ability to identify Mr. D. therein was likely materially false/inaccurate or misleading.

[43] In paras. 6-7, Cst. Anstey stated in part:

> **What is known for certain** is that Mr. G. and K.D. were involved in an altercation, and when struck once in the head, [K.D.] fell to the ground, striking his head on the pavement, ultimately causing his death.
>
> **Information has been learned that [Mr. D.] was also present during this altercation.** This information has been confirmed through viewing of multiple surveillance camera angles. Mr. D. has been observed on those video angles talking on a cellular phone moments before the altercation took place. A confidential source has provided a phone number that is consistently used by Mr. D., and it is that phone number, that this affidavit is in support of securing.
>
> [emphasis added]

[44] At para.13, Cst. Anstey stated:

> Multiple statements have been taken, but are all very similar in that they offer a perspective of the disturbance, one in which several people had seen a fight, had seen punches thrown, chaos erupting, but are unable or unwilling to offer more specific detail that would offer the identity of those involved are responsible. **No one has as yet been able to positively identify the person that threw the punch** that ultimately led to the death of [K.D.].
>
> [emphasis added]

[45] At para. 22 and 23, Cst. Anstey stated:

> On August 29, 2012, **I viewed video surveillance** footage from the liquor Dome's outside camera on Argyle Street dated 11 August at approximate 3:36

> AM. **I observed who I believe to be [Mr. D.]** wearing grey pants, black sneakers and a purple shirt with white lettering. I **observed him to have several tattoos above and below his left eye**. After watching the video for several minutes, [Mr. D.] walks South on Argyle Street toward Durty Nelly's bar with several other people. During this time, [Mr. D.] was talking on a cellular telephone.
>
> On August 29, 2012, I viewed surveillance footage from Durty Nelly's bad [sic] dated 11 August at approximate 3:53 a.m. This video angle shows the main entrance area on Argyle Street. In viewing this video **I observed a male I believe to be [Mr. D.] involved in a fight with a white male I believe to be [Mr. G.]. I believe this is the fight that led to the death of [K.D.].**
>
> [emphasis added]

[46] At para. 26 and 29, Cst. Anstey stated:

> This investigation is still in its preliminary phases. Several witnesses have been interviewed, with both positive and negative outcomes coming from those interviews.
>
> …
>
> Given the gravity of the situation and seriousness of the outcome of this fight, **I believe it is reasonable that having been directly involved [Mr. D.] would have spoken with others either using text messages or phone conversations.** Having observed him talking on a cellular phone during my review of video surveillance, and adding information specific to Source C having offered a cellular phone number, [902-818-1585] I believe it is reasonable that this phone is the phone number that Mr. D. was using during the night of the offence. I believe that a review of Mr. D.'s telephone records prior to and after the incident will offer information that will further this investigation.
>
> [emphasis added]

[47] The crux of Mr. D.'s argument is that Cst. Anstey could not possibly have reasonably believed that he had identified Mr. D. in the video surveillance tapes.

[48] Undermining this assertion, however, are the following factors that support the reliability of Cst. Anstey's belief:

i. Cst. Anstey referred to multiple surveillance camera angles;

ii. There was no evidence about the nature of the equipment Cst. Anstey relied upon to view the surveillance camera footage – however he stated that he was able to identify the individual he believed to be Mr. D. "to have several tattoos

above and below his left eye" – I infer he had magnification or other capability when viewing the surveillance videos;

iii. He also had the benefit of a digital mug shot of Mr. D. which he compared with what he properly believed were several "Facebook photographs of [Mr. D.]", and he noted that referenced therewith, the Facebook profile listed Merrick Stevenson [a.k.a Demmerick Stevenson] as Mr. D.'s brother, which is consistent with other information received during the investigation;

iv. And as to full and frank disclosure, Cst. Anstey made clear he only believed it was Mr. D. in the videotapes, and that "no one has as yet been able to positively identify the person that threw the punch that ultimately led to the death of [K.D.]." He had earlier stated: "information has been learned that Mr. D. was also present during this altercation".

ii *- The significance of the omission that D.T. had been a suspect on August 15, 2012, according to the notes of Detective Cst. Penny Hart*

[49] The only evidence before me is the mere existence of the handwritten notes of Detective Cst. Penny Hart. From that documentary snapshot in time, Mr. D. argues the JP was misled by not being informed of the existence of an earlier suspect at the time Cst. Anstey swore the affidavit on August 29, 2012.

