COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lucas, 2014 ONCA 561

DATE: 20140723

DOCKET: C51429, C51469, C51526, C51606 and C52075

Rosenberg, Goudge and van Rensburg JJ.A.

BETWEEN

C51429

Her Majesty the Queen

Respondent

and

Steven Lucas

Appellant

C51469

Her Majesty the Queen

Respondent

and

Vinh Ban Chau

Appellant

C51526

Her Majesty the Queen

Respondent

and

Ryan Coyle

Appellant

C51606

Her Majesty the Queen

Respondent

and

Stefan Rosa

Appellant

C52075

Her Majesty the Queen

Respondent

and

Jose Alvarez

Appellant

Joseph Wilkinson, for the appellant, Steven Lucas
Michael Dineen, for the appellant, Vinh Ban Chau
P. Andras Schreck, for the appellant, Ryan Coyle
Michael W. Lacy, for the appellant, Stefan Rosa
Richard Adam Fedorowicz, for the appellant, Jose Alvarez
John McInnes, Frank Au and Karen Papadopoulos, for the respondent

Heard: December 16, 17, 18, 19, 2013

On appeal from the convictions entered on December 8, 2009 by Justice Ian V.B. Nordheimer of the Superior Court of Justice, sitting with a jury; and on appeal from the convictions entered on June 16, 2009 by Justice Anne M. Molloy of the Superior Court of Justice, sitting without a jury.

By The Court:

INTRODUCTION

[1] The appellants, Steven Lucas, Stefan Rosa, Ryan Coyle and Vinh Ban Chau appeal from their convictions by a court composed of Nordheimer J. and a jury on charges of conspiracy to traffic in cocaine and possession of the proceeds of crime. Lucas and Rosa were also convicted on two counts of possessing a prohibited firearm with readily accessible ammunition and two counts of possessing a prohibited firearm.

[2] The appellant, Jose Alvarez, appeals from his convictions by Molloy J., sitting without a jury, on various drug and firearms-related charges, among other charges.

[3] A great deal of the evidence against the appellants was obtained during interception of private communications, physical surveillance and surreptitious entry into premises pursuant to general warrants. For the following reasons, the appeals are dismissed.

THE FACTS

[4] Many of the grounds of appeal raised by the appellants concern questions of law arising out of the interception of private communications and evidence obtained during execution of the general warrants. Where necessary, we have set out the facts as they relate to the individual grounds of appeal.

[5] As an overview, the charges against the appellants arose out of an extensive police investigation labelled Project XXX into the Doomstown Crips (also known as the Doomztown Crips or Jamestown Crips). The Doomstown Crips was an alleged criminal gang operating in the Rexdale neighbourhood of the City of Toronto. The four appellants, Lucas, Rosa, Coyle and Chau, were alleged to be distributing drugs and firearms to the Doomstown Crips. They were not suspected of being gang members. The appellant Alvarez was alleged to be a member of the Doomstown Crips.

[6] The Project XXX investigation began in November 2005. Lucas was the initial suspect. He was implicated by a gun smuggler from the United States, Earl Cooke, who identified Lucas as someone who had purchased 110 firearms from him between October 2002 and October 2003. By 2006, the police had only recovered 20 of the firearms. Nine of these recovered guns were linked, directly or indirectly, to the Doomstown Crips.

[7] The appellants Rosa, Coyle and Chau were targeted for investigation because of their association with Lucas. Police surveillance in January 2006 revealed Lucas leaving Rosa's residence with a knapsack containing three pipe-shaped objects the police believed to be firearms.

[8] On February 13, 2006, police obtained a wiretap authorization under s. 186(1.1) of Part VI of the *Criminal Code* to intercept private communications of a large number of people including the appellants, Lucas and Alvarez. The authorization was issued by Echlin J.

[9] In support of the February 13, 2006 Part VI wiretap authorization, the police filed an Information to Obtain ("ITO"), sworn by Detective Vander Heyden, which consists of more than 1000 pages plus lengthy appendices. Included in the ITO was information that the police obtained from two confidential informants. On March 31, 2006, the initial Part VI authorization was extended in time and expanded in scope.

[10] In addition to the wiretap authorizations, the police also obtained three general warrants pursuant to s. 487.01 of the *Criminal Code*. The general warrants were issued on February 16 and 24, 2006 by Taylor J. and on March 31, 2006 as part of the Part VI authorization issued by Echlin J.

[11] The February 16 general warrant authorized covert entry into 20 residences and eight motor vehicles. Among other things, the officers were authorized to copy documents, photograph or seize weapons and controlled substances, examine or record data contained in cellular telephones and covertly retrieve keys. The February 16 warrant was used to search Lucas' vehicle on March 21, 2006 and his residence on March 25. It was also used to search Coyle's residence on March 22, during which police observed, but did not seize, a significant quantity of U.S. and Canadian cash.

[12] The February 24 general warrant authorized the police to enter a storage locker at a public storage site at 389 Paris Road in Brantford. The search of the locker, conducted on February 25, 2006, revealed that it contained guns, ammunition, drugs, and a box containing 1 kg of cocaine. The box had a label with Coyle's home address on it.

[13] The March 31 general warrant was embedded in the wiretap authorization issued by Echlin J. It authorized the surreptitious entry of a large number of places and vehicles belonging to the appellants or persons associated with them. The March 31 warrant was used to search Lucas' residence on April 29. The police also executed the general warrant on Coyle's residence on April 8 and seized approximately $64,000 in cash, a money counter, and other items.

[14] Chau's vehicle was searched without a warrant on May 16, 2006. During this search the police seized a laptop bag containing $17,000 in cash.

[15] Arrest and search warrants were executed on May 18, 2006 (the "take-down warrants"). The take-down warrants authorized the police to enter the premises of a large number of individuals, including the appellants, without knocking or giving notice to the occupants, in order to effect the arrests of the individuals named in the warrants and to search the premises. Pursuant to the take-down warrants, the police arrested 102 persons, including the five appellants, in the early morning hours during dynamic no-knock entries.

[16] During the search of Coyle's residence, police found $20,000 in cash and marijuana. During the search of Chau's residence, the police found $6,195 cash in the possession of another male, a safe containing $2,000 in cash, a money counter, several cell phones, and a document believed to be a debt list. During the search of Rosa's residence, police seized $3530 and US$450, a money counter, and numerous cell phones. Rosa also had $1,000 on his person when he was arrested. The search of Lucas' residence revealed numerous cell phones, a money counter, and a hollowed-out book that had been seen to contain cash during a covert entry into his residence on March 25.

[17] Lucas, Rosa, Coyle and Chau were charged with various firearms and/or drug-related offences on a 29-count indictment. Alvarez was charged together with six co-accused on a 126-count indictment.

PRE-TRIAL MOTIONS

(a) *R. v. Lucas et al.*

[18] The proceedings against Lucas, Rosa, Coyle and Chau prompted a number of pre-trial motions, the outcomes of which are in issue on this appeal.

[19] On December 1, 2008, Ewaschuk J. heard a motion for disclosure of the edited portions of the ITO sworn by Detective Constable Vander Heyden in support of the February 13, 2006 Part VI wiretap authorization, as well as an application for disclosure of police notes and confidential informer files. This motion was brought in anticipation of defence challenges to the wiretap authorizations.

[20] At the hearing, defence counsel learned that, a few days prior, Ewaschuk J. had heard an *ex parte*, *in camera voir dire* concerning the Crown's claim of informer privilege in relation to two individuals who gave evidence referred to in the ITO. Defence counsel asked Ewaschuk J. to recuse himself from the proceedings on the basis that the court had no jurisdiction to hear an application that was part of the trial in their absence. Justice Ewaschuk dismissed the recusal motion and went on to deal with the editing motion.

[21] On April 14, 2009, the trial judge, Nordheimer J. heard an application by the appellants, Lucas, Rosa, Coyle, Chau and two other accused, challenging the constitutional validity of s. 186(1.1) of the *Criminal Code*. The trial judge ruled that the provision is constitutionally valid and dismissed the application: see [2009] O.J. No. 2250.

[22] Also in April 2009, the trial judge heard an application under s. 8 of the *Charter* by these same accused challenging the February 13 and March 31, 2006 authorizations to intercept their private communications based on the test established by the Supreme Court of Canada in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 ("*Garofoli* application"). The trial judge found that the wiretap authorizations did not breach s. 8 and dismissed the *Garofoli* application: see [2009] O.J. No. 2252.

[23] In June 2009, the trial judge heard an application by the same accused advancing a three-pronged attack on the general warrants issued under s. 487.01 of the *Criminal Code*. First, the applicants challenged the constitutionality

of s. 487.01 of the *Criminal Code*. Second, the applicants argued that the wording of the general warrants improperly delegated to police the authorizing judge's role of assessing if reasonable and probable grounds existed. Finally, the applicants contended that it was not in the best interests of the administration of justice to grant the warrants. The trial judge rejected all three prongs of the challenge to the general warrants: see [2009] O.J. No. 3145.

[24] Also in June 2009, the appellants brought an application to exclude evidence that police had obtained in three covert searches of Lucas' residence and vehicle. The searches were executed based on the authority of the February 16 and March 31, 2006 general warrants. The trial judge concluded that the three searches were valid under the general warrants and dismissed the application: see [2009] O.J. No. 3420.

[25] Finally, in July and continuing in September 2009, the trial judge heard applications by the same individuals to exclude evidence obtained during searches pursuant to the take-down warrants executed on May 18, 2006. The execution of three of the take-down warrants was challenged on the following bases: (i) the search warrants were invalid because they failed to specifically name the police officers who were authorized to search; (ii) there was insufficient foundation for dispensing with the "knock and notice" requirements for executing the warrants; and (iii) the police should have had a so-called "*Feeney*" warrant to arrest the applicants. The trial judge rejected each of these objections and dismissed the application: see [2009] O.J. No. 5333.

(b) *R. v. Alvarez*

[26] The appellant Alvarez participated in the motion before Ewaschuk J. related to the disclosure of the redacted portions of the ITO and other material filed in support of the February 13, 2006 Part VI wiretap authorization.

[27] In April 2009, the trial judge, Molloy J. heard a *Garofoli* application by Alvarez and four of his co-accused seeking to exclude the evidence seized as a result of the initial February 13, 2006 Part VI wiretap authorization. Justice Molloy concluded that there was a reasonable basis upon which the authorization could have issued and dismissed the application: see 2009 CanLII 48828 (Ont. S.C.).

TRIALS

[28] Lucas, Rosa, Coyle and Chau were tried together by Nordheimer J. and a jury. After a trial lasting almost three months, the four accused were convicted of conspiracy and proceeds of crime charges. Lucas and Rosa were convicted of a number of firearms offences. Lucas also had been charged with 19 counts of trafficking in firearms. These charges depended on the evidence of Earl Cooke. Lucas was acquitted on all of these charges, suggesting that the jury did not accept Cooke's evidence.

[29] Alvarez was tried separately by Molloy J., without a jury. The Crown's case was read into the record. Alvarez called no evidence in his defence. He was convicted of the offences of conspiracy to traffic marijuana, trafficking in cocaine, conspiracy to traffic in a firearm, trafficking in cocaine in association with a criminal organization, possession of a loaded firearm, possession of property obtained by crime, failing to comply with recognizance, and possession of a loaded firearm while bound by a section 109 order.

[30] We will set out more of the facts as they become relevant to the various grounds of appeal.

ISSUES

[31] The five appellants advance 18 grounds of appeal, both in common and individually. The five appellants jointly rely on three grounds of appeal raising the following issues:

> 1. Did the application judge, Ewaschuk J., err in conducting an *ex parte*, *in camera* hearing in respect of the Crown's assertion of

informer privilege over portions of the ITO submitted in support of the February 13, 2006 Part VI wiretap authorization?

2. Is s. 186(1.1) of the *Criminal Code*, which permits an authorization to intercept private communications without the need to establish investigative necessity, unconstitutional as violating s. 8 of the *Charter*?

3. Is s. 487.01 of the *Criminal Code*, the general warrant provision, unconstitutional as violating s. 8 of the *Charter*?

[32] The appellants Lucas, Rosa, Coyle and Chau raise the following issues related to the February 13, 2006 Part VI wiretap authorization:

4. Did the trial judge err in failing to find that the authorization was invalid when it did not identify a past or current offence in respect of which the authorization could have issued?

5. Did the trial judge err in refusing to permit cross-examination of the affiant of the Part VI ITO?

[33] The appellant Alvarez raises the following additional issues concerning the Part VI authorization:

6.Did the trial judge, Molloy J., err by not excising certain information contained in the ITO filed in support of the Part VI authorization?

7. Did the trial judge err in concluding that there were reasonable grounds to believe a specified offence had been or was being committed?

8. Did the trial judge err in concluding that the appellant Alvarez was properly named as a known person in the affidavit?

[34] The appellants, Lucas, Coyle and Chau raise the following issues related to the general warrants:

9. Did the trial judge err in failing to find that the February 16 and March 31, 2006 general warrants were invalid because they amounted to an impermissible delegation of the judges' discretion?

10. Did the trial judge err in failing to find that the general warrants of February 16 and March 31 were invalid as being contrary to the best interests of the administration of justice?

11. Did the trial judge err in failing to find that the search of the locker under the February 24 warrant was unreasonable and violated s. 8 of the *Charter*?

[35] The appellant Rosa separately raises the following issue concerning the reasonableness of the following verdicts against him:

12. Are the verdicts in respect of the possession of firearms and ammunition found in the storage locker unreasonable?

[36] The appellant Coyle raises the following issue concerning the trial judge's instructions to the jury concerning a box seized from the storage locker:

13. Did the trial judge err in his instructions to the jury regarding the admission and/or use the jury could make of the box seized from the locker against the appellant Coyle?

[37] The appellant Lucas raises the following additional issue related to the execution of the general warrants:

14. Did the trial judge err in failing to find that the searches of Lucas' car and home on March 21, March 25 and April 29 2006 were unreasonable?

[38] The appellant Chau separately raises the following issue concerning the warrantless search of his vehicle:

15. Did the trial judge err by admitting evidence seized in an unreasonable search of Chau's vehicle pursuant to s. 24(2) of the *Charter*?

[39] The appellants Lucas, Rosa and Chau jointly raise the following issue concerning the take-down warrants:

16. Did the trial judge err in failing to find that the removal of the knock and notice requirements in the take-down warrants violated the appellants' s. 8 *Charter* rights?

[40] In addition, the appellant Chau raises the following issue concerning the execution of the take-down warrant:

17. Did the trial judge err by finding that the dynamic entry search of Chau's residence was reasonable and by failing to exclude the evidence seized during the search?

[41] And, finally, the appellant Coyle raises the following issue concerning the admission of expert evidence:

> 18. Did the trial judge err by allowing the Crown's expert witness to comment in his evidence in chief on a hypothetical conversation?

