C64280

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

KEN YING MAI

Applicant/Appellant

APPELLANT'S FACTUM
(CONVICTION APPEAL)
(JOINT APPEAL WITH THE APPELLANTS YU, TANG AND SACCOCCIA)

PART I: STATEMENT OF THE CASE

1. The Appellant was charged with trafficking in association with a criminal organization, conspiracy to traffic in a controlled substance, possession of heroin, cocaine, methamphetamine, MDMA, and marijuana for the purpose of trafficking, and possession of the proceeds of crime. He was tried at the Superior Court of Justice in Toronto. At the outset of proceedings on March 2, 2016, the Appellant, along with 34 co-accused, brought an application pursuant to ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms* challenging the wiretap authorizations and general warrants used to gather the evidence against them. The 13-day application before the Honourable Justice Code was dismissed in two rulings, on June 27 and December 21, 2016. On April 10, 2017, the Appellant entered a plea of not guilty before the Honourable Justice McMahon at the Superior Court of Justice in Toronto. The evidence against him was entered by way of an agreed statement of facts and the Appellant was convicted. On September 21, 2017, he

was sentenced to 13 years of imprisonment, less credit of 19 months for time spent in presentence custody and on restrictive bail conditions.

2. The appellants submit that Code J. erred by dismissing the ss. 8 and 24(2) applications. This factum address one of the issues raised on that application: whether police breached their obligation to make full, frank and fair disclosure by:

- Failing to provide the issuing justice with complete and accurate information about the function, capacity and use of Mobile Device Identifiers used in the investigation;
- Failing to disclose to the issuing justice the nature and extent of the police investigators' unauthorized entries into multi-unit buildings; and
- Failing to disclose to the issuing justice that police had installed covert video cameras in the hallways of multi-unit dwellings without judicial authorization.

The Appellant adopts the arguments of his co-appellants as they apply to his case and seeks leave to appeal the sentence imposed. His sentence appeal is addressed in a separate factum.

PART II: SUMMARY OF THE FACTS[1]

i) Overview of the Investigation

3. Between October 2013 and May 2014, the appellants were targeted by Project Battery which, along with Project Rx, targeted dozens of individuals suspected of association with criminal organizations. In February 2014, police submitted a joint wiretap and General Warrant application to McMahon J. based on affidavits from Detective Ranbir Dhillon, of the Toronto Homicide Squad, Police Constable Dana Clark on behalf of Project Battery led by the OPP and the Asian Organized Crime Task, and Sergeant Shingo Tanabe on behalf of Project Rx led by the Toronto Guns and Gangs Task Force. McMahon J. granted authorizations on February 24, April

[1] The Appellant accepts the statement of facts outlined in the factums of his co-appellants subject to a number of additions and clarifications.

15 and May 2, 2014. Prior to receiving authorization, police surreptitiously entered the common areas of multi-unit buildings to make observation and install covert cameras. This activity was not properly disclosed to McMahon J. in the affidavits in support of the applications, notwithstanding that they sought authorization to enter common areas and install cameras. The affiants also did not fully disclose information about the Mobile Device Identifiers used during the investigation.

ii) Evidence Gathered During the Investigation

4. The evidence linking the Appellant Mai to the offences under appeal arises from his association with two units for which he was the lease-holder: unit 1719 at 38 Joe Shuster Way and unit 1211 at 125 Western Battery Road. The Appellants Tang and Yu were also associated with units at 125 Western Battery Road, while Saccoccia was linked to unit 1420 at 38 Joe Shuster Way. Between December 4, 2013 and April 2, 2014, police entered the common areas at 38 Joe Shuster Way without authorization on nine occasions. Between January 20, 2014 and April 15, 2014, there were 12 unauthorized entries into the common areas at 125 Western Battery Road. Authorization to enter both buildings was granted on April 15, 2014.

Agreed Statement of Facts, Joint Appeal Book, pp. 4718-4740

5. On January 29, 2014, police installed a motion-sensor video camera in the hall near unit 1719 at 38 Joe Shuster Way. The camera captured the Appellant Mai 46 times between January 30 and April 15, 2014. During this time, the camera recorded Tang once, Yu twice, and Saccoccia four times. Other targets in the investigation were captured on camera 26 times before April 15, 2014 when police received judicial authorization to install the camera. The camera recorded the Appellant Mai 18 times between April 16, 2014 and the takedown on May 28, 2014. Other targets were captured on camera attending the unit 12 times after April 15, 2014.

Agreed Statement of Facts, Appeal Book on Sentencing, pp. 40-43

6. On April 15, 2014, police received authorization to install an audio probe inside unit 1719. It recorded the Appellant Mai making crack cocaine on May 1, May 11, and May 22, 2014. Pursuant to the Authorization, police made three covert entries into unit 1719:

- On April 23, 2014 police entered and found 50 grams of heroin, 190 grams of cocaine, 82 grams of an unknown substance, and 61 grams of marijuana.
- On April 30, 2014, police entered and found 98.6 grams of cocaine, 80 grams of an unknown substance, 659 pills or 197 grams of mixed MDMA, BZP, and Ketamine, 10.7 grams of BZP, 188 grams of marijuana, and 140 grams of phenacetin.
- On May 14, 2014 police entered and found 75 grams of crack cocaine, 197 grams of ketamine, 4.5 kilograms of marijuana, and 215 grams of phenacetin as well as unknown amounts of heroin, BZP and cocaine.

Agreed Statement of Facts, Joint Appeal Book on Sentencing, pp. 39-40

7. The April General Warrant authorized police to install a camera outside Mai's residence at 125 Western Battery Road. It captured Yu and Tang, also residents in the building, five times, and captured other targets five times. Mai was captured on a different camera attending Yu's unit twice.