[50] Mr. D.'s assertion of a material omission in the affidavit is undermined by the following:

a. I infer that Cst. Anstey was aware of this Crime Stoppers tip purporting to identify DT, on August 15, 2012, according to Detective Cst. Hart's notes: there was "source info that he was involved, Crime Stoppers tip that he threw 'the' punch, video of him leaving The Dome and video of altercation appears he is involved in the altercation." The only controversial aspect of the note is the suggestion that the tipster indicated D.T. "threw 'the' punch". There is no direct evidence that this anonymous tip was corroborated, credible, or compelling;

b. Bearing in mind that Cst. Anstey did not suggest it was his conclusion that Mr. D. was responsible for K.D.'s death, but rather that he was "involved in the fight that ultimately led to the death of K.D., and quite possibly being the person responsible for his death", Cst. Anstey's affidavit expressly did not preclude the *possibility* that someone other than Mr. D., such as D.T., may have been the one to ultimately have caused the death of K.D.;

c. At para. 13, Cst. Anstey stated: "No one has as yet been able to positively identify the person that threw the punch that ultimately led to the death of K.D." – all the evidence points toward there having been a melee, involving numerous attackers on K.D. and Mr. G.;

d. At para. 23 Cst. Anstey stated: "… I viewed surveillance footage from Durty Nelly's Bad [sic] dated 11 August at approximate 3:53 AM… I observed a male I believe to be Mr. D. involved in a fight with a white male I believe to be [Mr. G.]. I believe this is the fight that led to the death of K.D.";

e. Notably, all three confidential informants sources cited by Cst. Anstey indicate that Mr. D. was "involved" in the altercation that led to the death of K.D. – and excepting the anonymous Crime Stoppers tip, the affidavit provides information regarding the reliability of the other two sources. Moreover, although Cst. Hart recorded her hearsay based notes on August 15, 2017, there is no evidence when that tip was provided – it could have been as early as August 11, 2012.

[51] Clearly, the investigation had become more focused by August 29, 2012, and Cst. Anstey's fulsome affidavit on that date is a reflection of the significant investigative efforts made to that date.

[52] In that context, I conclude Mr. D. has not satisfied me that is more likely than not that Cst. Anstey's omission from the affidavit of the referenced August 15, 2012 Crime Stoppers tip, indicating that it was D.T. that "threw 'the' punch", was a material omission, such that the effect of the omission was likely to create a materially false, inaccurate or misleading impression in the mind of the JP.

iii- *The claimed other non—material omissions that cumulatively caused the JP to be misled as to the accuracy and sufficiency of the grounds in the affidavit*

[53] These references are to paras. 7, 26, 27 and 28, in Cst. Anstey's affidavit.

(a) Regarding para. 7, Mr. D. attributes great significance to the fact that Source "C" is the only person who identifies Mr. D.'s consistently used telephone number as 902-818-1585.

[54] Presuming for the moment that Source "C" is also the source referred to in para. 19, which is not necessarily the case given police concerns about ensuring that the affidavit is drafted in a fashion that will protect the identity of any sources, I am unpersuaded that the failure to particularize what the source means by "consistently used by Mr. D.", is of any significance herein. The words are easily understood. Cst. Anstey's belief was that this telephone number was for a cellular phone. A telephone number *per se*, is a very precise bit of information, which subscriber information can be readily verified over time in a minimally intrusive manner.

(b) Mr. D. complains that paras. 26 and 27 are speculative and potentially misleading, leaving the JP with the impression that the requested evidence is of a particularly high value due to these unsubstantiated investigative difficulties.