[42] We will now provide our reasons for dismissing each of these grounds of appeal.

DISCUSSION

(1) Did the application judge err in conducting an *ex parte*, *in camera* hearing in relation to establishing informer privilege?

[43] The appellants brought a pretrial motion for disclosure of the edited portions of the ITO sworn by D.C. Vander Heyden in support of the February 13, 2006 Part VI wiretap authorization, as well as an application for disclosure of police notes and confidential informer files in anticipation of their *Garofoli* application. The Crown justified many of the edits in the ITO on the basis of informer privilege. The motion and application were heard by Ewaschuk J. commencing on December 1, 2008 (the "editing hearing").

[44] At the start of the editing hearing, the appellants became aware that only a few days earlier (November 27, 2008), the Crown had attended before Ewaschuk J. *in camera* and *ex parte* for the purpose of establishing the applicability of the informer privilege. At that hearing, the Crown sought to confirm the status as confidential informers of two individuals whose information was relied on in the ITO. To this end, the Crown called the individuals' police handlers, Detective Constables Beausoleil and Caracciolo. After hearing evidence from the police handlers and submissions from the Crown, the application judge determined that the individuals in question were *prima facie* confidential informants, and that their identities needed to be protected.

[45] Upon learning of the earlier *ex parte* hearing, the appellants applied for an order that the application judge recuse himself because of a reasonable apprehension of bias arising from the fact that he had acted without jurisdiction in conducting the *in camera*, *ex parte* hearing.

[46] The application for recusal was dismissed. The application judge ruled that the *ex parte* hearing constituted part of the trial at which the appellants had a *prima facie* right to be present, but that the exclusion of the appellants was consonant with the procedure outlined in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, to be followed where a question of informer

privilege arises. In the course of his ruling, the application judge also noted that his decision respecting confidential informer status was subject to review, stating:

> At the conclusion of the hearing, I ruled that the two individuals were *prima facie* confidential informers. I did so on the basis that their status, decided *ex parte*, could later be revisited during the subsequent editing process of the Information to Obtain the wiretap authorization, and still later on the *Garofoli* hearing as part of a s. 8 *Charter* motion.

[47] The editing hearing then proceeded before the application judge. He determined the applicable edits to the notes and files of the confidential informants' handlers, to the ITO, and to a transcript of the prior *ex parte* hearing into the status of the two individuals. In considering the scope of the appropriate edits to the transcript, the application judge made it clear that the only criterion for the edits was the redaction of information that might reveal the identity of the confidential informants. He rejected a number of proposed Crown edits on this basis, including with respect to the revelation of police investigative techniques and the mode of communication with the informants.

[48] The issue of whether the two individuals were confidential informants was not revisited during the editing hearing, and their status as confidential informers was not challenged during the *Garofoli* application before the trial judge, nor at any later stage in the proceedings.

[49] The Supreme Court of Canada's decision on informer privilege in *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389, was released during the appellants' trial. After all the evidence at trial had been heard, the question of the propriety of the earlier *ex parte* hearing was raised before the trial judge. Justice Nordheimer dismissed the application. He concluded that the Supreme Court's clarification of its position on the issue did not *per se* invalidate the approach taken by the application judge. Rather, the question would be whether the application judge's failure to take a different approach infringed the appellants' rights such that the ultimate decision was not sustainable. Ultimately, Nordheimer J. found that it was not his role to sit on appeal from the pre-trial procedure followed by one of his colleagues.

Analysis

[50] Section 650(1) of the *Criminal Code* provides that, subject to certain exceptions (that are not material here), the accused "shall be present in court during the whole of his or her trial." Section 650(1) protects the interest in allowing the accused to "hear the case made out against him and, having heard

it, have the opportunity of answering it" and the interest in fairness and openness, which is advanced by allowing the accused "the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial": *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.), at para. 81. In light of these interests, the words – "the whole of his or her trial" – in s. 650(1) should be given an expansive reading: *R. v. Barrow*, [1987] 2 S.C.R. 694, at para. 14. A proceeding will be characterized as a part of the trial for the purposes of s. 650(1) where the accused's absence would "prejudic[e] their opportunity of defending themselves" or would violate "his right to be present so that at all times he may have direct knowledge of anything that transpires in the course of his trial which could involve his vital interests": *R. v. Hertrich,* at para. 82.

[51] The parties differ over whether the *ex parte* hearing was part of the appellants' trial. The *ex parte* hearing was conducted for the sole purpose of determining whether the two police informants referred to in the ITO were, in fact, confidential informants. In our view, the procedure adopted by the application judge conformed to the principles outlined by the Supreme Court in *R v. Basi*.

[52] The point of departure is to recognize the extent and importance of the privilege protecting the identity of the confidential informants. Informer privilege has been described as "nearly absolute": see *R. v. Basi*, at para. 37; *Named Person*, at para. 23. It is a class privilege, subject only to the "innocence at stake" exception and is "safeguarded by a protective veil that will be lifted by judicial order only when the innocence of the accused is demonstrably at stake": *R. v. Basi*, at paras. 22, 37.

[53] Informer privilege protects from revelation in court or in public any information that might tend to identify one who gives information related to criminal matters to the police in confidence. Its twin objectives are to protect the informer from possible retribution, and to encourage other potential informers to come forward. The Supreme Court has emphasized that the rationale for the informer privilege rule "requires a privilege which is extremely broad and powerful": *Named Person*, at paras. 16-18, 30.

[54] There is a presumption that any proceeding that might reveal the identity of an informer will be held *in camera.* As the Supreme Court noted in *R. v. Basi*, at para. 44: "[w]hile the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply" and "[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies": *R. v. Basi*, at para. 44

[55] The appellants assert that the application judge erred in relying on the *Named Person* case as authority for conducting an *ex parte* hearing to determine whether the two individuals were confidential informants. They point out that in that case, there was no exclusion of the accused because the proceeding at issue was an extradition hearing in which the accused person himself was claiming to be a confidential informer.

[56] Notwithstanding that the person claiming informer privilege in *Named Person* was the accused, who was, therefore, in attendance, the logic of that case was applied to the question of informer privilege and *ex parte* proceedings in *R. v. Basi*.

[57] In *R. v. Basi*, the accused had been charged with fraud and other offences. The defence applied to the trial judge for disclosure of unredacted copies of police notes and reports, which were alleged by the Crown to be subject to informer privilege. The Crown contended that the claim could not be properly established without live testimony by a police officer, and insisted on an *in camera* and *ex parte* hearing to determine the existence of the privilege. Defence counsel objected to the *ex parte* nature of the hearing and applied for permission to attend without the accused. The trial judge ruled that defence counsel could participate fully in the *in camera* hearing, subject to a court order and undertaking not to disclose to anyone any privileged information. In her ruling, the trial judge noted that the Crown could invoke s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the "*CEA*"), which permits the Crown to object to disclosure of information before a court on the grounds of a specified public interest.

[58] After receiving the trial judge's ruling, the Crown invoked s. 37 of the *CEA*. An application under s. 37 is a discrete proceeding separate from, and ancillary to, the trial of an accused and s. 650 of the *Criminal Code* has no application to a decision under s. 37 of the *CEA*: see *R. v. Basi*, at para. 50; *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 (Ont. C.A.), at para. 46. The trial judge ruled that even in an application under s. 37, defence counsel could attend the *in camera* hearing, subject to undertakings and a court order.

[59] The Crown appealed to the B.C. Court of Appeal pursuant to s. 37.1(1) of the *CEA*, but that appeal was dismissed: 2008 BCCA 297, 257 B.C.A.C. 253. The Crown then appealed, with leave, to the Supreme Court of Canada.

[60] The Supreme Court held that it was an error for the trial judge to permit defence counsel to attend the *in camera* hearing to determine the existence of informer privilege where, in the course of the hearing, information tending to reveal the identity of the putative informer was bound to be revealed. Justice Fish clarified the following governing principles:

- Whenever informer privilege is claimed, or the court of its own motion considers that the privilege appears to arise, its existence must be determined by the court *in camera* at a "first stage" hearing. At this stage, the existence of the claim cannot be publicly disclosed: at para. 38.

- In determining whether the privilege exists, the judge must be satisfied, on a balance of probabilities, that the individual concerned is indeed a confidential informant. If the claim is established, the judge must give it full effect – trial judges have no discretion to do otherwise: at para. 39.

- The informer privilege belongs jointly to the Crown and to the informant. Neither the Crown nor the informer can waive the privilege without the consent of the other: at para. 40.

[61] With respect to whether the "first stage" hearing must proceed *ex parte*, Fish J. reiterated that the primary concern is the protection of the identity of the informant. Thus, even though the right to make full answer and defence is constitutionally guaranteed, the hearing to determine privilege must proceed "on the assumption that [the privilege] does apply". No one beyond the Crown and the putative informer may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies: *R. v. Basi*, at para. 44. Thus, the accused and defence counsel will be excluded from the proceeding when the identity of the putative informer cannot be otherwise protected: *R. v. Basi*, at para. 53.

[62] The Supreme Court's reasons in *R. v. Basi* indicate that the appellants and their counsel had no right to attend the *ex parte, in camera* hearing in this case. The application judge made clear that the hearing was conducted to determine whether the two individuals were *prima facie* confidential informers. He ultimately determined that "there is a need to protect the confidentiality of the two informers". At the conclusion of the *ex parte* hearing, the application judge ordered that the transcript of that hearing be sealed. He later ordered that the appellants would only be entitled to an edited transcript of the *ex parte* hearing that had been redacted to protect the identity of the confidential informants. On the authority of *R. v. Basi*, it would have been an error for the application judge to permit the appellants to attend the hearing at issue in these circumstances. As such, the application judge proceeded with jurisdiction in holding the hearing *in camera* and *ex parte*.

[63] Although the Crown in *R. v. Basi* ultimately invoked s. 37 of the *CEA*, the reasoning in that case did not depend on the fact that s. 37 was engaged.

Rather, the conclusion that the accused and their counsel were not to be in attendance at that “first stage” hearing was premised on the absolute need to protect the identity of the confidential informants, and the reality that information relating to their identity could be revealed in such a hearing.

[64] The appellants argue that other passages in *R. v. Basi* stand for the proposition that they should have been present at the hearing that was held *ex parte*, except where necessary to protect the two individuals’ identity. They also argue that, in any event, they had the right to make submissions about the procedure that ought to have been followed in that hearing. For convenience, we set out the passages in question from *R. v. Basi*, at paras. 53-58, in their entirety:

> Where a hearing is required to resolve a Crown claim of privilege, the accused and defence counsel should therefore be excluded from the proceedings only when the identity of the confidential informant cannot be otherwise protected. And, even then, only to the necessary extent. In determining whether the claim of privilege has been made out, trial judges should make every effort to avoid unnecessary complexity or delay, without compromising the ability of the accused to make full answer and defence.
>
> Throughout, it should be remembered as well that the interest of accused persons in being present (or, at least, represented) at any proceeding relating to the charges they face remains a fundamental one, even where s. 650, by its very terms, has no application. An *ex parte* procedure is particularly troubling when the person excluded from the proceeding faces criminal conviction and its consequences.
>
> In order to protect these interests of the accused, trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence. Trial judges have broad discretion to craft appropriate procedures in this regard.
>
> Measures that a trial judge may wish to adopt in assessing a claim of informer privilege include inviting submissions on the scope of the privilege -- including argument as to who constitutes a confidential informant entitled to the privilege -- and its application in the circumstances of the case. Defence counsel may be invited as well to suggest questions to be put by the trial judge to any witness that will be called at the *ex parte* proceeding.

> In appropriate cases, fairness may require the court to provide the defence with a redacted or summarized version of the evidence presented *ex parte* -- edited to eliminate any possibility of disclosing the informant's identity -- so as to permit the trial judge to receive additional submissions from the defence on whether the privilege applies in the particular circumstances of the case. In particularly difficult cases, the trial judge may appoint an *amicus curiae* to attend the *ex parte* proceeding in order to provide assistance in assessing the claim of privilege.
>
> In the present case, permitting defence counsel to make submissions and to propose questions to be put by the court to the witness at the *ex parte* hearing might well have been appropriate. The trial judge, however, will be in a better position to decide how best to craft safeguards that mitigate any potential unfairness arising from the *ex parte* nature of the proceedings. The adoption of appropriate initiatives is therefore best left to the trial judge.

[65] We disagree with the appellants' interpretation of these passages for the following reasons. First, these passages do not undermine the *ratio* of the decision, which is that there is no right for the accused or their counsel to be present at a "first stage" *in camera* hearing on a claim of informer privilege; to the contrary, *Basi* anticipates that the first stage hearing will be conducted in the absence of the accused.

[66] Second, the Supreme Court confirms in these passages that the trial judge has broad discretion to craft appropriate procedures to safeguard the interests underlying informer privilege and to protect the interests of the accused. By way of example, Fish J. suggests that in some circumstances, defence counsel may be invited to suggest questions to be put by the trial judge to witnesses that will be called to the *ex parte* hearing, or the court may be required to furnish the defence with a redacted or summarized version of the evidence presented *ex parte* so as to permit the trial judge to receive additional submissions on whether the privilege applies in the particular circumstances of the case.

[67] In the case at bar, while the appellants' counsel were not given the opportunity to propose questions to be put to witnesses at the *ex parte* hearing, they were provided with a redacted transcript of what had occurred. As the application judge noted, the appellants also continued to have the opportunity to challenge the privilege and its application at the editing hearing, as well as at the *Garofoli* application. At no point in their attendance before the application judge, nor during the appeal to this court, did the appellants suggest that additional

questions or alternative procedures were required to ensure that confidential informer status was properly assessed.

[68] Moreover, a review of the transcript of the editing hearing makes it clear that the application judge focused on the need to provide the appellants with all of the information from the notes and files of the handlers of the confidential informants, the ITO, and the *ex parte* hearing, such as would enable them to fully participate in the *Garofoli* hearing, but for any information that might reveal the identity of the confidential informants.

[69] The respondent acknowledges that it may have been preferable for defence counsel to have been given notice of the procedure the Crown proposed to adopt to deal with the issue of confidential informer status, and for the appellants to have had the opportunity to make submissions about the procedure to be followed. The respondent argues, however, that the failure to do so in these circumstances did not result in any prejudice to the appellants, or a denial of their right to make full answer and defence. Keeping in mind the broad discretion judges possess to craft procedures when faced with an assertion of informer privilege, we agree. The application judge adopted adequate measures to safeguard the interests of the appellants in connection with the determination of the question of confidential informer status.

[70] If we had concluded that the procedure that was followed was a breach of s. 650(1) of the *Criminal Code*, this would be an appropriate case for the application of the curative proviso under s. 686(1)(b)(iv). Applying the factors identified in *R. v. Simon*, 2010 ONCA 754, 104 O.R. (3d) 340, at para. 123, while the procedure was adopted deliberately by the Crown and not initiated or consented to by defence counsel, the appellants were informed about what had occurred and received a redacted transcript. The appellants were present when the transcript was edited, and only information that might reveal the identity of the confidential informants was withheld. The determination of informer privilege at the *ex parte* hearing was provisional and subject to later challenge. There was minimal prejudice to the appellants, who did not challenge the assertion of informer privilege in any proceedings that followed.