Agreed Statement of Facts, Joint Appeal Book on Sentencing, pp. 47-50

8. The relevant physical surveillance relating to Mai in the Agreed Statement of Facts is:

- In mid-February Mai attended the funeral of Peter Nguyen, a member of the Asian Assassins gang who had been murdered.
- On April 1, 2014, Mai was seen in the company of a target delivering a box. Later, Mai was seen exchanging a bag with an unknown male.
- On April 16, 2014, Mai was seen leaving one address with a backpack, then leaving the backpack in the vehicle of another target. Police later seized the backpack which contained one ounce of cocaine and half a kilogram of marijuana.
- On May 1, 2014, Mai was followed to a rendezvous with an unknown man. The other man exited his taxi, entered Mai's car, and remained inside for two minutes.
- On May 13, 2014, Mai was observed arriving at 38 Joe Shuster Way with a Goodlife gym bag and a box. He was later observed returning to 38 Joe Shuster Way with a

Harry Rosen bag. On May 14, 2014, police entered unit 1719 at 38 Joe Shuster Way and located a Goodlife bag containing 4 pounds of marijuana, a box containing 3.5 pounds of marijuana, and, near an empty Harry Rosen bag, 3 pounds of marijuana.

The Appellant Mai was never intercepted on a wiretap.

Agreed Statement of Facts, Joint Appeal Book on Sentencing, pp. 44-46

PART III: THE ISSUES AND THE LAW

Issue #1 – The Mobile Device Identifiers

i) Overview

9. On February 21, 2014, Stg. Shingo Tanabe swore an affidavit seeking authorization for, among other things, a General Warrant allowing RCMP officers to use a mobile device identifier (MDI) during the investigation. An MDI, also known as a "Stingray", is a surveillance technology that mimics a cell phone tower in order to identify a specific phone by revealing its International Mobile Subscriber Identity (IMSI) and International Mobile Equipment Identity (IMEI) numbers. The former attaches to the SIM card placed in a cell phone; the latter to the individual phone. The MDI is deployed by an investigator with eyes on the target and used determine, through process of elimination, which phone or SIM card the target is using. In his affidavit, Sgt. Tanabe swore:

> If required by law, I request that a General Warrant be authorized to use a Mobile Device Identifier (MDI) **for the purpose of identifying any device being used for communicate** by a principal known person in paragraph 3(a) of the proposed Authorization where there are reasonable grounds to believe that one of the Principal Known persons is using a mobile device to communicate **that was not previously known**.
>
> I believe that the Principal Known Persons of the proposed Authorization will communicate on mobile devices that are not known to the investigators at this time. I am aware that persons engaged in criminal activities such as narcotics and firearms trafficking will at times change their devices to avoid police detection. When this happens, investigators are challenged with identifying the new device that the proposed named party had resorted to. If investigators are unable to quickly identify the new device resorted to by the proposed named party, evidence of the named offences will be lost. Investigators require a means to covertly identify the numbers of these mobile devices without alerting the subjects of the investigation. I believe that the Mobile Device Identifier will assist investigators with this goal. **Through a previous investigation I am**

aware of the following in regards to the Mobile Device Identifier and the operation of the Mobile Device Identifier:

...

(v) **The MDI will collect device information from all mobile telephones within its range, including those which are not related to this investigation**. This information will include each mobile telephone's IMSI, IMEl, ESN and/or MSID.

...

(viii) When the MDI is in use, mobile telephones within its range will be unable to complete or receive calls, but calls already in progress when the surveillance device is activated will normally not be affected.

(ix) The following measures will be taken to minimize the potential to cause unreasonable interference with any mobile telephones, since it is an offence under s. 9(1)(b) of the *Radio Communication Act* to interfere with or obstruct any radio communication without lawful excuse:

1. **The Operator will activate the MDI for not more than 3 minutes at a time, with rest periods of at least 2 minutes between activations**... (emphasis added)

McMahon J.'s authorizations largely adopted the language proposed by Sgt. Tanabe.

Affidavit of Sgt. Tanabe, Joint Appeal Book, pp. 3000-3003
February and April Authorizations, Joint Appeal Book, pp. 7453-7454; 7530-7531

10. The MDI was deployed by RCMP officers 15 times during the investigation. As a result of this, investigators identified two phone numbers and intercepted 73 phone calls on one of the numbers.

MDI Raw Data, Joint Appeal Book, pp. 4432-4650
Submissions of Mr. Bottomley, Vol. 6, p. 171

ii) The Defence Attack on the MDI Authorization

11. The defence argued that Sgt. Tanabe's affidavit was deficient because it did not disclose:

1) That MDIs have two functions: one that captures all cellphone signals in the vicinity, and relies on a process of elimination to determine which phone is being used by a target and a second which allows the officer deploying it to input a specific phone number and verify the location of that phone and the person using it (the "locating" function);

2) That MDIs have two modes, one that interrupts phone calls for 15 seconds, and one that interrupts calls for two minutes which is used in circumstances where the target is particularly suspicious of police surveillance; and

3) That the "three minute rule" in the ITO and authorization which limited operation of the device to 3 minutes at a time with 2-minute rest periods, was not followed by the officers who instead deployed it for three minutes on one frequency and then switched to another frequency to continue deploying it in the same area.

iii) Sgt. Tanabe's Testimony

12. Sgt. Tanabe testified that he had limited experience with MDIs.

> Q. Had you been involved in prior cases where you had sought authorization for a stingray or used a stingray?
> A. **I have not... It was new to me.** I did not know if it was necessarily new to police, other police services.
>
> ...
>
> Q. **First time in 15 years you've seen this device as a possible tool was in this case?**
> A. **Correct**...
> Q. **So this is the first time you heard it?**
> A. **Correct.** (emphasis added)
>
> *Testimony of Sgt. Tanabe, Transcript, Vol. 3, pp. 88-97*

13. Tanabe copied the MDI section of his ITO from an ITO prepared by D.C. Matthew Clarke as the affiant on Project Traveler in 2011. Tanabe explained:

> So when I, when - during Project Traveller it was a part 6 investigation. I was not the part 6 affiant. However, however, I was the - an investigator and an affiant on other search warrants. During this project the MDI was discussed, on how it's used, on how - what, what type of authorization is required, and I worked with Detective Constable Clarke every day, and he took the steps of going right to RCMP operators, the people who we believe know this device the best.

Tanabe retrieved Clarke's draft from a shared police file and copied it "word-for-word". Although the information was two years old, Tanabe did not discuss it with Clarke and did not contact the RCMP for an update. Sgt. Tanabe did not know that the MDI had two functions, that it had two modes or that it was not deployed according to the 3-minute rule. Had he known, he would have conducted further research. He understood that the three-minute rule was included to minimize the impact on third parties. Regarding the practice of jumping frequencies instead of resting the device, Tanabe agreed: "That wasn't the way that the operator indicated that device would be used."