[55] Cst. Anstey does make generalized assertions of fact regarding investigative difficulties in those paragraphs. Nevertheless, of greater significance is that, almost 3 weeks after the incident, he is addressing the status of the investigation, and confirming why it is reasonable for the police to ask the JP to issue the production order. I bear in mind that the Charter of Rights dictates that searches should only be authorized which are permitted by law, based on reasonable grounds, and executed in a reasonable manner. Strictly speaking, the use of the word "may order a person…. to produce", allow a residual discretion for a JP to refuse to issue an order, in proper circumstances, even if all the statutory pre-conditions have otherwise been satisfied – e.g. *CBC v. Manitoba (A.G.)* 2009 MBCA 122, at paras. 31 – 47. These paragraphs may contain some surplusage, but they are not fairly characterized as likely to leave the JP "with the [materially false, inaccurate or misleading] impression that requested evidence of is of particularly high value due to these unsubstantiated investigative difficulties".

(c) Although Cst. Anstey does refer to the telephone records of [K.D.'s] phone in para. 28, this is so clearly a mistaken reference to him rather than to Mr. D., that the JP could not have been misled thereby.

(d) Mr. D. argues that the information provided by the three confidential sources, is insufficiently credible, compelling or corroborated, such that the JP could not have relied thereon.

[56] Mr. D. characterizes this issue as one of the material omissions, which cumulatively caused the JP to be misled as to the accuracy and sufficiency of the grounds in the affidavit. As noted below, in considering facial validity of the production order, I conclude that the information provided by the three confidential sources is sufficiently credible, compelling and corroborated (i.e. reliable).

[57] In summary, I conclude that Mr. D. has not satisfied me that it is more likely than not that Cst. Anstey's purported non-material omissions, individually or cumulatively, were such that the effect thereof was likely to create a materially false, inaccurate or misleading impression in the mind of the JP.

B- Why Mr. D.'s facial validity arguments fail

[58] Mr. D. makes three major arguments in support of his position that Cst. Anstey's affidavit as drafted, and amplified on review, failed to contain sufficient reliable evidence that might reasonably be believed on the basis of which the authorizing JP could have concluded that the conditions precedent required to be established had been met:

i. He argues that there is an insufficient basis to conclude that there is a connection between: Mr. D. and the death of K.D.; as well as between the detailed information contained "on" [in the records associated with] Mr. D.'s phone (contacts, phone calls and text messages made and received, data communications, and cellular telephone towers accessed) to say that there are reasonable grounds to believe "the documents or data will afford evidence respecting the commission of the offence".

ii. He argues that there is an insufficient basis in the affidavit to have permitted the overly broad/inclusive nature of the production order granted (i.e. that para. 2(b) of the order is overly inclusive – "all phone calls, text messages and data plan communication sent and received from August 1, 2012, to August 29, 2012 by phone number 902-818-1585" - relying upon *R. v. AJB*, 2015 BCCA 126, at paras. 59 – 60 and *R. v. Gerassimou*, 2016 ONCJ 378, at paras. 48 – 50; consequently Cst. Anstey's articulated grounds were in that respect insufficient, therefore the granting of the order constituted unreasonable breaches of Mr. D.'s Section 8 Charter rights to not be subject to search/seizure without a lawful basis (a succinct general discussion thereof appears in Justice Watt's decision in *R. v. Mahmood*, 2011 ONCA 693, at paras. 90-98; and Justice MacPherson's comments in *R. v. Marakah*, 2016 ONCA 542, at paras. 44 – 86 - leave to appeal granted [2016] SCCA 336);

iii. That the information provided by the three confidential informant sources was insufficiently credible, compelling or corroborated-relying on cases the like of which include *R v Debot*, [1989] 2 SCR 1140, at para. 53 per Wilson J., and *R. v. Morris*, (1998) 173 NSR (2d) 1 (CA) at paras. 30 and 88-91, per Cromwell JA, as he then was.

i. There is a sufficient connection articulated in the affidavit grounds between Mr. D. and the death of K.D., as well as between Mr. D. and the use of his phone before and after the death of K.D.