[71] For these reasons, this ground of appeal is dismissed.

(2) Is s. 186(1.1) of the *Criminal Code* contrary to s. 8 of the *Charter*?

[72] The appellants challenge the constitutionality of s. 186(1.1) of the *Criminal Code*, which was used to obtain the wiretap authorizations of February 13 and March 31, 2006. They argue that this provision infringes s. 8 of the *Charter*, which guarantees protection against unreasonable search and seizure, because

it does away with the investigative necessity requirement in s. 186(1)(b). According to the appellants, state interception of private communications without a demonstration of investigative necessity renders the authorization unconstitutional.

[73] Sections 186(1) and (1.1) provide as follows:

> 186. (1) An authorization under this section may be given if the judge to whom the application is made is satisfied
>
> > (a) that it would be in the best interests of the administration of justice to do so; and
> >
> > (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
>
> (1.1) Notwithstanding paragraph (1)(b), that paragraph does not apply where the judge is satisfied that the application for an authorization is in relation to
>
> > (a) an offence under section 467.11, 467.12 or 467.13;
> >
> > (b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or
> >
> > (c) a terrorism offence.

[74] In the present case, the two Part VI ITOs alleged that the offences being investigated were organized crime offences. As such, s. 186(1.1) of the *Criminal Code* applied, and the authorizing judge did not need to be satisfied that there was investigative necessity before granting the authorizations. This is because, when s. 186(1.1) applies, an authorizing judge need not be satisfied that other investigative procedures have been tried and have failed, that other procedures are unlikely to succeed or that the urgency of the matter is such that it would be impractical to investigate the offence using only other investigative procedures, before granting an authorization.

[75] As part of their challenge to the two Part VI authorizations issued in this case, the appellants (other than Alvarez) brought a pre-trial application before the trial judge seeking to have s. 186(1.1) declared unconstitutional. The trial judge,

Nordheimer J., rejected the constitutional challenge in reasons reported at [2009] O.J. No. 2250.

[76] The trial judge concluded that the minimum constitutional requirements of s. 8 are met by s. 186(1)(a) alone, which requires the authorizing judge to determine whether the issuance of the Part VI authorization would be in the best interests of the administration of justice (at paras. 13-16). The trial judge rejected the contention that the Supreme Court of Canada's decision in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, establishes that investigative necessity is a constitutional precondition to granting an authorization, noting that the weight of authority in Ontario courts and in other provinces is to the contrary. The trial judge reasoned, at para. 21, that the removal of the investigative necessity requirement in s. 186(1.1) reflects Parliament's "predetermination" that other investigative procedures are unlikely to succeed in the narrow and defined contexts outlined in s. 186(1.1)(a)-(c). He concluded that s. 186(1.1) is constitutionally valid (at paras. 21-26).

[77] The appellants had also applied to cross-examine the affiant of the ITOs on the investigative necessity requirement. Having concluded that a finding of investigative necessity was not a constitutional prerequisite, the trial judge refused leave to cross-examine on this issue.

Analysis

[78] The presumed constitutional standard for searches or seizures in the criminal sphere is judicial pre-authorization, which involves: "a prior determination by a neutral and impartial arbiter, acting judicially, that the search or seizure is supported by reasonable grounds, established on oath": *R. v. Tse,* 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 16, citing *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

[79] There is no question that Parliament can legislate beyond minimal constitutional requirements on matters engaging constitutionally guaranteed rights and freedoms without expanding its constitutional obligations: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 49.

[80] The issue is whether the investigative necessity requirement articulated in s. 186(1)(b) is only a statutory requirement, or whether it is also a constitutional requirement.

[81] The point of departure in considering this question is *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48, leave to appeal refused [1985] S.C.C.A. No. 46, where this court considered the constitutionality of what is now Part VI of the

Criminal Code. In that case, it was argued that the failure of the relevant provisions to limit interceptions to targets who are believed to be involved in the commission of an offence, and to require measures to minimize the impact of court-ordered electronic surveillance on privacy interests (as were contained in the comparable Title III provisions in the U.S.),[1] rendered the provisions unconstitutional.

[82] Writing on behalf of the court, Martin J.A. rejected these arguments. He concluded that the requirement that a judge be satisfied that granting the authorization would be in the "best interests of the administration of justice" (as required by what is now s. 186(1)(a)) "imports at least the requirement that the judge must be satisfied that there is reasonable ground to believe that communications concerning the particular offence will be obtained through the interception sought" (at p. 72). He went on to hold that what is now s. 186(1) is constitutional and meets the requirements of s. 8 of the *Charter*. The Supreme Court of Canada explicitly affirmed Martin J.A.'s conclusion in *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 45.

[83] In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, Sopinka J. stated that the statutory requirements of s. 178.13(1)(a) [now s. 186(1)(a)] "are identical to the constitutional requirements. An authorizing judge must, therefore, be satisfied on the basis of the affidavit evidence that these conditions have been met" (at p. 1445).

[84] In *R. v. Araujo*, the Supreme Court considered the specific question of what was required to satisfy the investigative necessity requirement in s. 186(1)(b), having regard to its three branches. Justice LeBel, writing for the court, concluded that s. 186(1)(b) requires the authorizing justice to determine whether there is, practically speaking, no other reasonable alternative method of investigation (at para. 29).

[85] The appellants point to the following paragraph in *Araujo*, at para. 26, in support of the argument that investigative necessity is a constitutional requirement rather than simply a statutory element of a s. 186(1) authorization:

> The correct interpretation of s. 186(1)'s investigative necessity requirement must be based on the text of the provision read with a simultaneous awareness of two potentially competing considerations.… [W]e need to give the section a fair and liberal reading as part of our country's criminal justice legislation. Second, however, we must not forget that the text of s. 186(1) represents a type of constitutional compromise. *In particular, the investigative necessity requirement embodied in s. 186(1) is one of the safeguards*

> *that made it possible for this Court to uphold these parts of the Criminal Code on constitutional grounds (Duarte, supra, at p. 45; Garofoli, supra, at p. 1444).* As a result, s. 186(1) must be read with a simultaneous awareness of the competing values of enabling criminal investigations and protecting privacy rights. [Emphasis added.]

[86] However, LeBel J. specifically stated at the outset of his reasons that "these reasons will not discuss the new s. 186(1.1) and related amendments adopted in 1997 which target criminal organizations. These amendments were not invoked or examined in the case at bar" (at para. 2). Consequently, the highlighted passage from para. 26 of his reasons cannot be relied on as establishing that investigative necessity is a precondition to the constitutionality of s. 186(1.1).

[87] The Supreme Court referred to *Araujo* in *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. No. 678. In that case, Arbour J., writing for the court, concluded that investigative necessity is not a constitutionally-required precondition for obtaining a DNA warrant. The court was not specifically considering s. 186. However, in a passage relied on by the appellants, Arbour J. referred to investigative necessity in the context of wiretap authorizations as "a constitutional requirement" (at para. 53), and contrasted the intrusiveness and scope of wiretaps with the specific focus of a DNA warrant (at para. 54):

> I see no reason to import, as a constitutional imperative, a similar requirement in the case of DNA warrants. There are obvious differences between the use of wiretaps as an investigative tool, and recourse to a DNA warrant. Wiretaps are sweeping in their reach. They invariably intrude into the privacy interests of third parties who are not targeted by the criminal investigation. They cast a net that is inevitably wide. By contrast, DNA warrants are target specific. Significantly, DNA warrants also have the capacity to exonerate an accused early in the investigative process. Although it would have been open to Parliament to provide for the use of forensic DNA analysis as a last resort investigative technique, I can see no reason to require, as a condition for constitutional compliance, that it be so. Moreover, as the Court of Appeal noted, the s. 487.05(1) requirement of showing that the warrant is "in the best interests of the administration of justice" would prevent a judge from issuing a warrant where it is unnecessary to do so.

[88] The *obiter* statements of the Supreme Court in *S.A.B*. are not determinative of the constitutional issue here. The Supreme Court in that case was speaking about wiretap authorizations in general. The court was not considering the constitutional preconditions for wiretap authorizations used to investigate the

specific types of offences enumerated in s. 186(1.1). Moreover, the reasons of the Supreme Court in *Garofoli* or *Araujo* do not establish that investigative necessity is a constitutional requirement.

[89] In *R. v. Largie*, 2010 ONCA 548, 256 C.C.C. (3d) 297, leave to appeal refused, [2011] S.C.C.A. No. 119, this court recently considered whether investigative necessity is a constitutional requirement under s. 184.2 of the *Criminal Code*. Section 184.2 does not include a requirement of investigative necessity in the case of authorizations of the interception of private communications with the consent of a participant to the communication.

[90] In that case, Watt J.A., writing for the court, concluded that the minimum constitutional requirement that s. 8 of the *Charter* demands for electronic surveillance, especially wiretapping, is the requirement dictated by *Hunter v. Southam* and *Garofoli* of "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search" (at para. 40). The requirement in s. 186(1)(a) that the authorizing judge be satisfied that granting the authorization would be in the best interests of the administration of justice is identical to the constitutional requirement set by *Hunter*. Justice Watt, at para. 42, found support for this view in *Finlay v. Grellette*:

> In *Finlay and Grellette*, the appellants challenged the constitutional validity of [then] Part IV.1 of the *Criminal Code*, the predecessor to current Part VI. The basis of the challenge was threefold, including a submission that the standard for granting a conventional authorization, the current s. 186(1), fell below what the Constitution requires. The court upheld the validity of the Part examining the full panoply of safeguards sprinkled throughout the legislation. Without express reference to the investigative necessity requirement of s. 186(1)(b), the court was satisfied that the provisions of former s. 178.13(1)(a) were constitutionally sound.

[91] Justice Watt also considered *Araujo*. We agree with his conclusion that the Supreme Court in that case reaffirmed the equivalence of s. 186(1)(a) with the minimum constitutional standard imposed under *Hunter*, and the court did not characterize investigative necessity "as anything other than a statutory pre-condition to the exercise of the discretion to grant a conventional authorization permitting state-conducted third party surveillance": *Largie*, at para. 46.

[92] The appellants contend that the analysis and conclusions about investigative necessity in *Largie* are distinguishable because that case involved a consent authorization. With consent authorizations, the interception is a targeted

one, because the focus is on preserving a record of a communication where there is already a witness who could testify about it. The breadth of the invasion of privacy is narrower. Indeed, Watt J.A. noted these distinctions at para. 56 of *Largie*.

[93] The appellants assert that there is a different constitutional matrix for third-party electronic surveillance, given the greater potential intrusion on individual privacy, including the privacy of third parties who are not the target of the police investigation. Once the authorizing judge is satisfied that an authorization under s. 186 should be issued, the police can intercept communications at large and there is no requirement that they stop listening when the communications are irrelevant to their investigation.

[94] The appellants contend that their argument is reinforced by this court's recent decision in *R. v. Mahal*, 2012 ONCA 673, 292 C.C.C. (3d) 252, leave to appeal refused, [2012] S.C.C.A. No. 496. Justice Watt, writing for the court, held that the threshold for naming a person in a wiretap authorization as a "known" person is a modest one and does not require reasonable grounds to believe that the person was involved in the commission of an offence being investigated (at para. 71). The appellants contend that because the scope of potential targets is so broad, investigative necessity is required as a constitutional precondition for authorizing wiretapping as an investigative tool.

[95] We do not share the appellants' narrow interpretation of *Largie*. It is clear from a reading of that decision that Watt J.A.'s conclusion that investigative necessity is not a constitutional requirement for consent authorizations did not turn on their difference in scope from third party surveillance: see paras. 47-57. He rejected the assertion of a constitutional imperative of investigative necessity for wiretaps in general. And in *Mahal*, although the issue of the constitutional preconditions for granting an authorization under s. 186(1) was not directly engaged, Watt J.A. stated that s. 186(1)(a) embodies the constitutional requirement for a wiretap authorization (at para. 68):

> The interception of private communications constitutes a search or seizure for the purposes of s. 8 of the *Charter*, thus any statutory provisions that authorize these interceptions must conform to the minimum constitutional standards that s. 8 demands: *R. v. Duarte*, [1990] 1 S.C.R. 30. Section 186(1)(a) complies with these standards. Before granting a conventional authorization, the authorizing judge must be satisfied by the supportive affidavit that there are reasonable and probable grounds to believe the following:
>
> i. A specified crime has been or is being committed; and

> ii. That the interception of the private communications proposed will afford evidence of the crime.
>
> *Garofoli*, at p. 1451. The affidavit must also establish the requirements of s. 186(1)(b).

[96] Accordingly, in the two recent decisions in *Largie* and *Mahal*, this court has confirmed that the minimum constitutional requirement for electronic surveillance finds expression in s. 186(1)(a) of the *Criminal Code*.

[97] Other courts have rejected the invitation to recognize investigative necessity as a constitutional imperative. The New Brunswick Court of Appeal in *R. v. Doiron*, 2007 NBCA 41, 221 C.C.C. (3d) 97, leave to appeal refused, [2007] S.C.C.A. No. 13, considered and dismissed the same constitutional argument that the appellants advance before us. Writing for the court, Deschênes J.A. held (at para. 33):

> Notwithstanding Justice LeBel's and Arbour's *obiter* pronouncements [in *Araujo* and *S.A.B.*], …I believe that the necessity requirement is not a constitutional requirement for court-ordered electronic surveillance in cases involving organized crime, and that its absence from the legislation does not violate the right guaranteed by s. 8 of the Charter.

[98] In reaching this conclusion, the court relied on the statements in *Garofoli* to the effect that the requirements of s. 186(1)(a) are identical to the constitutional requirements. The court also referred to the trial decision in *R. v. Largie,* [2004] O.J. No. 5675 (S.C.J.), to the effect that investigative necessity is not a constitutional requirement to be met under Part VI of the *Code*.

[99] In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, the Supreme Court refused to recognize investigative necessity as a constitutional requirement for the search of the premises of media organizations. The court rejected the argument that the impact of media searches on diverse constitutional interests apart from the narrow privacy interests of the target would require a demonstration of investigative necessity. Justice Cory stated at p. 478:

> In my view, the assessment of the reasonableness of a search cannot be said to rest only upon these two factors [comprising investigative necessity]. Rather all factors should be evaluated in light of the particular factual situation presented. The factors which may be vital in assessing the reasonableness of one search may be irrelevant in

> another. Simply stated, it is impossible to isolate two factors from the numerous considerations which bear on assessment of the reasonableness of a search and label them as conditional prerequisites. The essential question can be put in this way: taking into account all the circumstances and viewing them fairly and objectively can it be said that the search was a reasonable one?
>
> It is the overall reasonableness of a search which is protected by s. 8 of the Charter. Certainly the potentially damaging effect of a search and seizure upon the freedom and the functioning of the press is highly relevant to the assessment of the reasonableness of the search. Yet neither s. 2(b) nor s. 8 of the *Charter* requires that the two factors set out in *Pacific Press* [respecting investigative necessity] [*Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C. S.C.)] must always be met in order for a search to be permissible and constitutionally valid. It is essential that flexibility in the balancing process be preserved so that all the factors relevant to the individual case may be taken into consideration and properly weighed.