Testimony of Sgt. Tanabe, Transcript, Vol. 3, pp. 88- 98

iii) Testimony of the RCMP Sub-Affiants

14. Sgt. Michael Roach, the RCMP's program manager for MDI deployment, was responsible for educating law enforcement about MDIs. He testified that the standard language provided to police by the RCMP does not mention the device's second function "because that's not the primary reason they're using it in most typical cases". The second function is for exigent circumstances, such as missing persons and kidnappings, but it was used twice in this investigation: when Cpl. Smith tested it on his own phone and, on May 23, 2014, when it was used to confirm that the target Than Vo was using the phone that police suspected he was using. Regarding the two modes, Roach testified that there was no way to tell from the raw data which mode had been used and the officers did not make notes of the mode they used. Roach testified that the reason for shutting the device down after 3 minutes was to "give a rest to those same phones so that you're not continuously affecting them." The discrepancy between the practice of switching frequencies after 3 minutes and the language in the ITO suggesting that the device would be rested arose because "[t]he standard wording that was provided was written by people that are not operators of the equipment so they didn't fully understand the capabilities and how it operated". This wording was in place before he joined the RCMP in 2013, and he did nothing to update it prior to McMahon J.'s Authorization. Roach agreed that it would have taken less than 10 minutes to correct the wording.[2]

Testimony of Sgt. Roach, Vol. 3, pp. 1, 4-5; 8-15; 16-20; 39-40
Affidavit of Sgt. Roach, Joint Appeal Book, p. 4376

[2] The language for the MDI part of ITOs was updated following this investigation. The new language does not identify the multiple functions and modes of MDIs. The 3-minute rule has been replaced with a clause saying that the MDI will transmit for "as little time as necessary". *New Draft Wording, Joint Appeal Book, pp. 7612-7613.*

15. Sgt. Roach reviewed a table prepared by the Crown outlining 48 alleged breaches of the 3-minute rule in this investigation. The longest period of constant activity, on March 26, 2014, lasted 15 minutes. Roach opined that switching frequencies was more efficient than resting the device between activations and did not constitute a greater invasion of privacy. When defence counsel pointed to instances where the MDI appeared to continue to monitor phones on one frequency after it had ostensibly switched to another, Roach could only guess at the reason.

Testimony of Sgt. Roach, Vol. 3, pp. 16-20; 50-55
Affidavit of Sgt. Roach, Joint Appeal Book, pp. 4379-4381
Exhibit 31, Joint Appeal Book, p. 7615
Submissions of Mr. Passeri, Vol. 6, pp. 393-395
Submissions of Mr. Bottomley, Vol. 6, p. 489

16. Cpl. Smith was responsible for educating affiants in project cases involving MDIs and deployed the MDI in this case. He confirmed that the wording in Tanabe's affidavit was standard. When asked why it did not mention the two modes, he testified: "That wouldn't be for me to determine. That's be up to the policy center at the RCMP." When asked why the standard wording did not mention the practice of jumping frequencies, Smith struggled to answer: "...that's the wording provided by – yeah."

Testimony of Cpl. Smith, Vol. 3, p. 63; 65- 67; 70-71

iv) The Application Judge's Reasons

17. Code J. held that the omissions were immaterial because their full and accurate inclusion in the ITO would not have affected the issuance of the Authorization:

> The real issue is whether they are *material* omissions, that is, could their full and accurate inclusion in the Affidavit have made a difference to either McMahon J.'s decision to grant the General Warrant or to the minimization conditions that he imposed on use of the MDI. Nothing stated in Sgt. Tanabe's Affidavit about the MDI can be described as "erroneous information" that should be excised. See: *R. v. Ebanks*. It is simply incomplete or, in the case of the "three minute rule," it was arguably not followed when the warrant was executed. The expanded record filed by the Applicants on the s. 8 Motion must now be taken into consideration "to fill the gaps in the

original ITO," as Fish J. put it in *R. v. Morelli.* The General Warrant can then be assessed, on this expanded record, to determine whether the omission is "material." [citations omitted]

Code J. concluded:

> In my view, the three deficiencies in Sgt. Tanabe's Affidavit summarized above were not "material" in the above sense. Had the relevant facts been fully explained to McMahon J., as they have been in the now expanded record before me, I am satisfied that it would have made no difference to issuance of the General Warrant or to its minimization terms.
>
> *R. v. Brewster,* 2016 ONSC 4133, at paras. 41-46

v) Arguments on Appeal

a. Erroneous Information in the ITO Should Have Been Excised

18. Justice Code erred by relying on *Ebanks* to find that the ITO contained no incorrect information and thus needed no excision. In *Ebanks,* the trial judge found that the affiant had omitted and misstated **some** information relating to the accused's motive and opportunity and remedied these omissions by deleting from the affidavit **all** the evidence relating to motive and opportunity. On appeal by the Crown, MacPherson J.A. held:

> In my view, in excising all information relating to motive and opportunity from the affidavit, even the correct information, the trial judge exceeded his jurisdiction. It is settled law that a reviewing judge must exclude erroneous information from an affidavit supporting a wiretap authorization. However, **there is no authority for a reviewing judge to exclude correct information**. Instead, the proper approach is for the reviewing judge, after excluding the erroneous information, to assess the affidavit as a whole to see whether there remains a basis for the authorization in the totality of the circumstances. (emphasis added, citations omitted)
>
> *R. v. Ebanks*, 2009 ONCA 851, 249 C.C.C. (3d) 29, at paras. 27-28

19. The appellants did not ask Code J. to excising every reference to the MDI. However, the following incorrect and misleading statements should have been excised:

(1) Purpose

20. Sgt. Tanabe swore that the purpose of employing the device was to permit investigators to locate the new telephone numbers of targets who frequently changed phones to avoid

detection. In fact, the device *also* allowed police to confirm or verify phone numbers that they already believed the suspect was using. The following paragraph should therefore be excised in the following way:

> ...I request that a General Warrant be authorized to use a Mobile Device Identifier (MDI) for the purpose of identifying any device being used for communicate by a principal known person in paragraph 3(a) of the proposed Authorization where there are reasonable grounds to believe that one of the Principal Known persons is using a mobile device to communicate ~~that was not previously known~~.