[59] It is not seriously disputed that there were reasonable grounds to suspect that an offence had been committed in relation to the deceased K.D., nor that Telus Communications is the relevant possessor/custodian of the documents or data. However, Mr. D. argues that the grounds in the affidavit are insufficient to conclude that there are reasonable grounds to believe that production of *his* client's phone records "will afford evidence respecting the commission of the offence".

[60] In *CanadianOxy*, the Supreme Court of Canada confirmed that those words should be read broadly, and that the phrase encompasses "all materials which might shed light on the circumstances of an event which appears to constitute an

offence… anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability …"

[61] In a nutshell, Mr. D. argues that Cst. Anstey's grounds do not connect him sufficiently to K.D.'s death; nor do they connect him to the (phone 902-818-1585), or usage thereof-from which the Crown argued inferences could otherwise be drawn that: he contacted other persons involved, received responses from them, and that therein he made statements regarding his observations, knowledge, or belief regarding the circumstances of K.D.'s death; his physical location could be ascertained based on the phone's location.

[62] I disagree with Mr. D.'s position. As noted below, I am satisfied that the information received from the three confidential sources was properly considered by the JP in issuing the production order.

[63] That being the case, the grounds contained ample evidence of Mr. D's connection to the death of K.D. – Source A identifies Mr. D. as "involved in the altercation" that led to K.D.'s death; the anonymous Crime Stoppers tip per Source B identifies Mr. D. and his brother M.S. as "involved in the death of K.D."; Source C identifies Mr. D. as "involved in an altercation with K.D. on the night of his death… Mr. D. has told people he was responsible for K.D.'s death"; Cst. Anstey's evidence is that he was able to identify who he believes is Mr. D. in a fight with K.D.'s white male friend Mr. G. that early morning, which is generally consistent with other evidence from independent witnesses, and that Mr. D. was talking on a cell phone shortly before the time when the melee involving K.D. broke out in the same vicinity.

[64] At a minimum, the evidence of Source C identifies Mr. D.'s regular cellular telephone number as 902-818-1585. Telus Corporate Security has confirmed that 902-818-1585 is a Telus subscriber's number.

[65] It would not have been an unreasonable inference for the JP to conclude that:[1] Mr. D. was involved in the altercation that led to K.D.'s death; he had a cellular phone subscription (902-818-1585); and that was the phone he was using as seen on video surveillance around the time of the altercation; and would have been the telephone he used if: he had contact with other persons who were present

[1] I note here that if the evidence available to the JP could have supported more than one inference, in my review, I may not prefer one inference over another – *R. v. Sadikov*, 2014 ONCA 72, at para. 88, *R. v. Liew*, 2015 ONCA 734, at para. 46, *R. v. Nero*, 2016 ONCA 160 at paras. 68 and 70.

with him (or others close to him who were not themselves present) at or about the time of the altercation; and if he fled to Toronto, Ontario, as Source C indicated (which might provide police with the opportunity to identify his location, if they needed to do so).

[66] After a contextual review of the affidavit material as a whole, I conclude that there is no merit to the position taken by Mr. D.

ii. Paragraph 2(b) of the production order is not impermissibly broad/over-inclusive

[67] Cst. Anstey's grounds included that, not only does Mr. D. have a cellular phone (902-818-1585), but he also had a Facebook account which he was using at the relevant times. Mr. D. was born in 1990. Given these basic facts, one a reasonable inference that the JP could have drawn is that Mr. D. communicates with his family, friends and acquaintances by way of telephone conversations, text messaging, and uses data plan communications. Moreover, arguably Internet browsing may also be a source of "evidence respecting the commission of the offence". Similarly, as I understand it, any usage of the phone will involve the phone device communicating with a cell phone tower nearby and that this information is also recorded which can provide a location for the phone when used. As Justice Watt observed in *Mahmood* at para. 1*:*

> Cell phone use is ubiquitous. Users and their phones become one, inseparable. Users talk to other users. Any time. Anywhere.

[68] These observations have led courts to conclude that: "If you find the phone - you will find the user".