[100] In our view, this passage articulates the correct approach to the constitutional issue here. The potential intrusion of a person's privacy in any search, whether it is by electronic surveillance, a search of personal information in a computer or the search of a place or person, will vary depending on the particular circumstances. We agree with the general assertion by this court at para. 49 of *Largie* that s. 186(1)(a) of the *Criminal Code* "coincides with the minimum constitutional requirement dictated by *Hunter*." The statutory language "it would be in the best interests of the administration of justice to do so [to grant the authorization]" is the equivalent of "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search."

[101] Thus, we conclude that the investigative necessity requirement in s. 186(1)(b) is not a constitutional imperative. That said, whether or not other investigative methods had been considered and utilized, and why a wiretap would be important and even necessary to the investigation was addressed in the ITO, and was part of the circumstances that would affect the assessment by the authorizing judge of whether the wiretap authorization in this particular case was in the best interests of the administration of justice.

[102] The appellants also argued that there was no demonstration of investigative necessity on the record in this case, and that they were prevented from exploring this issue on the cross-examination of the sub-affiants of the ITO, who were the two handlers of the confidential informers who provided information

to the affiant, D.C. Vander Heyden. As such, the appellants argue that the authorizations were illegal, and that the evidence obtained through their use should be excluded.

[103] Having concluded that investigative necessity was not a constitutional requirement for granting the wiretap authorizations, it is unnecessary for us to determine whether it would have been made out on the record before the trial judge. Likewise, the determination that investigative necessity is not a constitutional imperative disposes of the question concerning the exercise of the trial judge's discretion not to permit cross-examination of the sub-affiants on this issue.

(3) Is s. 487.01 of the *Criminal Code* contrary to s. 8 of the *Charter*?

[104] As part of the pre-trial applications in these proceedings, the appellant Lucas brought a constitutional challenge to s. 487.01 of the *Criminal Code*. Section 487.01 is the provision under which the police obtained the three general warrants of February 16, 24 and March 31, 2006.

[105] The relevant parts of s. 487.01 are as follows:

> 487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if
>
> > (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
> >
> > (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
> >
> > (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

> (2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.
>
> (3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

Other parts of the section deal expressly with video surveillance and with notice to a person whose property has been subjected to a covert search.

[106] Before the trial judge, the appellant argued that the section is unconstitutional because it authorizes unlimited prospective searches over lengthy periods of time and leaves it to police officers to determine when, why and how often the warrant should be executed.

[107] In thorough reasons reported at [2009] O.J. No. 3415, Nordheimer J. concluded that, properly interpreted, s. 487.01 is valid. He held that the safeguards in s. 487.01 are similar to those that may be imposed as a term of an authorization to intercept private communications. The trial judge explained that s. 487.01 requires the authorizing judge (who must be a judge and not a Justice of the Peace) to make an advance determination that there are reasonable grounds to believe that an offence has been or will be committed and that the actions to be taken under the general warrant will lead to information concerning the offence (at paras. 9-10). These provisions of s. 487.01 "contain all of the recognized safeguards for a reasonable search set out in *Hunter*" (at para. 10).

[108] The trial judge went on to observe that s. 487.01 provides an additional safeguard by requiring the authorizing judge to be satisfied that issuing the warrant is in the best interests of the administration of justice. Still further, the provision requires that the authorizing judge impose terms and conditions that the judge considers advisable to ensure the reasonableness of any search or seizure authorized by the warrant (at para. 11).

[109] For the following reasons, we agree with the trial judge that s. 487.01 of the *Criminal Code* does not contravene s. 8 of the *Charter*.

Analysis

[110] The authorization of searches under s. 487.01 of the *Criminal Code* raises legitimate concerns about the protection of privacy guaranteed by s. 8 of the *Charter* because of the types of searches that can be authorized and the execution of such warrants. As interpreted by this and other courts, s. 487.01

authorizes the search for evidence and other information that is not known to exist at the time the warrant is granted. Warrants have been granted to authorize covert searches for many different places over extended periods of times. Such warrants challenge the basic notion of a reasonable search as explained by the Supreme Court of Canada in *Hunter v. Southam*, at p. 168:

> In cases like the present, reasonable and probable grounds, established upon oath, to believe that *an offence has been committed* and that *there is evidence to be found at the place of the search*, constitutes the minimum standard, consistent with s. 8 of the *Charter*, for authorizing search and seizure. [Emphasis added.]

Nature of General Warrants

[111] Section 487.01 requires that a judge be satisfied on reasonable grounds that an offence has been or will be committed. The extension of the general warrant to offences that will be committed is different from the normal s. 487 warrant described in *Hunter.* However, in our view, permitting the authorization of search warrants for that purpose is not a violation of s. 8.

[112] As explained in *Hunter*, like the Fourth Amendment to the United States Constitution, s. 8 of the *Charter* protects people not places. Section 8 only protects a reasonable expectation of privacy and mandates an assessment of whether “in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement” (pp. 159-60). This expansive explanation from *Hunter* means that measuring the validity of intrusions into privacy cannot be frozen in the traditional s. 487 search warrant.

[113] Section 487.01(1)(a) requires the demonstration of reasonable grounds to believe that an offence “will be committed”. This requirement is an adequate basis for balancing the public interest in being left alone and the government’s interest in intruding into a person’s privacy. The section requires the judge to be satisfied, before the warrant is issued, that an offence will be committed. Further, the judge must be satisfied, when asked to grant the warrant, that there are reasonable grounds to believe that “information concerning the offence will be obtained” through use of the authorized procedure. It is not left for the police executing the warrant to make those determinations.

[114] Permitting the authorization of a warrant to search for information for an offence that has not yet been committed does, however, raise issues about execution. There must be some way of ensuring that the warrant is only executed

when there are reasonable grounds to believe that information about a specific offence will be obtained.

[115] In our view, the appropriate way to ensure that the warrant is carried out in a manner consistent with s. 8 is to limit its execution to circumstances where the police have gathered sufficient evidence to give rise to reasonable grounds that information related to the specified offences will be present. In our view, the validity of such terms has been approved, albeit in somewhat guarded language, by this court in *R. v. Brooks* (2003), 178 C.C.C. (3d) 361, where Moldaver J.A. held as follows, at para. 28:

> For reasons that will become apparent, the facts of this case do not lend themselves to a comprehensive discussion of the nature and type of pre-conditions contemplated by s. 487.01(3). Suffice it to say that in order to avoid the risks associated with anticipatory warrants, I think there is much to be said for insisting on pre-conditions that are explicit, clear and narrowly drawn.

[116] The appellants challenge the validity of s. 487.01 because it does not require the inclusion of safeguards similar to those required for anticipatory warrants issued in the United States. In *Brooks*, at para. 21, the court referred to the decision in *United States v. Ricciardelli,* 998 F. 2d 8 (1st Cir. 1993). In *Ricciardelli*, the United States Court of Appeals, First Circuit found that anticipatory warrants were constitutionally valid so long as they contain sufficient safeguards. The *Brooks* court referred to three safeguards outlined in *Ricciardelli*:

- The conditions in the anticipatory warrant must be explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents.

- The triggering event must be ascertainable and preordained.

- The warrant should restrict the officers' discretion in detecting the occurrence of the event to almost ministerial proportions, similar to a search party's discretion in locating the place to be searched.

[117] The safeguards referred to in *Ricciardelli* are helpful for a court in determining whether to grant an anticipatory warrant and in structuring the terms and conditions set out in the warrant under s. 487.01(3) of the *Criminal Code*. Those safeguards need not be spelled out in the statutory provision itself. The need for conditions that are explicit, clear and narrowly drawn is consistent with

the statutory requirement in s. 487.01(1)(b) that the judge be satisfied that the issuance of the warrant is in the best interests of the administration of justice.

[118] As noted above, this court took a similar approach in considering the validity of authorizations to intercept private communications under Part VI of the *Criminal Code*. In *R. v. Finlay and Grellette*, this court found that the provisions of what are now Part VI of the *Criminal Code* are constitutionally valid even though there is no explicit requirement that the authorizing judge be satisfied that there are reasonable grounds to believe that a crime is being committed and that evidence would be found as a result of interception of private communications. As Martin J.A. explained in the context of interception of private communications, the concept of the best interests of the administration of justice necessarily imports readily identifiable and mutually supportive components (at p. 70). Those components are that granting the authorization would further the objectives of justice and that there be a balancing of the interests of law enforcement and the individual's interest in privacy. These components necessarily preclude granting an authorization to intercept private communications on the basis of mere suspicion.

[119] As this court concluded in *R. v. Finlay and Grellette*, the absence of the express requirements of reasonable grounds, as found in the comparable Title III provisions in the U.S., did not invalidate the legislation because the authorization could only be granted where it was in the best interests of the administration of justice to do so. The precondition that the authorization be in the best interests of the administration of justice requires the authorizing judge to be satisfied that there are reasonable grounds to believe that an offence has been or is being committed (at pp. 70-71):

> Thus, it appears to me that the prerequisite that the judge must be satisfied that it would be in the best interests of the administration of justice to grant the authorization, in the context of the legislative scheme, imports as a minimum requirement that the authorizing judge must be satisfied that there are reasonable grounds to believe that a particular offence or a conspiracy, attempt or incitement to commit it has been, or is being, committed.

[120] As explained by Martin J.A., this reading of the statutory language "is not to read in words that are not there, but to give a reasonable meaning to Parliament's language" (at p. 72). As Martin J.A. went on to say: "Indeed, the language Parliament has chosen in the context of the legislative scheme might import a higher standard than reasonable grounds to believe that communications concerning the offence will be intercepted, as required by §2518(3)(b) of Title III."

[121] A similar approach is appropriate in considering the validity of s. 487.01, which explicitly includes the requirement that there must be reasonable grounds to believe that an offence has been or will be committed. Like the interpretation that courts have given to s. 186(1)(a) of Part VI, this legislated precondition to granting a general warrant similarly protects privacy interests. Part VI of the *Criminal Code* permits the granting of authorizations that can extend for periods of 60 days, that cover the private communications of numerous individuals for numerous offences, and that authorize interception of private communications of persons who become known in the course of the authorization: see the majority's reasons in *R. v. Chesson,* [1988] 2 S.C.R. 148, at p. 164. We see little constitutional distinction between legislation that authorizes interception of private communications of unknown persons in the wiretap context and a warrant that authorizes the search and seizure of named premises for offences that will be committed. The crucial protection lies in the requirement that the judge is satisfied to the standard of reasonable grounds before granting the warrant.

[122] Further, like provisions to intercept private communications, in considering the validity of s. 487.01, the legislation must be viewed as a whole. Thus, in addition to the reasonable grounds requirements in s. 487.01(1)(a) and the best interests of the administration of justice requirement in s. 487.01(1)(b), s. 487.01(1)(c) includes the important safeguard that the general warrant be used only where there is no other provision that would provide for a warrant, authorization or order permitting the particular technique.

[123] As Moldaver J. explained in his concurring reasons in *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, s. 487.01 includes stricter requirements than the ordinary warrant (para. 71). The "no other provision" requirement in s. 487.01(1)(c) ensures that police must use the general warrant sparingly, and only when the proposed technique is substantively different from an investigative technique accounted for by another legislative provision (at para. 80; see to the same effect the majority reasons of Abella J., at para. 20). Justice Moldaver reminded judges considering a s. 487.01 application of the need to impose terms and conditions reflecting the nature of the privacy interest at stake (para. 81).

[124] In *R. v. Thompson*, [1990] 2 S.C.R. 1111, the majority of the court upheld an authorization even though it would permit the surreptitious interception of private communications at public telephones with the result that the communications of innocent third persons could be intercepted. Likewise, covert search of premises previously identified in the warrant on the basis of reasonable grounds to believe an offence will be committed and that information concerning that offence will be obtained in those premises does not violate the guarantee in s. 8 of the *Charter*.

[125] A central safeguard in s. 487.01 is the requirement that the judge be provided with reasonable grounds in respect of specified offences that have or will be committed and that information concerning such offences will be obtained. Limiting the scope of the warrant to specified offences is particularly important where the authorization is sought in relation to offences that have not yet been committed. Judges would not be in a position to impose appropriate terms and conditions if they did not know what offences the police intended to investigate. To permit covert search and seizure in relation to offences that have not yet been committed and have not yet even been identified would not strike the appropriate balance between law enforcement and protection of privacy.

[126] For these reasons, we are satisfied that s. 487.01 of the *Criminal Code*, properly interpreted, is consistent with s. 8 of the *Charter*. Having dealt with the constitutional challenges to s. 186(1.1) and s. 487.01 of the *Criminal Code*, we now turn to the grounds of appeal related to the validity of the wiretap authorizations and the general warrants that were issued under these provisions.

(4) Did the trial judge err in failing to find that the February 16, 2006 ITO was invalid because it did not identify a past or current offence in respect of which the authorization could have issued?

[127] The appellants Lucas, Rosa, Coyle and Chau contend that the trial judge, Nordheimer J., erred in dismissing their *Garofoli* application. It was through Lucas' inclusion as a named person in the authorization that Rosa, Coyle and Chau had their communications intercepted.

[128] As noted, the police sought the Part VI authorization in the context of their investigation of a number of offences involving the Doomstown Crips, including participation in a criminal organization, commission of an offence for a criminal organization, and drugs and weapons trafficking. Lucas was not a member of the Doomstown Crips; however, he was believed to have supplied guns to the gang in the past.

[129] The appellants assert that the trial judge erred in finding that the February 13, 2006 Part VI authorization was validly issued to intercept Lucas' communications. They say the authorization was invalid because it was issued with respect to the investigation of future, unspecified offences that the police assumed would occur as a result of propensity reasoning based on the targets' past criminal conduct. The appellants contend that s. 186 requires a specific past or present offence that is currently being investigated, coupled with a belief that the communications the state proposes to intercept will provide evidence in respect of the offence. Since the authorization was not based on specified

current or past offences, it was improperly issued, and the evidence obtained through its execution should be excluded.

[130] For the following reasons, we reject the appellants' argument that the ITO failed to identify reasonable grounds to believe that the authorization would afford evidence of past or ongoing offences.