(2) Function

21. With respect to the function of the MDI, Sgt. Tanabe swore:

> The MDI will collect device information from all mobile telephones within its range, including those which are not related to this investigation. This information will include each mobile telephone's IMSI, IMEl, ESN and/or MSID.

This description of one of the MDI's function suggested that it was the only function. It was misleading and should have been excised.

(3) Limitation

22. Sgt. Tanabe swore:

> The Operator will activate the MDI for not more than 3 minutes at a time, with rest periods of at least 2 minutes between activations.

Code J. held that this was not "erroneous information" but simply something in the ITO that was not followed. Sgt. Tanabe may not have known that this was erroneous, but the RCMP sub-affiants knew that it was false. This phrase should therefore have been excised from the ITO.

(4) Source

23. Sgt. Tanabe's misled McMahon J. as to the source of his knowledge. He swore:

> **Through a previous investigation I am aware of the following** in regards to the Mobile Device Identifier and the operation of the Mobile Device Identifier... (emphasis added)

The assertion that he knew about the MDI "through a previous investigation" was misleading and should have been excised. It suggested that *Tanabe* had personal and professional experience with the technology, when in fact, this was the first time he had been involved with an MDI. The extent of his exposure to the technology was that he worked with another officer who had sought an MDI authorization. When Tanabe composed his ITO, he copied the information from D.C. Clarke's two-year old ITO and made no effort to confirm that it was still correct. Sgt. Tanabe's failure to mention his reliance on second-hand information from the RCMP (as recorded by D.C. Clarke) was an omission as to the source of his knowledge, which mislead the issuing justice into believing that he had personal knowledge of MDIs, when in fact, everything in the ITO pertaining to the MDI came from sub-affiants.

> *First Affidavit of Sgt. Tanabe, Joint Appeal Book, pp. 2133; 2137*
> *R. v. Agensys International Inc.* (2004), 187 C.C.C. (3d) 481 (Ont. C.A.), at para. 44; *R. v. Boucher* (2006), 225 C.C.C. (3d) 45 (Que. C.A.), at para. 16, leave to app' to S.C.C. ref'd [2006] 2 S.C.R. vi; *R. v. M. (N.N.)* (2007), 223 C.C.C. (3d) 417 (Ont. S.C.J.), at paras. 355-360

b. The Application Judge Should Not Have Amplified the Record

24. Code J. held that "[t]he expanded record filed by the Applicants on the s. 8 Motion must now be taken into consideration "to fill the gaps in the original ITO"". He cited a passage of *Morelli* for that principle:

> The facts originally omitted must be considered on a review of the sufficiency of the warrant application. In *Araujo*, the Court held that where the police make good faith errors in the drafting of an ITO, the warrant authorization should be reviewed in light of amplification evidence adduced at the *voir dire* to correct those mistakes. **Likewise, where, as in this case, the police fail to discharge their duty to fully and frankly disclose material facts, evidence adduced at the *voir dire* should be used to fill the gaps in the original ITO**. (emphasis added)

> *R. v. Morelli*, 2010 SCC 8, 252 C.C.C. (3d) 273, at para. 60
> *R. v. Brewster*, 2016 ONSC 4133, at para. 41

25. In *R. v. Jaser*, Code J. reasoned that this passage of *Morelli* authorizes a reviewing court to enhance an excised ITO with evidence from the *voir dire* in two distinct circumstances. First, the Court may rely on the doctrine of amplification where evidence is introduced by the Crown, the omissions were technical, and the officers were acting in good faith. Second, where the police failed to discharge their duty to fully and frankly disclose material facts, the Court should rely on any evidence adduced at the *voir dire* "to fill the gaps in the original ITO". In *Jaser,* Code J. declined to enhance the ITO in this second way. He wrote:

> None of the authorities, as far as I am aware, have used the Applicant's Record in this way on a s. 8 sub-facial review, that is, to *strengthen* the grounds for a search warrant or wiretap authorization. The difficulty with proceeding in this way is that none of this information was before the issuing judge, Snider J., and so it was never evaluated or relied on at first instance. It would be an entirely artificial exercise, and it would circumvent the warrant process, to conduct a s. 8 review on the basis of a significantly stronger record than what was before the issuing justice.

Relying on this Court's decision in *Harris,* Code J. held that previously undisclosed information that strengthens the grounds of the issuance of the warrant is best left for the s. 24(2) analysis.

R. v. Jaser, 2014 ONSC 6052, at paras. 77-84; *R. v. Harris* (1987), 35 C.C.C. (3d) 1 (Ont. C.A.)

26. Contrary to his approach in *Jaser,* in this case Code J. used evidence from the defence *voir dire* – unknown to McMahon J. – to enhance the ITO in the present case and find that the MDI General Warrant could have issued. He relied on the testimony of the sub-affiants that the secondary function and mode were infrequently used and no more invasive and their testimony that the practice of switching frequencies instead of resting was less intrusive, to conclude that, had this information been before McMahon J., the warrant could still have issued. This interpretation of *Morelli* is logically and legally flawed. Read in context, this passage of *Morelli* cannot be taken as establishing a second type of enhancement in cases, such as this one, where

there is no evidence of good faith and the errors/omissions are more than technical. Earlier in his judgement, Justice Fish rephrased and adopted the following passage of *Araujo:*

> Thus, in looking for evidence that might reasonably be believed on the basis of which the authorization could have issued, the reviewing court must exclude erroneous information. However, if it was erroneous despite good faith on the part of the police, then amplification may correct this information.