[69] It would not have been an unreasonable inference for the JP to conclude that Mr. D.'s use of his cellular phone, likely would have included him making/receiving telephone calls, sending/receiving text messages, and using the data plan communications ability thereof, before and after K.D.'s death, which would support a conclusion that there are reasonable grounds to believe that "the documents or data will afford evidence respecting the commission of the offence."

iii. Why the information provided by the three confidential informant sources is sufficiently credible, compelling and corroborated

[70] The evidence of the informants was significant among the grounds articulated by Cst. Anstey. In such cases, Justice Doherty stated in *R. v. Shivrattan*, 2017 ONCA 23:

> 27 The reviewing judge, when determining whether the warrant should have been granted, must consider the totality of the circumstances as set out in the ITO and as amplified by any additional material placed before him or her. When, as in this case, the information to support the warrant comes almost entirely from a CI, the totality of the circumstances inquiry focuses on three questions. Does the material before the reviewing judge demonstrate that the CI's information was compelling? Does the material demonstrate that the CI was credible? And does the material demonstrate that the CI's information was corroborated by a reliable independent source? See *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1168; *Hosie*, at para. 12; and *R. v. Rocha*, 2012 ONCA 707, 112 O.R. (3d) 742, at paras. 16-18.
>
> 28 The first question addresses the quality of the CI's information. For example, did he purport to have first-hand knowledge of events or was he reporting what he had been told by others? The second question examines the CI's credibility. For example, does he have a long record which includes crimes of dishonesty, or does he 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 CI that offers some assurance that the CI provided accurate information. The answers to each of the 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 CI's credibility: see *Crevier*, at paras. 107-108.

a) Source A – Paras. 15 – 16

[71] Mr. D. says Source A is not credible or corroborated, and that their information amounts to mere conclusory statements.

[72] Source A's information is compelling. The JP could reasonably have inferred that Source A had first-hand knowledge (see affidavit, para. 16(f)). Regarding Source A's credibility, they do have a criminal record, but no convictions for fraud or perjury related crimes. There is no evidence suggesting a motive to falsely implicate Mr. D. No payments had been made for information provided to that date. Source A's information in the past has been corroborated "on each occasion through investigation, surveillance and information provided by other confidential sources". Source A's handler believes the information to be accurate. Source A's handler has had approximately 10 contacts in total (in person and on the phone) with Source A.

[73] Regarding the case at bar, Source A's information is corroborated by other sources of information – e.g. Mr. D. was involved in the altercation and was the instigator; the group of males with Mr. D. were yelling something regarding Mulgrave Park, which is where Source B stated Mr. D. lives. Source C also states Mr. D. was involved in the altercation. Cst. Anstey stated he believed Mr. D. was the person he saw on the video surveillance in a fight with Mr. G., who was in K.D.'s company at the relevant times.

[74] Source A was a sufficiently reliable source of information. Paragraphs 15 and 16 were properly considered by the JP.

b) Source B – Para. 17

[75] Source B is an anonymous Crime Stoppers tipster. The source identified Mr. D. as living in Mulgrave Park, being an approximately 20 year old African Nova Scotian male, and having tattoos on his face as well as other parts of his body. He/she also states that another 20-year-old African Nova Scotian male Demmerick Stevenson [aka Merrick Stevenson] and Mr. D. were both involved in the death of K.D.

[76] It is unclear whether Source B has first-hand knowledge or relied upon hearsay for his/her information. On the limited information available, Source B's information standing on its own, would make it difficult to find the source's information compelling or credible. However, the source's information is in some respects corroborated: Mr. D. is identified as approximately 20 years old and an African Nova Scotian male who lives in Mulgrave Park; a nickname is used which suggests some level of familiarity with Mr. D., as does the knowledge that Mr. D. has tattoos on his back, neck, arms and chest, as well as on his face. His/her statement that Mr. D. and Merrick Stevenson were both involved in K.D.'s death is consistent with Mr. D.'s Facebook profile which lists Merrick Stevenson as his brother, and would seem to be the same person referred to by Source B as Demmerick Stevenson.