Ruling on the *Garofoli* Application

[131] The trial judge, Nordheimer J., concluded that there was sufficient evidence in the ITO to establish the existence of a gang known as the Doomstown Crips, that the gang had engaged in criminal activity, including drug trafficking and shootings, and that the gang possessed weapons it was prepared to use to protect its territory: see [2009] O.J. No. 2252, at para. 36. He concluded that there were reasonable grounds to believe, at the time the ITO was sworn, that the Doomstown Crips existed for the purpose of engaging in criminal activity, and that there was no reason to believe that its members would not continue to do so (at para. 40).

[132] The trial judge considered the question of whether a Part VI authorization could issue in respect of the investigation of offences not yet committed. He concluded that the words "a particular offence… has been, or is being, committed," as used in *R. v. Finlay and Grellette,* at p. 71, and repeated in subsequent cases, could be interpreted to authorize the interception of private communications in order to investigate an impending crime, in addition to past or current crimes. In the trial judge's view, at para. 33: "it does not make sense, nor is it in the public interest, to require a crime to have commenced in order to permit the police to have resort to this investigative tool." He agreed with the conclusion of the B.C. Court of Appeal in *R. v. Madrid* (1994), 48 B.C.A.C. 271, at para. 82, that "it is sufficient if the issuing judge is satisfied that the deponent has reasonable and probable grounds to believe that a specific offence has, is being, or is about to be committed."

[133] The trial judge went on to consider whether there were reasonable grounds for authorizing the interception of Lucas' communications. In this regard, he reviewed the information about Lucas that was disclosed in the ITO and concluded that there were reasonable grounds to believe that Lucas had been, and continued to be, engaged in weapons trafficking for the Doomstown Crips, and that the interception of Lucas' communications would provide evidence respecting the weapons and related offences (at para. 51).

[134] Given his conclusion that there had been no s. 8 breach, the trial judge did not consider the application of s. 24(2) of the *Charter*.

Analysis

[135] There is no question, and indeed, defence counsel acknowledged before the trial judge, that the ITO provided reasonable and probable grounds to believe that a criminal organization was in existence (the Doomstown Crips), and, in the words of defence counsel, “that its primary bread and butter is guns, drugs and violence.” .

[136] The trial judge’s review of the evidence that was before the authorizing judge in relation to Lucas is at paras. 42-51 of his reasons. The evidence included: the information from the informer, Earle Cooke, that he had smuggled 110 firearms across the border and delivered these to Lucas between October 2002 and October 2003; that only 20 of these firearms had been recovered by the authorities; and that nine of those 20 firearms were linked to the Doomstown Crips. In addition, a DVD of a rap music video made in February 2005 (referred to as the “Rapsheet video”), which was attached as an exhibit to the ITO, showed members of the Doomstown Crips displaying what appeared to be weapons consistent with the type that Cooke claimed to have sold to Lucas.

[137] Furthermore, the ITO referred to police surveillance evidence on January 31, 2006 that revealed Lucas carrying a knapsack containing three pipe-shaped objects that the police believed were firearms.

[138] The trial judge concluded at para. 51:

> In my view, the totality of the circumstances justified the inclusion of Mr. Lucas in this authorization. It was clear that the Doomstown Crips had a source for weapons -- historically and currently. There was evidence capable of belief by the authorizing judge that would establish reasonable and probable grounds to believe that Mr. Lucas had, and was, engaged in weapons trafficking and that he had, and was, engaged in that criminal activity for the Doomstown Crips. There were also reasonable grounds to believe that the interception of Mr. Lucas’ communications would provide evidence respecting the weapons and related offences. It should be noted that the prosecution does not suggest that the authorizations could be justified in respect of Mr. Lucas other than in respect of those offences. The authorizations were therefore validly made in respect of Mr. Lucas.

[139] The appellants assert that the information relating to Lucas was stale and ought not to have been relied on by the trial judge. Earle Cooke was arrested in the U.S. in 2003. In a video statement in November 2004, he stated that he had

supplied guns to Lucas in 2003. There was no evidence of any ongoing supply of guns from Cooke to Lucas, as Cooke was subsequently incarcerated.

[140] In this regard, we observe that, in some situations, a gap in time between an event referred to in an ITO and an authorization would be important because the dated aspect of the information would make it less reasonable to believe that the interception of the person's communications would afford evidence of a specified offence. However, we agree with the trial judge that in this case, the fact that guns had allegedly been supplied to Lucas some years before the investigation into the offences referred to in the ITO did not undermine the grounds for issuing the authorization to intercept his communications. The ITO provided reasonable grounds to believe that Lucas had not disposed of all the guns delivered to him by Cooke, that he had supplied guns to the Doomstown Crips in the past, and the surveillance evidence from January 2006 indicated that Lucas may have been transporting firearms. The ITO thus provided reasonable grounds to believe that Lucas had been and continued to be involved in the organized trafficking of a substantial number of weapons.

[141] In the light of this information in the ITO, we reject the appellants' position that the authorization was prospective in nature and based only on propensity reasoning about past behaviour. We agree with the trial judge's conclusion that the authorizing judge was justified in finding reasonable grounds to believe that Lucas had been, and continued to be, engaged in weapons trafficking for the Doomstown Crips, and that the interception of his communications would provide evidence respecting past and ongoing weapons-related offences. This ground of appeal is thus dismissed.

(5) Did the trial judge, Nordheimer J., err in refusing to permit cross-examination of the affiant of the Part VI ITO?

[142] In the context of the *Garofoli* application, the appellant Lucas was granted leave to cross-examine two of the sub-affiants of the February 13, 2006 ITO: the two handlers of the confidential informers who had provided information to D.C. Vander Heyden. The scope of the cross-examination was limited to whether admitted errors in the ITO relating to the confidential informers (suggesting that they were tested informers, and that one of the confidential informers was providing information for altruistic reasons when he or she had sought compensation that was refused) were intentional. The issue of whether leave should be granted to cross-examine the affiant was left to be determined until after the sub-affiants were cross-examined. The trial judge's reasons on this issue are reported at [2009] O.J. No. 6387.

[143] During his cross-examination, D.C. Beausoleil was asked about a paragraph in the ITO, which states: “The information provided by Informant Number 1 demonstrates an ongoing gang war which has taken place between two (2) rival Crip gangs, the Doomstown Crips and the Crips from Mount Olive.” Officer Beausoleil agreed that he had never conveyed this information to the affiant, and that the confidential informer “would not use the term ‘Doomstown’”.

[144] As a result, counsel for Lucas sought leave to cross-examine the affiant on why he used the words “ongoing gang war” when the information did not originate with D.C. Beausoleil or the confidential informer. It was suggested that this statement had been included with an intention to mislead the authorizing justice.

[145] The trial judge heard argument and refused leave to cross-examine the affiant, stating briefly that he was not satisfied that such cross-examination would materially advance the issue. From the transcript of the argument, it is apparent that the trial judge was referring to the issue whether the issuing justice would have had reasonable grounds to believe that offences referred to in the ITO had occurred or were occurring and that the authorization would afford evidence of those offences.

[146] The appellants submit that the trial judge erred in refusing leave to cross-examine D.C. Vander Heyden because such cross-examination could have shown intent to mislead, or could have advanced their argument about the authorization being only in relation to prospective offences.

[147] A trial judge has discretion whether or not to grant leave to cross-examine the affiant who filed in support of a wiretap authorization: *R. v. Garofoli*, at para. 88; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. The test for permitting cross-examination in this context is stated in *R. v. Garofoli,* at para. 88*:*

> 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.

[148] There is no basis to interfere with the trial judge’s decision to deny leave to cross-examine the affiant on the reference to “an ongoing gang war which has taken place”. The evidence of the sub-affiant of the ITO confirmed the errors in what was reported as coming from confidential informant #1, and explained how the errors had occurred. The reference to “an ongoing gang war which has taken place” is, at worst, an awkward characterization attributed to confidential

informant #1, which Officer Beausoleil confirmed had not been provided by that source.

[149] The affidavit included specific information from the confidential informer about a gang war between the Doomstown Crips and the Mount Olive Crew with relevant dates indicating that the events the informer described had occurred in the past. As a result, the authorizing judge could not have been under any misapprehension about the currency of the information. As such, there was no error in the exercise of the trial judge's discretion to refuse leave to cross-examine the affiant on the issue of why he used the phrase "ongoing gang war".

[150] Moreover, and as is discussed further below at para. 168, the ITO was replete with details of the gang members' extensive criminal activities and information from which it could reasonably be concluded that such activities were ongoing. As such, the statement attributed to confidential informant #1 was not essential to the validity of the authorization.

[151] We would thus dismiss this ground of appeal.

(6) Did the trial judge, Molloy J., err by not excising certain information contained in the ITO filed in support of the February 13, 2006 Part VI authorization?

[152] The appellant Alvarez also attacks the validity of the February 13, 2006 authorization. He contends that certain erroneous information ought to have been excised from the ITO, and that if such information had been excised, the ITO would not have provided sufficient grounds to meet the requirement that an "identifiable specific" offence had been or was being committed by the targets on February 13, 2006, the day the authorization was obtained. He submits that the following three types of information ought to have been excised:

(i) The opinion of Special Constable Press, a firearms expert, that the individuals in the Rapsheet video possessed "possibly" ten different firearms. This evidence was misleading given P.C. Press' acknowledgment at the preliminary inquiry that without a physical examination, he could not conclude that the items met the legal definition of a firearm and that he had assumed the items were real firearms.

(ii) The evidence of the confidential informers should have been excised in light of the affiant's false statements about the reliability and track record of both informers, and his suggestion that confidential informer #1's motives were altruistic, when he had asked to be paid for information. The appellant contends that, contrary to the trial judge's conclusion, the incorrect information was included intentionally. Given this deliberate attempt to mislead, the authorization should have been invalidated or at least all of the information attributed to the informers ought to have been excised therefrom.

(iii) The specific elements of the information provided by the confidential informers that fell short of the threshold established in *R. v. Debot*, [1989] 2 S.C.R. 1140, ought to have been excised.

[153] For the reasons that follow, we conclude that the only information that the reviewing judge ought to have excised from the ITO was the information provided by confidential informant #2. However, excising the information provided by this informant would not have affected the validity of the authorization and so nothing turns on this error.

(i) Evidence of P.C. Press

[154] In reasons reported at 2009 CanLII 48828, the trial judge, Molloy J., considered the amplified record, including P.C. Press' evidence on the preliminary inquiry and his statement that he believed that the Rapsheet video depicted real guns because they looked real. She concluded that "P.C. Press' statement was a logical inference drawn from the evidence by an expert well-equipped to give such an opinion" (at para. 36).

[155] We agree that there was no reason to excise this information from the affidavit. P.C. Press acknowledged in cross-examination at the preliminary hearing that the only way to conclusively determine if an object meets the *Criminal Code* definition of a firearm is to test it. However, he testified that based on his extensive experience examining firearms, the firearms shown in the Rapsheet video depicted real guns because they looked real. We agree with the motion judge that this conclusion, coming from a firearms expert, was logically drawn from the evidence.

(ii) Evidence of the Confidential Informers was Misleadingly Presented

[156] The affiant stated that confidential informant #2 had been providing information for one month and had always been reliable, when in fact this informant had provided information two times in December 2005 with respect to the Project XXX investigation. The trial judge concluded this was merely a drafting error with no intention to mislead (at para. 77).

[157] In our view, the error in respect of confidential informant #2 was trivial and inconsequential. The affiant's description could not be taken as somehow suggesting that this informant had a lengthy track record of providing accurate information, nor is there any reason to think that the authorizing judge would have been misled by the error in this description.

[158] The errors in the affidavit concerning confidential informant #1 were more considerable. The affiant erroneously described confidential informant #1 as

having provided information to D.C. Beausoleil for approximately one year, and as always having provided reliable information. This was not true since the informant had only given information once in 2004. The affiant also indicated that confidential informant #1's sole motivation in providing the information was to prevent loss of life. In fact, confidential informant #1 had asked to be paid for the information. However, the informant agreed to provide the information without remuneration.

[159] In the absence of cross-examination of the affiant, it is difficult to discern the reasons for the errors in the description of confidential informant #1 in the ITO. However, we agree with the trial judge that these errors did not invalidate the authorization because the authorizing judge was unlikely to have been materially misled by the inaccurate description of confidential informant #1's track record. We agree with the trial judge's reasons for why it was not necessary to excise confidential informant #1's information from the ITO or to invalidate the warrant because of the misstatements in the ITO (at paras. 70-71):

> [I]t is highly unlikely that the authorizing judge would have placed any significant weight on the supposedly altruistic motivations of Informant #1. He/she is an admitted life-long member of a rival gang and could have had any number of reasons for giving information to the police. The fact that this informant had asked for money in exchange for information does not alter the situation significantly, since no consideration was ever paid and the information was provided in any event.
>
> [I]t is also unlikely that any weight was given to the alleged track record of accurate information in the past. No information is provided as to the number of times information was provided, the nature of that information, the specificity of that information or whether it led to any arrests or convictions. In the absence of such details the authorizing judge cannot be taken to have placed any weight on the informant's track record.

[160] We thus reject this ground of appeal.

(iii) Failure to Excise Information that Fell Short of the *R. v. Debot* Threshold

[161] The trial judge agreed with the Crown's position that, in assessing the reliability and weight to be given to the confidential informants' evidence, each was to be treated as a first-time informer with no track record. She went on to consider the information provided by each informer, and the extent to which the

information was corroborated by information gathered by the police in their investigations. The trial judge found that the evidence of both informers was sufficiently compelling, credible and corroborated as to provide "some evidence" that the authorizing judge was entitled to rely on in deciding to issue the authorization.

[162] At the *Garofoli* hearing, Crown counsel filed a table setting out the information in the ITO that was provided by the two informants and the extent to which the police corroborated this information through police occurrence reports, police investigation, and by comparison to the Rapsheet video. We agree with the trial judge's observation that much of the information provided by confidential informant #1 is "highly compelling in its detail and shows obvious inside knowledge" (at para. 73). The trial judge continued:

> Other information is corroborated by information gathered by the police in their investigations, and the extent of that corroboration is set out in the affidavit. In my opinion, the information provided by Confidential Informant #1 was sufficiently detailed and had sufficient corroboration that the credibility of this informant is greatly enhanced. It is not necessary that every aspect of an informant's information be corroborated. Where, as here, a substantial portion of the information is independently verified, the authorizing judge may consider all of the informant's information in considering whether reasonable and probable grounds to grant the authorization have been established.

[163] The trial judge reached the following conclusion about the information provided by confidential informant #2:

> On the whole, I am of the view that, looked at in context, the evidence provided by this informant is sufficiently compelling, credible and corroborated as to provide "some" evidence that the authorizing judge was entitled to rely upon in coming to his conclusion.

[164] The information provided by confidential informant #2 included street names of people who he/she said possessed weapons or sold drugs; however, some of this information was dated and some of it was uncorroborated. The informant also gave an inaccurate physical description of an individual. The trial judge concluded that this inaccurate description ought not to vitiate all the information provided by the informant.