Justice Fish continued:

> The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO. Furthermore, **the reviewing court may have reference to "amplification" evidence — that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO — so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.**
>
> It is important to reiterate the limited scope of amplification evidence, a point well articulated by Justice LeBel in *Araujo*. **Amplification evidence is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds. The use of amplification evidence cannot in this way be used as "a means of circumventing a prior authorization requirement".** (emphasis added, citations omitted)
>
> *R. v. Araujo*, 2000 SCC 65, 149 C.C.C. (3d) 449, at paras. 58-59; *R. v. Morelli*, 2010 SCC 8, 252 C.C.C. (3d) 273, at paras. 41-43

27. Amplification, as envisioned by Fish J., was never intended to permit enhancement of ITOs based on evidence adduced by the defence for the opposite purpose. This interpretation circumvents the prior authorization requirement and rewards the police for failing to discharge their duty to be full, frank and fair while, counterintuitively, penalizing defence counsel for presenting a fulsome record on the *voir dire.* It is telling that no appellate court in Canada has adopted Code J.'s reasoning and that Code J. himself did not use it in *Jaser.*

28. Applying *Araujo* and *Morelli*, the dual function, dual mode, and practice of switching frequencies, along with the RCMP's explanations, should not have been added to the ITO on

review because there was no evidence that their omission was a good-faith error, nor could they be characterized as "technical". By contrast, the testimony of the officers as to their indifference about the accuracy of the information they provided should have been added to "fill gaps" in the ITO. Evidence before Code J. (that was not before McMahon J.) established that the RCMP officers with professional responsibility to educate other law enforcement and the Courts on MDIs knowingly shared information that was, with respect to the functions and modes of MDI, incomplete, misleading, and, with respect to the 3-minutes rule, wholly false. The officers did so in part because they believed that responsibility for accuracy rested elsewhere – Sgt. Roach testified that the language preceded his arrival at the RCMP, and Cpl. Smith testified that responsibility for the language fell to the RCMP policy center.

c. The Omissions in the ITO were Material

29. In *Land,* Watt J.A. explained:

> A matter is material...[if it is] a matter of such significance as to be likely to influence the determination of the dual conditions precedent of probable cause and investigative necessity **or to alter the character of the supportive affidavit**...(emphasis added)

Materiality is determined by asking whether, following the process of excision and amplification, "sufficiently reliable" information remains upon which the issuing justice *could* have issued the warrant. Specifically, whether the information remaining in the ITO could satisfy the issuing justice that the technique sought would lead to the collection of evidence, that it was in the best interests of justice to deploy it, and that there was no other authorizing provision available.

> *R. v. Land* (1990), 55 C.C.C. (3d) 382 (Ont. H.C.), at paras. 79-82; 92; *R. v. Nguyen* (2011), 273 C.C.C. (3d) 37 (Ont. C.A.) at paras. 48 and 51

30. Had the information above (i.e. that the MDI targeted unknown phone numbers, that it functioned in one specific way, that it was rested for 2 minutes between activations, Tanabe's "experience", and the source of his knowledge) been properly excised, the part of the ITO

dealing with MDIs would have been difficult for the issuing justice – likely unfamiliar with MDI technology – to understand. The *voir dire* evidence demonstrated that the omissions were material as it showed that all details the ITO about MDIs came from sub-affiants who did not consider it to be their responsibility to ensure its accuracy and was repeated by an affiant who did nothing to test its accuracy. This information would alter the character of the ITO and fundamentally undermine the reliability of the remaining information about MDIs. The General Warrant for the MDI could not have issued, and all the evidence seized pursuant to it was therefore obtained in a manner that breached the appellants' s. 8 rights.

Issue #2 – Warrantless Entries[3]

i) Overview

31. As part of the investigation, police entered multi-unit buildings 112 times on 90 days without judicial authorization, including 9 entries into 38 Joe Shuster Way[4] and 12 into 125 Western Battery Road.[5] By the time Sgt. Tanabe swore his first affidavit seeking authorization for entries into the common areas of multi-unit buildings, police had already done so 83 times. The ITO states:

> I am requesting a General Warrant to authorize peace officers to enter covertly, or otherwise, the common areas of multi-unit buildings in paragraph 4 of the Authorization, and subject to the terms and conditions listed in the Authorization, install, maintain or remove any video recording equipment.
>
> ...
>
> I am requesting a General Warrant to authorize peace officers to surreptitiously enter and search the places listed in paragraph 4 of the proposed Authorization, other than any places named as resort to locations and custodial locations.

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[3] For complete facts related to warrantless entries, please see the factum of the Appellant Tang.
[4] December 3, 2014; December 4, 2013; December 5, 2013; December 16, 2013; December 31, 2013; January 8, 2014; January 20, 2014; January 29, 2014; and April 2, 2014.
[5] January 20, 2014; January 30, 2014; February 3, 2014; February 12, 2014; March 24, 2014; March 26, 2014; March 27, 2014; March 31, 2014; April 1, 2014; April 2, 2014; April 13, 2014; and April 15, 2014.

Tanabe testified that the first paragraph (above) sought authorization to enter electrical rooms for the purpose of installing cameras as well as authorization for the cameras themselves. The second paragraph (above) sought authorization for entries apart from installing cameras.

Agreed Statement of Facts, Exhibit 10, Joint Appeal Book, pp. 4716-4739Sgt. First Affidavit, Joint Appeal Book, pp. 2997-2998
Testimony of Sgt. Tanabe, Vol. 3, pp. 151-153; 155

32. Sgt. Tanabe's ITO incorporated 79 surveillance reports, 10 of which included entry into target buildings. Some of these clearly referred to entries.[6] However, Sgt. Tanabe also referred to instances of surveillance which the parties later agreed included warrantless entries, but which were not described that way in his ITO.[7] For example, on numerous occasions, surveillance reports indicate that a target's vehicle was parked in the underground parking lot, while the corresponding passage in the ITO notes only that police conducted surveillance and did not locate the target.

Sgt. Tanabe's First Affidavit, Joint Appeal Book, pp. 2622-2624; 2633-2639
Testimony of Sgt. Tanabe, Vol. 3, pp. 110-115; 143-145
Surveillance Report, Joint Appeal Book, p. 5860
Agreed Statement of Facts, Joint Appeal Book, pp. 4721; 4722

33. Cst. Clark's first affidavit also requested authorization to make covert entries:

> I am requesting a General Warrant to authorize peace officers to enter covertly or otherwise the common areas of the multi-unit buildings referred to in paragraph 4 of the Authorization, and subject to the terms and conditions listed in the Authorization, install, maintain, or remove any video recording equipment. Investigators plan to capture the recording of principal known persons and unknown persons on these surreptitious video cameras. There is no other provision in law that permits this investigative technique.