[77] Source B supports some of the other information in Cst. Anstey's grounds, and thus to a quite limited extent could have been considered sufficiently reliable for consideration by the JP.

(c) Source C- Paras. 19 and 20

[78] Source C provided information that: Mr. D.: "was involved in an altercation with K.D. on the night of his death"; "has told people he was responsible for K.D.'s death"; "is presently in Toronto, Ontario, as he fears he'll be arrested"; "phone number is 902-818-1585".

[79] It is unclear whether Source C has personal/direct knowledge of these matters or is relaying information received from others. Source C, however, does appear to be sufficiently close to the circle of Mr. D.'s associates to have relatively precise information as noted above.

[80] Source C's credibility is vouched for by his handler Cst. Jody Allison, who has been dealing with the source for one year in that capacity, and maintains weekly contact with Source C. Source C "has provided information on no less than 10 occasions… has been paid for information provided on no less than five occasions… has not provided information proven to be false or misleading… has provided information that has been corroborated by other source information, investigative procedures, surveillance, and positive search warrants having been executed."

[81] Although Mr. D. concedes "as with Source A, Source C provides detailed information that seems compelling on its face" [para. 142 defence brief] however Mr. D. suggests this court should be sceptical of Source C's credibility and low degree of corroboration because:

i. Cst. Anstey's grounds suggest Source C was known to Cst. Allison for "*just* one year" and although during that time has provided information approximately ten times, at best only two "positive search warrants" have been executed; and that because there is no reference to the source *not having* a criminal record, it is a reasonable inference that the source does, and the lack of further detail of the nature of the offences and extent of his/her record undermines the source's credibility; and

ii. There was no other information in the grounds that suggested Mr. D. was in Toronto, nor that his telephone number was 902 -818-1585, nor that he had "told people he was responsible for K.D.'s death".

[82] I conclude that, although Cst. Allison is not cited as expressly believing Source C's provided information to be accurate, as was the case with D.C. Jeffries regarding Source A, no adverse inference should be drawn therefrom. Source C's credibility is vouched for by Cst. Allison's contact with the source as noted above, and having reviewed the relevant Source Debriefing Report, and having spoken with Cst. Allison (para 19), Cst. Anstey stated in para. 2:

> … I have personal knowledge of the matters set out in this affidavit, as a result of my own observations, inquiries and from information provided by other peace officers. I believe the information in the affidavit to be true to the best of my knowledge and belief. Where the information is stated to have been received by me, from other peace officers, I believe such information to be true because the officers receiving and relaying the information or acting in the execution of their duties at the time they obtained the information and relayed it to me.

[83] I also find that Source C's information is corroborated by: Source A's information that Mr. D. "was involved in the altercation where K.D. was killed"; Source B's information that Mr. D. and Demmerick Stevenson "were involved in the death of K.D."; Mr. D.'s Facebook profile showing Merrick Stevenson as his "brother"; the fact that phone number 902-818-1585 is a subscribed -to number according to Telus Corporate Security; and Cst. Anstey's reasonable belief that Mr. D. was visible in the surveillance videos of the relevant time and place that he viewed, including that Mr. D. was "involved in a fight with a white male I believe to be Mr. G.", which latter information is corroborated directly by Mr. G.'s information that he was present with K.D. that night and that K.D. became involved with "a group of black males", and during that altercation he does recall "seeing K.D. fall… [and remembers] running towards K.D. yelling at their attackers to leave him alone so he could check on his friend, the males quickly dispersed".

[84] Source C was a sufficiently reliable source of information. Paras. 19 and 20 were properly considered by the JP.

Conclusion

[85] I conclude that no excisions should be made to the grounds contained in Detective Cst. Anstey's affidavit.

[86] Assessing Detective Cst. Anstey's grounds, as amplified, and as a whole, I conclude that they contained sufficiently reliable evidence that they might

reasonably be believed, on the basis of which the authorizing JP could have concluded that the conditions precedent required to be established had been met.

[87] The validity of the initial production order herein is confirmed.

Rosinski, J.