[165] In our view, confidential informant #2 provided little relevant, corroborated information concerning criminal activity in the Jamestown area. However, this would have been obvious to the authorizing judge. Moreover, even if the trial

judge had excised the information provided by confidential informant #2 from the affidavit for failing to meet the *Debot* standard of corroboration, the remaining material in the ITO provided ample reasonable grounds to believe that there was ongoing weapons and drug-related criminal activity in the Jamestown area by gang members. We go on to detail this information in explaining why we would not give effect to the appellant Alvarez's next ground of appeal.

(7) Did the trial judge err in concluding that there were reasonable grounds to believe a specified offence had been or was being committed?

[166] Like the appellant Lucas and his co-accused, the appellant Alvarez argues that the ITO failed to disclose reasonable grounds that an "identifiable specific" crime had been or was being committed, citing *R. v. Mahal*, at para. 75. The appellant contends that the type of reasoning presented in the ITO would permit the granting of an authorization whenever the police can demonstrate historic criminal activities of the targets, rather than information respecting the commission of an identifiable offence. The appellant Alvarez cites the Manitoba Court of Appeal's decision in *R. v. Grant* (1998), 130 C.C.C. (3d) 53, at paras. 26-27, for the propositions that wiretap authorizations cannot be granted to prevent criminal activity in the future, and are not intended to be used to uncover evidence of unknown crimes.

[167] We would not give effect to this submission. The material filed in support of the ITO provided ample reasonable grounds to believe that evidence of particular offences might be obtained through the wiretap authorization, including evidence of participation in a criminal organization and evidence of an ongoing conspiracy by the named targets to traffic in weapons and controlled drugs and substances on behalf of a criminal organization.

[168] The evidence in the ITO included the following information that supplied ample grounds to believe that the interceptions could provide evidence of past or ongoing offences by members of a criminal organization (see the trial judge's reasons, at para. 113):

- the 2005 Rapsheet video, which was alleged by police to portray members of the Doomstown Crips brandishing handguns and boasting of their criminal activities, including drug trafficking and shootings;

- the report of Officer Bobbis concerning the existence of a criminal gang operating in the Jamestown area known as the Doomstown Crips;

- the evidence of a drug expert, Det. Page, concerning the relationship between gangs and street level drug trafficking in the City of Toronto;

- the evidence of P.C. Press, a firearms expert, who expressed the opinion that 10 different firearms were shown on the Rapsheet video;

- the information from Det. Sgt. Comeau about the "Code of Silence" in the Jamestown and Rexdale areas that has hampered the police's ability to investigate crime and gang activity in those areas;

- the information from confidential informant #1 concerning the existence of the Doomstown Crips and the involvement of its members with illegal firearms;

- the information of Jermaine Street, a member of a known rival gang of the Doomstown Crips, who gave a statement to police about how gangs including the Doomstown Crips, operated;

- the evidence of the numerous inter-connections between the various individuals who are depicted on the Rapsheet video and those who are targeted persons for the wiretap authorization;

- the criminal records of the known persons, and their connections to firearms and to illegal drugs, support the inference that they were members of the Doomstown Crips and were carrying out crimes, at least in part, for the benefit of that organization; and,

- the evidence of firearms trafficking based on information from Earl Cooke about guns coming from Texas, a number of which were seized in the Jamestown area and were in the possession of persons associated with the Doomstown Crips.

[169] We agree with the trial judge's observation at para. 114 that "[a] street gang does not come into existence overnight, nor does it disappear over night. For that reason, some of the evidence [in the ITO] that might otherwise appear to be dated, remains relevant." Accordingly, we would not give effect to this ground of appeal.

(8) Did the trial judge err in concluding that the appellant Alvarez was properly named as a known person in the affidavit?

[170] The appellant Alvarez further contends that the trial judge erred in dismissing his *Garofoli* application in respect of the February 2006 Part VI authorization because the supporting affidavit did not reveal reasonable grounds for believing that intercepting his private communications would likely provide evidence respecting one of the named offences.

[171] Again, we see no reason to interfere with the trial judge's conclusions that the supporting affidavit afforded reasonable grounds to believe that intercepting Alvarez's communications might assist the investigation of the offences named in the ITO. The trial judge excised from the ITO incorrect and inaccurate information identifying Alvarez as a participant in the Rapsheet video, and thus as being involved in gun trafficking because he was allegedly holding a gun in the video. Before the trial judge, the appellant adduced evidence demonstrating that the police had wrongly identified him as a participant in the video. The trial judge concluded that, even after excising the erroneous information about Alvarez being in the Rapsheet video, there was other evidence in the ITO that made it reasonable to believe that intercepting Alvarez's communications would provide evidence of the offences under investigation (at para. 116):

[I]n my opinion, even after the excisions there is <u>some</u> evidence upon which the authorizing judge could find him to be a member of the Doomztown Crips and also conclude that there was reason to believe that intercepting his phone calls would likely provide evidence of criminal activities of that organization. That evidence is to be found in the information from the Confidential Informant [that Alvarez was a member of the gang], the nature and extent of Mr. Alvarez's criminal record, his association with other persons who had even more substantial connections to the Doomztown Crips, and his tattoo (even bearing in mind that "Doomztown" is also a nickname for the neighbourhood, not just the gang). [Emphasis in original.]

[172] We agree that there was a body of evidence provided in the ITO that together justified Alvarez's inclusion as a target in the Part VI authorization, even after excising the erroneous information linking him to the Doomstown Crips. This evidence includes the tattoo of "Doomz Town" across his forearms, the fact that he had been shot and injured in the company of two known gang members in 2003 and that none of the three had co-operated in the investigation, his extensive criminal record for drug trafficking and guns offences, his arrest in July 2005 for trafficking in cocaine, his identification by confidential informant #1 as a member of the Jamestown Crips, and the fact that three months before the ITO was sworn, someone had tried to smuggle marijuana to him in jail. Together, this

information provided reasonable grounds to believe that the interception of Alvarez's communications could provide evidence of criminal activity being committed by members of the gang.

[173] Accordingly, this ground of appeal fails.

(9) Were the general warrants invalid because they impermissibly delegated the judges' discretion to the police?

[174] We now turn to the grounds of appeal raised by the appellants, Lucas, Coyle and Chau concerning the validity of the three general warrants issued pursuant to s. 487.01 of the *Criminal Code*. These grounds of appeal relate to the ruling of the trial judge, Nordheimer J., reported at [2009] O.J. No. 3145.

[175] As noted, the three general warrants in this case were issued on February 16 and 24 by Taylor J. and on March 31, 2006, as part of the Part VI authorization issued by Echlin J. Each of the general warrants allowed for surreptitious entry into named premises for specified items when reasonable grounds existed to believe that specified named offences had been or would be committed and that those items would be present to be used for evidence in the investigation of the named offences "and/or anticipatory charges".

[176] For example, the wording of the March 31 general warrant authorized the following in the course of executing the covert entry:

> IT IS FURTHER ORDERED, pursuant to s. 487.01 of the *Criminal Code*, that subject to the interception of private communications and/or physical surveillance which give officers reasonable grounds to believe that the items listed below are in the named places…, that peace officers be authorized to surreptitiously enter and search the [named] places … at any time during the period that the Order is in effect, for controlled substances, firearms, firearm magazines, firearm components, prohibited devices, or firearm cartridges (ammunition), photographs, documents or data contained within cellular telephones, … Blackberries, personal data devices, and proceeds of crime, pertaining to the [named offences] ... *to examine, photograph, videotape and/or seize, any or all of those items to be used for evidence in the investigation of the named offences, and or anticipatory charges, as well as in the interest of public safety.* [Emphasis added.]

[177] We suspect that the inclusion of the emphasized provision in the warrants was an attempt to mirror the plain view provision in s. 489 of the *Criminal Code*, which permits the seizure of the following things not mentioned in the warrant:

> 489. (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds
>
> > (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
> >
> > (b) has been used in the commission of an offence against this or any other Act of Parliament; or
> >
> > (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[178] The reference to "anticipatory charges" in the general warrants is troublesome because it appears to delegate to the police officer the decision as to how the warrant is to be executed, but without the reasonable grounds safeguard in s. 489 in respect of offences not specified in the warrant. In our view, a term of a general warrant that is intended to authorize the surveillance, search and seizure of items related to offences not listed in the warrant must be more carefully worded, perhaps in terms similar to s. 489. We need not finally determine that issue, however, because we are satisfied the inclusion of this term did not render the warrants invalid and the offending parts of the warrants can be safely excised.

[179] This court was faced with an analogous problem in relation to an authorization to intercept private communications where a "basket clause" in an authorization purported to permit the interception of private communications of anyone at any place in the discretion of the police. In *R. v. Paterson* (1985), 18 C.C.C. (3d) 137, Martin J.A. held that the basket clause was invalid as it constituted a delegation of the judge's function to the police. The same might be said about the anticipatory charges parts of the general warrants in this case.

[180] The court in *Paterson* held at p. 149 that the basket clause was severable and did not affect the validity of the balance of the authorization. In *Paterson* none of the interceptions had taken place by using the basket clause. Similarly, in this case, there was no suggestion that any of the surreptitious searches were conducted in relation to unknown charges.

[181] The appellant submits that the wording of the general warrants authorized unconstitutional search and seizures because the decisions whether to execute the warrants were delegated to the police. We agree with the trial judge, Nordheimer J., that the conditions imposed by the warrants were valid: see [2009] O.J. No. 3415. As he said at para. 25, the authorizing judges had concluded that the intrusions could occur and where they could occur. The decision whether to allow the search was made by the authorizing judges based on reasonable grounds to believe that information concerning the offences would be obtained through the use of the authorized technique, here, covert entry.

[182] The appropriate timing of the intrusions could not be predicted in advance and thus the judges imposed a term authorizing the intrusions only when reasonable grounds existed to believe the items sought were present. As the trial judge noted, such a term is not unlike "resort to" clauses found to be validly included in wiretap authorizations. In *R. v. Thompson*, the majority of the Supreme Court held that such clauses are valid, at p. 1142:

> From the perspective of the rights of a person who is a target of the authorization, if it is reasonable to intercept the communication of a person at a specified address, it seems equally reasonable to intercept that person's communication at another place to which he resorts. Subject to what will be said about residences and pay telephones, the nature of the invasion of that person's privacy does not change with that person's location. *It is the issuing judge's function to determine whether there are grounds sufficient to justify this invasion. If the judge is so satisfied, it is no invalid shirking or delegation of his or her function to permit the police to conduct this surveillance at places for which there is sufficient evidence to believe the target resorts to.* [Underlining in original. Emphasis added.]

[183] In considering the validity of the time of execution clause, it is evident that we do not agree with the condition imposed in *United States v. Ricciardelli*, referred to above at para. 116, that the triggering event must be both ascertainable and "preordained". In our view, this is too strict a condition. Reasonable grounds to believe, as included in these warrants, is a sufficient guarantee to protect the privacy rights of the targets of the intrusions.

(10) Were the general warrants of February 16 and March 31, 2006 invalid as being contrary to the best interests of the administration of justice?

[184] The appellants Lucas, Coyle and Chau submit that on their face, the general warrants of February 16 and March 31, 2006 were too broad and the judges could not have been satisfied that such broad authorizations were in the

best interests of the administration of justice. The appellants focused on the fact that these warrants authorized covert entry into many specified places for a 60-day period.

[185] We agree with the trial judge that there is nothing in the legislation or in s. 8 of the *Charter* that limits the scope of the warrants in the sense of places to search (at para. 30). The question has to be whether the necessary reasonable grounds existed for each of those places. If they did not, the person affected who had a reasonable expectation of privacy could challenge that part of the warrant and any search pursuant to the warrant. The police could have obtained multiple general warrants related to each place sought to be searched. The fact that they sought and obtained authorization in one warrant for all of the places does not itself render the warrant invalid.

[186] The appellants have not shown that the 60-day time period during which the general warrants were extant was unreasonable. As the trial judge pointed out, at para. 32, the time of the validity of the warrants was the same as can be authorized for surreptitious interception of private communications. The covert entries authorized in this case by the general warrants had similar purposes and could reasonably extend for 60 days.

[187] We would not give effect to the grounds of appeal concerning the validity of the February 16 and March 31, 2006 general warrants.

(11) Was the search of the locker in violation of s. 8 of the *Charter*?

[188] The appellants, Lucas, Coyle and Chau advance a more focused attack on the validity of the search of a locker in a public storage facility at 389 Paris Road in Brantford, which was purportedly authorized by the general warrant of February 24, 2006. The storage locker was rented by Lucas' girlfriend. The search of the locker took place on February 25, 2006. The search revealed two small safes, one of which contained a blue cooler bag. Inside the blue cooler bag the police found two firearms, ammunition, some marijuana, a number of small bags containing cocaine, a cardboard box, and various other items. The box had a Purolator label affixed to it. On the label was the name Vincent Wong, as well as the appellant Coyle's home address and cell phone number. Inside the box was a one kilogram brick of cocaine.

[189] The appellants say the trial judge erred in failing to exclude the items seized from the storage locker. They submit that the affidavit in support of the general warrant for this search was materially misleading. When the misleading portions are excised or corrected, the information in support was not sufficient to justify

the granting of the warrant. In addition, the appellants submit that the warrant was not executed in accordance with its terms.

(i) Was the affidavit in support of the warrant materially misleading?

[190] The information to obtain the warrant to search the locker in question incorporated the material from the earlier information in support of the general warrant granted on February 16. At that time, the police did not know about the locker. On February 23, police officers attempted to surreptitiously execute the February 16 general warrant at Rosa's house. A neighbour called Rosa because he thought there were burglars at his house. Police surveillance tracked Rosa going to his home.

[191] The ITO sets out a series of intercepted telephone calls on February 23 related to the failed surreptitious entry into Rosa's home. The ITO also refers to surveillance showing Lucas and Rosa driving in separate vehicles to Rosa's home. Rosa entered the residence and returned. According to the ITO, Rosa "appeared to be walking awkwardly, bent over to the front and there was a large bulge under the front of his jacket." Rosa went to Lucas' vehicle and placed a large bag into the back of the vehicle. Rosa entered the vehicle and the police followed them to the self-storage facility at 389 Paris Road. According to the ITO:

> Observations determined either LUCAS or ROSA entered storage locker designated B 35. Surveillance was unable to determine who entered and what exactly occurred in the storage locker.

[192] The ITO further states that the affiant believes that Lucas and Rosa used the storage locker to "securely store their illicit commodities in order to facilitate the commission of the offences listed" in the ITO. The basis for this belief is that Rosa believed there had been a break-in at his home so he removed items from his home that he concealed under his jacket and placed in the rear of Lucas' vehicle. He and Lucas then drove to the storage locker.