His ITO incorporated 28 surveillance reports, seven of which clearly referred to entries into target buildings.[8] However, nine other instances of surveillance included in the ITO also

[6] See table of references to warrantless entries in Sgt Tanabe's ITO, Appendix A.
[7] See table of references to surveillance in Sgt Tanabe's ITO that the parties later agreed included warrantless entries, Appendix B.
[8] See table of references to warrantless entries in Cst. Clark's ITO, Appendix C.

involved warrantless entries but were not described that way.[9] On November 27, 2013 Det. Theriault (one of the surveillance officers) asked for, and received, permission from property management at 18 Valley Woods Road to conduct physical surveillance in the common areas and underground parking garage. Although Clark's ITO was replete with references to surveillance inside and outside this building, it made no mention of the fact that permission had been granted.

Cst. Clark's First Affidavit, Joint Appeal Book, pp. 1278; 1079-1081; 1083-1086; 1088-1089
First Authorization, Joint Appeal Book, pp. 7416; 7430
Surveillance Reports, Joint Appeal Book, pp. 5810; 5875-5876; 5883; 5890; 5894; 5915; 5930; 5976-5980; 6000; 6052
Testimony of Cst. Clark, Vol. 3, pp. 180-184
Agreed Statement of Facts, Joint Appeal Book, pp. 4719; 4722-4725; 4726; 4727; 4729
Testimony of Det. Theriault, Vol. 4, pp. 15-18; 38; 47

34. Clark's second ITO incorporated 38 surveillance reports including 13 explicitly involving entry into target buildings. The affidavit mentions 9 instances of surveillance targeting the Appellant Mai, 6 involving warrantless entries. The most significant observation made during a warrantless entry occurred on April 3, 2014 when the Appellant Mai was observed leaving the 17th floor at Joe Shuster Way without his winter jacket and then "observed enter the stairwell and go to the [redacted] floor. He used a key and entered unit [redacted]. Six (s) minutes later he left and returned to the 17th floor." This information, obtained at a time when police did not have judicial authorization to be inside that building, was used to establish that Mai operated a "stash house".

Second Affidavit of Cst. Clark, Joint Appeal Book, pp. 1827-1830; 1832-1835
Agreed Statement of Facts, Joint Appeal Book, pp. 4716-4739

35. The General Warrants authorized surveillance in common areas of specified buildings:

[9] See table of references to surveillance in Cst. Clark's ITO that the parties later agreed included warrantless entries, Appendix D.

> Observations of the persons listed in paragraph 3 may be made throughout the common areas of addresses listed in paragraph 4(a) which are multi-unit buildings. To be clear, a multi-unit building is any building listed in paragraph 4(a) which includes a unit number as part of its address...
>
> ...
>
> To carry out the terms of this order peace officers may enter covertly, or otherwise, the multi-unit buildings in paragraph 4a...
>
> *First Authorization, Joint Appeal Book, pp. 7437;7449*

ii) Testimony of the Affiants

36. Neither Sgt. Tanabe nor Cst. Clark told the issuing justice how the surveillance officers gained entry to the multi-unit buildings, nor did they explain why, given that officers had been entering so often, judicial authorization was necessary. The ITOs were silent on whether the officers had keys/fobs, whether they had permission from building management/security, or whether snuck into buildings unnoticed. Both affiants believed that the surveillance teams had permission to enter the buildings although the surveillance officers themselves testified that was not always the case. Cst. Clark's belief was based on his view that the surveillance officers needed "permission from the person that has the authority to provide that permission". He guessed that "a lot of times" permission was granted by building management.

Testimony of P.C. Clark, Vol. 3, pp. 171-173; 189-194; 204-205

37. Tanabe's ITO disclosed that management at one target building refused to provide police with residency and parking information absent a judge's order. He sought an assistance order for that information, along with keys, fobs, and access cards for the building. Tanabe was asked why police needed an assistance order to gain access to the building given that they had been entering without one for months. He guessed that it was impractical for the police to approach the security desk every time wanted to enter, although he did not know if that was what they had been doing.

Joint Appeal Book, pp. 2638-2639

Testimony of Sgt. Tanabe, Transcript Vol. 3, pp. 114-115; 118-119; 122- 127; 139-140; 143-145

iii) The Application Judge's Reasons

38. Justice Code drew three conclusions from the evidence of the warrantless entries:

1) The vast majority of the physical surveillance did not involve entries into common areas of multi-unit buildings and observations made inside the common areas of multi-unit buildings represented a very small percentage of the total surveillance evidence.
2) The purpose of the warrantless entries was benign and non-intrusive.
3) The surveillance officers eventually obtained the consent of property management (or condominium boards) in order to enter common areas of all the target buildings.

Code J. concluded that McMahon J. had "undoubtably appreciated" that the officers were conducting surveillance inside the common areas of multi-unit buildings. He wrote:

> The fact of observations being made in these areas and the nature of the observations was set out. No mention was made of a warrant having been obtained or of permission having been granted and McMahon J. would, therefore, have assumed the entries were warrantless and without permission. In fact, it was made clear on occasion that no permission had been granted (for example, as of January 14/15, 2014, it appeared that property management at the 1048 Broadview Avenue building was requiring some kind of judicial order, as set out above in the excerpt from Sgt. Tanabe's Affidavit). Accordingly, what was set out in the Affidavits was neither erroneous nor misleading. It simply lacked additional details.

He concluded that the entries were immaterial because they could have been excised without affecting the issuance of the Authorization.

R. v. Brewster, 2016 ONSC 4133, at paras. 68-71; 104-105

iv) Arguments on Appeal

39. Code J.'s conclusion that there was no breach of their duty to make full, frank and fair disclosure with respect to the warrantless entries hinged on misapprehensions of the evidence that caused him to downplay the materiality of the undisclosed entries. The frequency of warrantless entries was much greater than Code J. acknowledged. When Sgt. Tanabe and Cst. Clark swore their first affidavits, officers had entered buildings without judicial authorization 83 times. Yet, of the 107 instances of surveillance relied on in the first affidavits, only 17 explicitly referred to warrantless entries. Several instances of surveillance referred to in the affidavits did

involve warrantless entries that were not disclosed to the issuing justice. The effect of this portrayal was to, incorrectly, that warrantless entries were a minor part of the investigation.

40. If much of the surveillance in the common areas of multi-unit buildings was not essential to the investigation – which is the reasonable conclusion to be drawn from its omission – the duty to be full, frank and fair required the affiants to disclose the ineffectiveness of this technique to McMahon J. The materiality of the non-disclosure stems from the high likelihood that McMahon J. would have found that, given the fruitlessness of the warrantless entries, the investigative technique was not necessary or that limits should be imposed on it. The rule that affiants cannot "pick and choose" what facts to include and must include anything material, favorable or not, surely includes information about the ineffectiveness of an investigation strategy for which authorization is being sought.

> *R. v. Araujo*, 2000 SCC 65, 149 C.C.C. (3d) 449, at paras. 46-47; *R. v. Morelli*, [2010] S.C.J. No. 8 (S.C.C.) at paras. 44, 55 and 58-60; 102; *R. v. Nguyen,* 2011 ONCA 465, 273 C.C.C. (3d) 37, at paras. 48-49

41. The application judge further found that McMahon J. would have assumed from reading the ITO that the entries were warrantless and without permission. This conclusion was unreasonable in light of the evidence from the affiants that they assumed the entries had been permitted by building management or security. Sgt. Tanabe's ITO referred to the request by property management at 1048 Broadway Avenue for a judicial order prior to releasing residency and parking information, but this was unrelated to whether the entries themselves had been permitted by management. The evidence adduced at the *voir dire* was that some of the entries were authorized by building management and some were not. The affiants' failure to disclose this information was a breach of their duty to make full, fair and frank disclosure because it was material to whether a General Warrant was necessary.

42. If the officers had the permission of building management or security to enter the buildings, then they did not need a General Warrant for this purpose because, on Code J.'s own logic, the entries were lawful pursuant to that permission. Yet, the affiants never inquired of the officers how they were gaining access. Instead, they assumed that permission had been granted and sought authorization as a failsafe, in case seeking permission each time ultimately became impractical. The failure to inquire of the surveillance officers whether or not they had permission was negligent. By failing to confirm their assumptions and then swearing affidavits seeking authorization for entries that they assumed had been permitted, the affiants misled the issuing justice as to the necessity of the investigative technique for which they were seeking authorization.

> *R. v. Arsenault*, 2012 ONSC 2499; *R. v. Noseworthy* (1997), 116 C.C.C. (3d) 376 (Ont. C.A.), at para. 13

43. The application judge should have excised the references to warrantless entries in Cst. Clark's April ITO and then considered whether, based on the remaining reliable evidence, the General Warrants could have issued. It is submitted that, without the warrantless entries into 125 Western Battery Road and 38 Joe Shuster Way, the General Warrants authorizing the covert entries and covert video cameras in those two buildings, along with the installation of audio and video probes and covert entry into units 1719 and 1420 at 38 Joe Shuster Way could not have issued.

Issue #3 – Covert Cameras[10]

i) Overview

44. As part of the investigation, police installed 3 covert cameras inside multi-unit buildings prior to receiving judicial authorization:

[10] For complete facts related to unauthorized camera installation, please see the factum of the Appellant Yu.

18 Valley Woods Road, outside unit 807

On November 27, 2013, police obtained permission from property management to install "police equipment", without disclosing that they planned to install a covert camera. The camera was installed on December 14, 2013. Cst. Clark did not disclose the existence of this camera in the ITOs he swore in February and April. However, authorization to install the camera was granted from February 21, 2014 onward as 18 Valley Woods Road was a listed address in both ITOs. Nothing from this camera was used in subsequent ITOs or relied upon by the prosecution.

38 Joe Shuster Way, outside unit 1719

On January 20, 2014, police received permission from the building manger and condominium board to install a camera, though the specific location was not disclosed. The camera was installed on January 29, 2014. Cst. Clark knew about the camera, but did not mention it in his first ITO. He disclosed its existence and relied on information gleaned from it in his April ITO. On April 15, 2014, 10 weeks after the cameras was installed, McMahon J. authorized its installation.

1600 Keele Street, outside unit 1124

On March 20, 2014, police learned from the property manager that there was a camera installed outside unit 1124. Police sought and obtained permission to take a video feed from that camera. They began the feed on April 11, 2014 but Cst. Clark did not mention it in second ITO. Authority for this was granted by McMahon J. on April 15, 2014.

Agreed Statement of Facts regarding video cameras, Joint Appeal Book, pp. 4704-4708
Cst. Clark's Second Affidavit, Joint Appeal Book, pp. 1736; 1776; 1830-1834
Testimony of P.C. Clark, Vol. 3, p. 218

45. In his February affidavit, Cst. Clark swore:

Footage from surveillance cameras **can provide** valuable information by capturing crimes in progress, identifying suspects, vehicles, and the movements of the proposed named parties. Footage from surveillance cameras can also provide information in relation to associations amongst the proposed named parties. The installation of police surveillance cameras **will assist** surveillance officers in maintaining the surveillance of the names proposed parties...The use of surveillance cameras **will assist** police from being detected when monitoring the movement of the proposed named parties... Police **plan to use** surreptitious cameras for the purpose of monitoring the movements of the proposed named parities in this investigation. **Police plan to install** these cameras in the common areas of buildings where the proposed named parties reside.

...

I am requesting a General Warrant to authorize peace officers to enter covertly or otherwise the common areas of the multi-unit buildings referred to in paragraph 4 of the Authorization, and subject to the terms and conditions listed in the Authorization, install, maintain, or remove any

> video recording equipment. Investigators plan to capture the recording of principal known persons and unknown persons on these surreptitious video cameras. There is no other provision in law that permits this investigative technique. It is proposed that peace officers **will install video cameras** to monitor the movements of the principal known persons entering and exiting the named locations. Investigators plan to have the cameras installed in a manner which minimizes the exposure of private places. **With regards to buildings in which the principal known persons reside in, the installed cameras will be placed to capture the common areas of the building as opposed to being placed in an area that points directly into any private unit...The installation, maintenance and removal of these video cameras will require access** to rooms or other areas that are not part of the common area...I am aware that due to technological factors, the video will [not] be subject to live monitoring. (emphasis added)

McMahon J. authorized police to enter the common areas of buildings other than Joe Shuster Way to install cameras in such as way "as to minimize capturing any observations within private units".