[193] Based on evidence from the preliminary inquiry and the *voir dire*, Nordheimer J. concluded that the observations of the surveillance officers were simply that Rosa was seen leaving his residence with something under his jacket and going to the rear of Lucas' vehicle. The trial judge excised the evidence in the ITO as to the manner in which Rosa was said to be walking and the evidence that he placed a large bag in the back of Lucas' vehicle. Having excised this information, the trial judge concluded that what remained in the ITO was nonetheless sufficient to show there were reasonable grounds to issue the general warrant. He put it this way at para. 17 of his ruling, reported at [2009] O.J. No. 3414:

> There would have been reasonable grounds to issue the general warrant if the subparagraph had been accurately worded. The fact that the police suspected that Mr. Rosa had information or items relating to criminal activity in his residence, that Mr. Rosa was seen apparently removing something from his residence after the failed attempt by the police to covertly search that residence and that Mr. Rosa and Mr. Lucas then drove to a public storage facility, taken with all of the other information that was contained in the ITO, would provide a sufficient basis for the general warrant to issue.

[194] We agree with the trial judge that there was sufficient remaining material in the ITO to establish reasonable grounds to search the storage facility. As a result of the wiretap and other surveillance, there was evidence showing a relationship between Lucas and Rosa against a background of Lucas' involvement in trafficking in illicit firearms. It was a reasonable inference from the physical and wiretap surveillance that Rosa wanted to remove contraband from his home in response to what he believed was an attempted break-in. That he immediately enlisted the aid of Lucas for that purpose was a basis for a reasonable inference that he wanted to store the contraband somewhere that was not only safe, but related to Lucas.

(ii) Manner of Execution of the Warrant

[195] The ITO states that the officers would obtain keys to locker B35 to enable them to enter without detection. In the event of exigent circumstances that made obtaining keys impracticable, the warrant authorized officers to use other means that caused the most minimal and reasonable amount of damage.

[196] The evidence adduced on the *voir dire* indicated that the officers had no intention of obtaining keys. They rented a locker in the facility to obtain the pass code and then intended to either pick the lock of locker B35 or break the lock to gain entry. The officer in charge of executing the warrant never told the officer who prepared the ITO about the investigative plan and the officer in charge did not read the terms of the warrant before gaining entry by picking the lock.

[197] The trial judge held that the terms of the warrant were not violated by the officers picking the lock rather than obtaining keys (at paras. 27-9):

> Like any other judicial authorization, the terms and conditions of a general warrant should be strictly complied with. Judicial authorizations do not allow the police to pick and choose among the terms with which they will comply and which they feel they can ignore. That rule, however, must be reasonably applied. It ought not to be

> used to place the police in a straightjacket such that they cannot adjust their plan for the execution of a warrant regardless of how minor that adjustment may be.
>
> At its core, the general warrant authorized a covert entry into storage locker #B35. It authorized the police to covertly obtain keys and make copies of those keys to enable that entry. The general warrant also authorized the police, in exigent circumstances and where it was not practical to obtain a key, to cause minimal damage in order to effect an entry into the premises. A fair reading of the terms and conditions of the general warrant did not mandate that keys be obtained. The ITO says that the plan was to obtain keys to facilitate entry into the storage locker. That plan was not cast in stone, however. No reasonable exception can be taken if the police were able to effect their entry without the need to resort to covertly copying keys. In contrast, if the applicant's literal interpretation were to be accepted, then it would follow that, if the police had attended at the storage locker and found it unlocked, they would have been prohibited by the terms of the general warrant from simply opening the door and undertaking their search.
>
> It perhaps goes without saying that it would have been preferable for the terms of the general warrant to have been stated in permissive as opposed to mandatory language so as to avoid any such problem. Nonetheless, I am unable to accept that the wording of paragraph 4.1 of the appendix can lead to the result for which the applicant contends.

[198] Again, we agree with the trial judge that there was no violation of the warrant. While the ITO suggested a method of operation whereby the police would obtain keys, the warrant itself is not that specific. As the trial judge observed, the core of the authorization was to covertly enter the premises. The warrant itself authorized the officers to "covertly retrieve keys and make an impression of those keys". The warrant does not, however, limit the covert entry to retrieving keys. In this case, the officer found an easier way of obtaining covert entry by simply picking the lock. The officers' use of this alternative means, which resulted in a covert entry, was consistent with the warrant. As the trial judge said: "A fair reading of the terms and conditions of the general warrant did not mandate that keys be obtained."

[199] In the appendix to the warrant, which sets out powers, terms and conditions, a process is set out for obtaining keys in a covert manner:

> Officers will obtain keys in a covert manner with the assistance of peace officers from the Toronto Police Service Intelligence Services that are trained and qualified to do so.

[200] We do not read this provision as requiring the officers to obtain keys to effect the covert entry authorized in the warrant. As we have said, the warrant authorizes covertly retrieving keys, but neither the warrant nor the appendix is written in a way that requires the police to only enter by using the keys.

[201] We would not give effect to these grounds of appeal.

(12) Are the verdicts in respect of Rosa for possession of firearms and ammunition unreasonable?

[202] The firearms and ammunition found in the storage locker formed the basis for the firearms offences for which Lucas and Rosa were jointly charged and convicted.

[203] Rosa challenges his convictions for these offences as being unreasonable. He argues that there was insufficient evidence of his knowledge and control of these firearms to constitute his possession of them for the purpose of these offences. He distinguishes his position from that of Lucas, who does not challenge the reasonableness of his convictions for the same offences. Lucas acknowledges that the fact that the locker was rented by his girlfriend and other evidence connecting him to the locker could reasonably support the conclusion that he was in possession of its contents.

[204] The issue here is simply whether there was evidence upon which a reasonable jury properly instructed could find Rosa guilty of the firearm offences. The appellant Rosa says that the evidence does not reasonably support the conclusion that he had knowledge or any control over the firearms and ammunition in the locker.

[205] We disagree. As found by the trial judge in dismissing Rosa's application for a directed verdict on the firearms offences, there was evidence from which the jury might draw the following conclusions:

- Lucas and Rosa were very closely associated with each other and they were engaged in a conspiracy to traffic in cocaine.

- They were using the storage locker as a place to hold cocaine.

- Rosa called Lucas immediately after learning of an attempted break-in at his home. With Lucas serving as look-out, Rosa went into his house and exited with something concealed under his coat.

- After appearing to have removed some object from his home, Lucas and Rosa drove together to the storage locker and one or both entered it.

- Inside the locker was a safe containing a cooler bag in which the police discovered the two firearms, the ammunition and a Blackberry. The Blackberry inside the storage locker was password protected with the same password as a Blackberry that was later seized from Rosa's home. The evidence of the identical passwords to the Blackberries was capable of connecting Rosa to the contents of the cooler bag, including the firearms and ammunition.

[206] On this evidence, it was open to the jury to find that the shared criminal activities of Lucas and Rosa, their joint visit to the locker, and the Blackberry connecting Rosa to the contents of the cooler bag, were sufficient to permit the reasonable conclusion that not just Lucas, but Rosa too had knowledge and control over the firearms and ammunition found in the cooler bag. It was reasonable to conclude that he was therefore in possession of them.

[207] This ground of appeal fails.

(13) Did the trial judge err in his instructions to the jury regarding the admission of and/or use the jury could make of the box seized from the locker against the appellant Coyle?

[208] Coyle was charged together with the appellants Lucas, Rosa and Chau with conspiracy to traffic cocaine. The trial judge was therefore obliged to charge the jury about the three steps set out in *R. v. Carter*, [1982] 1 S.C.R. 938, at p. 947, that they were required to follow to determine whether the Crown had proven the conspiracy charge. First, the trier of fact must be satisfied beyond a reasonable doubt that the alleged conspiracy exists. Second, if satisfied the alleged conspiracy exists, the trier of fact must review all of the evidence directly admissible against the accused and decide his membership in the conspiracy on a balance of probabilities. Third, if satisfied that the accused is probably a member of the conspiracy, then the co-conspirator exception to the hearsay rule applies, and the trier of fact may consider the acts and declarations of the co-conspirators in furtherance of the conspiracy as evidence against the accused on the issue of his or her guilt beyond a reasonable doubt.

[209] With respect to the second step, namely whether the evidence directly admissible against each appellant established his membership in the conspiracy

on a balance of probabilities, the trial judge summarized the evidence the jury could consider with respect to each appellant.

[210] In addressing the evidence relating to Coyle, the trial judge referred to various meetings, texts, phone calls and items discovered in Coyle's residence and in his car. However the trial judge began his review of the evidence available against Coyle at step two by referring to the box. He said this:

> Ryan Coyle,
>
> In terms of Ryan Coyle, you know that a cardboard box with his address and cell phone number was found in the storage unit at 389 Paris Road. The cardboard box had a kilogram of cocaine in it.

[211] Coyle raises two issues with this. His main argument is that the cocaine brick in the box could not be linked to him and therefore could not link him to the alleged conspiracy. He says that even if his address and phone number on the label was some evidence linking him to the box, that did not create an evidentiary link between him and the cocaine brick in the box. He says that it was highly prejudicial for the jury to consider this evidence at this stage, particularly since the alleged purpose of the conspiracy was to traffic in cocaine and since the amount of cocaine in the box was so large.

[212] We agree that the trial judge ought not to have included the cocaine brick in the body of evidence given to the jury to consider at the second step of the *Carter* analysis. There was simply no evidence that the cocaine in the box was to be sent to the address on the label or, even if it was intended to be sent to his address, there was no evidence Coyle had any knowledge of it. Equally there was no evidence of another possibility, namely that the cocaine was being stored in the box which previously had been used to send something else to his address. Both possibilities are merely speculation. If not connected to Coyle, the cocaine in the box could not help to show that he was probably a member of the conspiracy to traffic cocaine.

[213] Coyle's secondary argument is that the box itself should not have been considered by the jury at the second step of *Carter*. He says that even if the label on the box was some evidence linking him to the box, the label was essentially a statement by an unknown individual that the box was at some point destined for him and, as hearsay, was inadmissible against him.

[214] We do not agree. The label is better viewed as simply physical evidence that provides some linkage or connection between Coyle and the box. Given that the box was found in the locker together with many other pieces of evidence that

could be connected to the alleged conspiracy, the box could provide some link between Coyle and the contents of the locker. If so, it could provide some circumstantial evidence of Coyle's probable membership in the conspiracy. This argument fails.

[215] Although the jury ought not to have been left to consider the brick of cocaine as evidence against Coyle at the second step of *Carter*, in our opinion, no substantial wrong or miscarriage of justice resulted. Apart from the cocaine brick, there was an overwhelming body of direct evidence pointing to his probable membership in the conspiracy to traffic cocaine. This includes repeated inexplicable meetings in parking lots and underground garages involving odd package exchanges and counter-surveillance measures; the use of guarded language in texts and phone calls between Coyle and other alleged co-conspirators consistent with drug trafficking; the discovery of items in Coyle's residence consistent with drug trafficking including a money counter, phone debugger, numerous cell phones and over $100,000 in cash; and, the discovery of approximately eight ounces (226 grams) of cocaine in Coyle's vehicle that expert opinion indicated was, because of the amount, possession for the purposes of trafficking.

[216] Given this evidence, the jury's conclusion that Coyle was probably a member of the conspiracy to traffic cocaine would necessarily have been the same without considering the brick of cocaine found in the box labelled with Coyle's address. We would therefore apply s. 686(1)(b)(iii) of the *Criminal Code*.

[217] This ground of appeal fails.

(14) Were the searches of Lucas' vehicle and home on March 21, March 25 and April 29, 2006 unreasonable?

[218] The trial judge, Nordheimer J., dealt with the general warrant search of Lucas' vehicle and residence in reasons reported at [2009] O.J. No. 3420. The appellant Lucas submits that there were not sufficient grounds to permit these searches in accordance with the general warrants. In particular, he contends there was not sufficient information to meet the condition in the warrants that authorized execution "when reasonable grounds exist to believe that the [named items] are present".

(i) The vehicle search on March 21, 2006

[219] The circumstances leading to the search of Lucas' vehicle on March 21 are accurately summarized in the trial judge's reasons. The determination of whether

there were sufficient reasonable grounds for this search turns on findings of fact by the trial judge.

[220] The undisputed facts are that police surveillance officers saw Lucas and Rosa drive to a parking lot. An unknown male drove into the parking lot and parked behind Lucas' vehicle. Lucas left his vehicle and got into the vehicle of the unknown male. Lucas and Rosa had previously been seen with this man. After an animated 20 minute conversation, Lucas returned to his own vehicle.

[221] The disputed evidence was whether the officers saw Lucas put something in the back of his vehicle. The actions of Lucas were being videotaped by a member of the surveillance team. However, just as Lucas returned to his vehicle, another vehicle pulled into a parking spot and blocked the view of the officer who was videotaping the events. Thus, the videotape did not actually show Lucas placing anything in his vehicle. However, the trial judge accepted the evidence of one of the surveillance officers who observed Lucas place a package in the rear of his vehicle. This officer proceeded to execute the general warrant by surreptitiously entering Lucas' vehicle. In the rear of the vehicle, he observed a bag containing bundles of money, which he estimated totalled about $50,000.

[222] At para. 12 of his ruling, the trial judge explained why he accepted the surveillance officer's evidence that he believed Lucas was placing something in the rear of the vehicle. There are no grounds to set aside this finding. As to whether there was sufficient evidence to meet the reasonable grounds requirement, the trial judge said the following, at para. 13:

> Finally on this aspect of the application, it must be remembered that the investigation had, by this point, collected a great deal of information that implicated Mr. Lucas and others in criminal activity including drug trafficking. The observations of Mr. Lucas must be considered against that backdrop. Activities such as having a conversation in a car with another person in a grocery store parking lot that might be inherently suspicious become more so when viewed against all of the other information that the police had from other surveillance and from intercepted communications.

[223] This conclusion was open to the trial judge and the appellant has not shown any basis for interfering with this finding.

(ii) The residence searches on March 25 and April 29, 2006

[224] On March 25, the police covertly entered Lucas' home. The investigators selected this date because they knew that Lucas was going to be away from his

residence for an extended period of time. The police found various incriminating items including a hollowed-out book containing $10,000. The appellant's challenge to the execution of the warrant on this date centres on the allegation that the evidence was not sufficiently current to justify reasonable grounds for the entry.

[225] As the trial judge pointed out at para. 19 of his ruling, by the time of this search, the police had a considerable amount of evidence showing Lucas' involvement in weapons and drug offences. They had the evidence obtained from the February 25 entry into the locker and the results of the search of Lucas' vehicle on March 21 where the police found approximately $50,000 in cash. Given this evidence and the information from the wiretap and physical surveillance, there were reasonable grounds to believe that evidence relating to the offences would be found in Lucas' residence. Those grounds were, as found by the trial judge, reasonably contemporaneous with the March 25 search.

[226] The appellant submits that nothing had taken place after March 25 that could give the police grounds for the further search of Lucas' residence on April 29. The prosecution relied upon two particular pieces of evidence. During a traffic stop on April 10 in connection with an unrelated homicide investigation, the police found materials in Lucas' vehicle's tire well that could be used to package cocaine.

[227] In addition, on April 24, the police saw Lucas leave the residence of another person believed to be one of Lucas' drug distributors. Lucas was observed to have a package under his jacket, which he took to his home. When the police covertly entered Lucas' residence on April 29, they found jewellery in the hollowed-out book where the $10,000 had been.

[228] Again, we reject the appellant's contention that there was insufficient contemporaneous information to establish reasonable grounds for the April 29th search. Given the information in possession of the police, there were reasonable grounds to believe that evidence relating to the offences named in the ITO would be found in Lucas' residence. As found by the trial judge, the evidence in possession of the police was sufficiently recent to justify the search. Events had taken place since the March 25 search to give grounds for believing further evidence would be found at Lucas' residence on April 29.

[229] We would not give effect to these grounds of appeal.

(15) Did the trial judge err by admitting evidence seized in an unreasonable search of Chau's vehicle pursuant to s. 24(2) of the *Charter*?

[230] The appellant Chau argues that the trial judge erred in admitting the evidence seized in the warrantless search of his vehicle pursuant to s. 24(2) of the *Charter*: see [2009] O.J. No. 3417

[231] Early on in the Project XXX investigation, Chau was identified as a suspect who, together with Lucas, Rosa and Coyle, was alleged to have supplied drugs to the Doomstown Crips. Chau was observed in activities believed to be drug-related, including bag exchanges with these three appellants. The police came to believe that Chau was supplying cocaine to these three individuals at the kilo or multi-kilo level.

[232] On May 16, 2006, two days before the May 18 planned "take-down" day for the overall investigation, the police had Chau under surveillance from 9:15 in the morning. In the early evening, Chau was observed getting into his vehicle at his home in Vaughan. He drove to Coyle's house in Toronto where he met up with Coyle. They entered the residence, with Chau carrying a laptop bag and a white plastic bag. Twenty minutes later, Chau emerged with the laptop bag, although it looked heavier and bulkier than when he went in. He then drove to a restaurant in Toronto and went in, leaving his laptop bag in his vehicle.

[233] The police believed that the laptop bag and its contents constituted evidence of a drug transaction. They considered various ways of obtaining it. Getting a search warrant presented the risks that Chau would not stay in any one place long enough for them to do so and that obtaining the warrant would alert Chau and, through him, others, to the ongoing investigation just two days before its culmination. Alternatively, arranging for a traffic stop that could result in a search of the vehicle raised the concerns that it could not be set up in time and that proper grounds for the search would not be available.

[234] The third option was a warrantless search based on the exigent circumstances that the police believed existed. They could easily lose sight of Chau in downtown Toronto in the dark, and thus could lose the laptop bag as evidence, or at least raise continuity problems in respect of Chau's possession of it.

[235] To avoid losing this evidence, the police had a plain clothes surveillance team member smash the driver's side window, grab the laptop bag and run away. This drew the attention of by-standers who called 911. When Chau emerged from the restaurant, both he and the uniformed officers who arrived treated the break-in as a common theft.

[236] When the surveillance team examined the contents of the laptop bag, they found bundles of cash totalling approximately $17,000.

[237] The appellant brought a pre-trial application to exclude the evidence obtained from this search. It was decided by the trial judge on June 26, 2009. He found that, while exigent circumstances existed for the search, it was conducted in a way that was unreasonable and therefore violated s. 8 of the *Charter* (at paras. 16-27). That conclusion is not contested in this court.

[238] The trial judge then turned to s. 24(2) to determine if the evidence seized should nonetheless be admitted. He considered the criteria set out in *R. v. Collins*, [1987] 1 S.C.R. 265, and the applicable law. He first found that the admission of this non-conscriptive evidence would not presumptively render the trial process unfair (at para. 30).

[239] He then found that the breach of Chau's s. 8 *Charter* rights was at the lower end of the seriousness scale primarily because, although the smash and grab technique used was troubling, the police acted in good faith, reasonably believing they had to move quickly to preserve the evidence or risk the broader investigation. He also observed that there is a much reduced expectation of privacy in a person's vehicle (at paras. 32-37).

[240] Finally, he found that excluding the evidence would damage the administration of justice more than its admission because of the seriousness of the charges and the significance of the evidence as part of the prosecution's case against Chau (at paras. 38-40). Balancing these factors, he concluded that the evidence ought to be admitted.

[241] A few weeks after the trial judge's ruling, on July 17, 2009, the Supreme Court of Canada released *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, which revised the criteria to be considered in applying s. 24(2). As a result, the appellant obtained leave to revisit the s. 24(2) issue. The trial judge heard submissions and then addressed the three *Grant* criteria in reasons reported at [2009] O.J. No. 3514.

[242] As to the seriousness of the *Charter*-infringing conduct, the trial judge repeated his earlier conclusion that it was at the lower end of the spectrum. He reiterated that, although the way the police did their search warranted criticism, their desire to preserve evidence reduced the seriousness of the breach (at para. 5).

[243] As to the impact of the breach on the appellant's *Charter*-protected interests, the trial judge found it to be lessened because of the good faith of the

officers involved and given the lesser expectation of privacy applicable to the appellant's vehicle (at para. 7).

[244] Third, the trial judge repeated that society's interest in an adjudication of these charges on the merits was better served by the admission of the evidence and furtherance of the truth-seeking function of the criminal justice process than by its exclusion (at para. 9).

[245] Finally, the trial judge weighed these various factors and reached the same conclusion as before, namely that the evidence be admitted (at para. 10). It is this conclusion that the appellant attacks on this appeal.

[246] The appellant does not contest that the trial judge, in coming to his s. 24(2) conclusion, considered the proper factors. Where this is so, and the trial judge has not made any unreasonable finding, this court must give considerable deference to his s. 24(2) assessment: see *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44.

[247] The appellant argues that the *Charter* breach was serious and that the trial judge erred in not so finding. Contrary to the appellant's submission, it was reasonable for the trial judge to find that the police acted in good faith believing they had to move quickly to preserve the evidence and not risk the entire investigation. In other words, they had no other good option. Moreover, there was no basis in the evidence to conclude that they acted in ignorance of the law. If anything, it is implicit in the police evidence that they believed they had the power to conduct an exigent search. Balancing these considerations against what can only be described as the unjustifiable method of executing the search, we cannot find that placing this search on the less serious end of the spectrum is unreasonable.

[248] Nor do we find unreasonable the trial judge's conclusion that the impact on the appellant's *Charter*-protected interests was less severe because of his lesser expectation of privacy in his vehicle.

[249] Finally, we agree that the seriousness of the charges and the importance of their adjudication on the merits required admission of this evidence not its exclusion.

[250] Overall, the balancing of these factors rendered a result that we cannot say was unreasonable.

[251] This ground of appeal therefore fails.

(16) Did the removal of the knock and notice requirements in the take-down warrants violate the appellants' s. 8 *Charter* rights?

[252] The take-down warrants executed on May 18, 2006 authorized the police to enter and search the residences of the appellants and, at the same time, to effect their arrests in the residences. The warrants authorized the police to enter the premises without knocking or giving notice to the occupants. The authorizing judge was of the view that it was unnecessary to issue a separate warrant authorizing the arrest of each person while the searches were being carried out (so-called "Feeney" warrants). The appellants do not challenge that aspect of the warrants in this court.

[253] The appellants argue that the execution of these warrants was unreasonable in three respects.

[254] The legal context for all three arguments is that in order to conduct a reasonable search of a dwelling house, the police should, except in exigent circumstances, give the occupants notice by knocking or ringing the doorbell, identify themselves as law enforcement officers, and state the lawful reason for their entry. Where the police depart from the "knock and notice" approach, there must be evidence available to them at the time they acted, that they thought it necessary to dispense with knock and notice because they had reasonable grounds to be concerned about harm to themselves or the occupants, or about the destruction of evidence: see *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at paras. 18 and 20.

[255] The appellants Lucas and Rosa's first argument is that the execution of the warrants against them could not be said to be in exigent circumstances because the police could have arrested them the previous evening when Lucas was out with his wife and Rosa was also present. Lucas and Rosa say this would have avoided the necessity for the dynamic entry of their residences the next morning.

[256] In reasons reported at [2009] O.J. No. 5333, the trial judge dismissed this argument. He found, at para. 17, that the evidence made it obvious that a synchronized approach to the searches and arrests was necessary to prevent some targets from alerting others, leading to the real possibility of the destruction of evidence and the escape of intended targets. Arresting Lucas and Rosa in the mall parking lot would have possibly been fatal to the needed synchronized approach. Moreover, the arrests of Lucas and Rosa in a public place could have put the safety of the police and the public at risk since they were both believed to be trafficking guns and drugs to a violent gang (at para. 18).

[257] The trial judge's assessment of this evidence must be given substantial deference on appellate review: *Cornell*, at para. 25. Moreover, it is an assessment with which we agree. There was ample evidence before the trial judge that the arrests of Lucas and Rosa in the mall parking lot would have created a real risk of evidence destruction and harm to the police or the public. Avoiding these risks does not render the dynamic entry of the residences early the next morning unreasonable.

[258] This argument fails.

[259] Second, the appellants say that the execution of these warrants was unreasonable because they were effected entirely on the basis of an operational plan to coordinate all searches, which all were to be made on a "no-knock" basis, without considering the particular circumstances of each entry.

[260] However, as the trial judge pointed out, one of the lead investigators testified before him on the *voir dire* that, despite the overall plan, in each case the team leader had to make his or her own determination prior to executing the warrant that a "no-knock" entry was justified. That evidence is fatal to this argument.

(17) Did the trial judge err by finding that the dynamic entry search of Chau's residence was reasonable and by failing to exclude the evidence seized during the search?

[261] The appellant Chau contends that the police had no basis to effect a "no-knock" forced entry of his residence. He says that the police had no information linking Chau to violence or firearms and therefore no basis for concern about officer safety if they did not use a dynamic entry.

[262] In reasons reported at [2009] O.J. No. 5333, the trial judge dismissed this argument for two reasons. He concluded that the information the police had about Chau's direct connection with Lucas and Rosa (who had access to firearms), raised the possibility that Chau might well have come to possess a firearm from them. He also found that the information indicating that Chau was a high-level dealer in the notoriously dangerous business of drug-dealing, where many have firearms for their own protection, raised an additional concern for officer safety if a dynamic entry was not used (at para. 19).

[263] In our view, there was ample evidence for the trial judge to take this view of the evidence and to conclude that these exigent circumstances justified the use of a no-knock entry of Chau's residence.

[264] This ground of appeal therefore fails.

(18) Did the trial judge err by allowing the Crown's expert witness to comment in his evidence in chief on a hypothetical conversation?

[265] The appellant Coyle argues that the trial judge erred in allowing an expert witness to give opinion evidence about the meaning of coded language in a hypothetical conversation between drug dealers. Coyle says that the hypothetical conversation was not meaningfully different from the actual intercepted communications that were in evidence. He says that the Crown effectively sought to have the expert offer an opinion on the ultimate question for the jury, namely the meaning of the actual conversations. For that reason, he argues the opinion should have been excluded.

[266] By way of background to this ground of appeal, the expert in question was Detective Constable Canepa. All parties agreed that he was qualified to give opinion evidence on the use of coded or guarded language between drug dealers in their dealings and that expert evidence about this was relevant and necessary to assist the jury. No issue was taken with the expert opining that certain communications were "consistent with" them being communications about drugs (although the risk of misunderstanding from the phrase "consistent with" is now well-known, see *e.g.*, *The Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Queen's Printer for Ontario, 2008) v. 3, p. 433).

[267] At trial the Crown sought to have D.C. Canepa testify about the meaning of the actual communications tendered in evidence. The various defence counsel generally took the position that the expert testimony should be restricted to advising the jury that coded language is often used amongst drug dealers and, at most, giving the jury a glossary of terms typically used.

[268] The trial judge ruled that D.C. Canepa could not be asked if the actual intercepted communications were consistent with them being communications about drugs because of his concern that this would usurp the jury's fact-finding role on the ultimate issue in the trial. However, he permitted the Crown to elicit opinion evidence about a hypothetical conversation similar to the actual conversations that the Crown alleged to be coded.

[269] At trial, counsel for the appellants Lucas, Rosa, Coyle and Chau took different positions in response to the trial judge's approach to the presentation of the expert evidence. Counsel for Lucas and Chau did not oppose the use of a hypothetical conversation, while counsel for Rosa opposed any hypothetical that might include "buzz words" taken from the actual intercepts. In contrast, counsel for Coyle contended that if any conversation was to be put to the expert witness,

it should be from the actual intercepts and not a hypothetical one. The trial judge refused to accede to counsel for Coyle's position.

[270] In oral argument before this court the appellant says that D.C. Canepa's opinion should not have been admitted because it addressed the ultimate issue for the jury.

[271] We would not give effect to the appellant's position. There is no longer a general prohibition on expert evidence in respect of the ultimate issue: see *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 24. As explained in *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 84, the gatekeeper function of the trial judge concerning the admissibility of expert evidence requires an assessment of the costs and benefits of admitting the evidence as part of determining its legal relevance. Part of the costs side of the ledger is a risk assessment of the extent to which a jury faced with an opinion from a recognized expert may abdicate its fact-finding role in favour of the conclusion reached by someone said by the court to be more qualified. The closer the opinion evidence comes to the ultimate question the jury must answer, the more this risk may be heightened.

[272] In discharging his gatekeeper responsibility, the trial judge determined that permitting D.C. Canepa to give his opinion about the meaning of a hypothetical conversation using similar language to the actual conversations reduced that risk sufficiently, while still remaining useful to the jury. Defence counsel were permitted to conduct vigorous cross-examinations of D.C. Canepa during which he confirmed that he could not speak definitely about the true meaning of the intercepts.

[273] The assessment as to whether the expert should have been permitted to give his opinion on the meaning of a hypothetical conversation that was similar to an actual conversation between the accused was best made by the trial judge in the context of the trial, particularly in a case where counsel for the accused took conflicting positions on this issue. Here the trial judge made the assessment in the context of all the circumstances and admitted the evidence. That conclusion is entitled to deference on appeal: see *Abbey*, *at* para. 97. We see no basis to interfere with it here. It was entirely reasonable in the circumstances.

[274] This ground of appeal is dismissed.

DISPOSITION

[275] For these reasons, we dismiss the appeals of all five appellants.

Released: "MR" July 23, 2014

“M. Rosenberg J.A.”

“S.T. Goudge J.A.”

“K.M. van Rensburg J.A.”

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[1] Title III of the *Omnibus Crime Control and Safe Streets Act*, 18 U.S.C.A., §§ 2510-20.