Cst. Clark's First Affidavit, Joint Appeal Book, pp. 1268-1269; 1278-1279
Cst. Clark's Second Affidavit, Joint Appeal Book, pp. 1900-1901; 1913-1914
First Authorization, Joint Appeal Book, p. 7446

46. The Crown's factum on the application described the cameras at 38 Joe Shuster Way:

> The police-installed camera outside unit 1719 – 38 Joe Shuster Way was motion activated. The motion detector-activated camera records images when targets of the investigation are not there. It is located beside the elevator looking into a portion of the 17th floor. Other people living in the three apartments in the areas of the camera can be recorded. The camera does not look directly into any of the apartments. When the condominium unit to the right of the camera has its door open, a mirror can be seen on a closet door that at certain angles on occasion can reflect the view to the inside. There are two more units belonging to other residents; one to the left, where people can be seen entering and leaving the door, and another just around the corner, the door of which is not visible. The door to Mr. Mai's unit is not visible; it is off to the right of the camera's view. The camera can look directly into an electrical room. On three occasions, because of the way the mirrored closet is angled inside her apartment, [the resident of the unit on the right] can be seen in a state of partial dress. On February 24 she is wearing a towel over her body, exposing her legs and above her shoulders; on April 21 she wore a towel and t-shirt. On February 8 she was wearing only underwear.

These images were taken *inside* her apartment. Additionally, 13 images of third parties seized by the camera outside unit 1719 at 38 Joe Shuster Way before February 24, 2014 were filed as part of an agreed statement of facts.

Factum of the Respondent, Joint Appeal Book, p. 8742; 8748

Agreed Statement of Facts, Joint Appeal Book, pp. 4708-4715

ii) Testimony of the Affiants

47. Cst. Clark knew that covert cameras had been installed prior to swearing his first ITO but did not mention the camera at 38 Joe Shuster Way in his affidavit. He testified:

> Q. So knowing that cameras had been installed, why did you not make reference to cameras having been installed at these addresses when you made your information to obtain for the first authorization? I see you're thinking about it.
> A. Yeah. I think....
> Q. You made a reference in your second authorization...But I'm talking about the first authorization, and why is there no reference in your first information to obtain for the first authorization?
> A. **Because there probably hadn't been any information gleaned from these cameras that I, that I would put into the, the ITO**. (emphasis added)

Testimony of P.C. Clark, Vol. 3, p. 203

48. The Joe Shuster Way camera was installed on January 29, 2014. Clark swore his first affidavit two weeks later, on February 14.[11] Yet he testified:

> [S]ome of this information isn't coming to me like live, right, so my only logical explanation would have been the timing of the information. If you look at when the first authorization was authorized, I mean the authorization was done well ahead of the, the date that it was authorized... And hence since it happened kind of on the borderline when the paper was finished, the first opportunity I got to put it in, I did.[12]

Justice Code sought clarification:

> THE COURT: When you say that at the time you were drafting the first affidavit, you may not have known information from that camera?
> A. Yes. Like from my recollection, this was coming just as we were like finalizing. It was, **it was on the borderline**. When you write these papers you kind of have a cut-off date of when you have to stop writing, and then, you know you, you just get the paper and get it before the judge 'cause it, it's done well in advance of, of the, of the - before going to the judge.
> THE COURT: But what I understood you to say that you knew the fact that there was a camera installed prior to the completing that first affidavit?

---

[11] Clark swore the affidavit on February 14 and then edited it and re-swore it on February 21. There was no evidence that he could not have added to the affidavit between February 14 and 21. Cst. Clark's first ITO, Joint Appeal Book, p. 1290.

[12] Clark's first ITO was sworn on February 21, 2014. McMahon J.'s first authorization was granted on February 24, 2014.

A. Yes, I did.
THE COURT: What you're saying you may not have known is the...images or the results, the fruits of that camera?
A. Yes.
THE COURT: All right.
THE CROWN: I think I understand, sir. You knew the camera would be there, but you didn't know you know what, if anything, you'd gotten yet of potential investigative significance?
A. Yes. (emphasis added)

This interpretation of Clark's evidence was reinforced by the Crown in re-examination:

Q. And so I just want to understand, the - you already told His Honour that you became aware of the fruits of that camera installation after you'd written the first authorization?
A. **Pretty close to it, yes.** (emphasis added)

Testimony of P.C. Clark, Vol. 3, pp. 211-213; 217

49. The Crown submitted that Cst. Clark had seen evidence from the camera "just before" writing his first affidavit. When the defence submitted that Clark could not explain his failure to mention the camera in his first affidavit, Justice Code interjected:

I think you *(sic)* said he did have an answer, his answer was they hadn't got any evidence from it yet, and, and it was late in the day and he had to finish up his affidavit.

Submissions, Vol. 6, pp. 300; 468

50. Cst. Clark believed that the surveillance officers did not need judicial authorization to install cameras if they had been granted "permission" by "someone high up in the building management". He assumed that they had permission, and did not inquire further. He testified:

[M]y understanding at the time was you know you definitely needed to have permission to install the camera, again, regarding the trespass issue, to be able to go on the property to install it.

Testimony of P.C. Clark, Vol. 3, pp. 197-202; 205-206; 209-210
First Affidavit of Cst. Clark, Joint Appeal Book, pp. 1278

51. Clark was asked to justify his decision to seek a General Warrant for the cameras given his belief that they could be installed with permission from the building manager. He testified:

Well, it's more leaning towards the lines of if they don't. If they say, "No, you can't install this camera.", then what legal authority do I have to install the camera? I think it just - I guess the way it's being interpreted, right. I'm looking for lawful authority to be able to install the

> camera. If the building management says no, then, what other recourse do I have? The only other recourse I have is to get a general warrant to be able to go on the property and install it.
>
> *Testimony of P.C. Clark, Vol. 3, pp. 209-210*

52. When asked why he used prospective language to refer to the cameras even though he knew that they had already been installed, Clark responded: "I don't know." He did not think the use of prospective language was misleading because he was seeking a General Warrant to install cameras "in the future for any other addresses that we may identify." (The General Warrant named specific addresses and could not be used to authorize installation at unnamed locations.) When asked why he did not consider it important to tell the issuing justice that cameras had already been installed at some of the buildings named in his ITO, Clark testified: "I don't know why."

> *Testimony of P.C. Clark, Vol. 3, pp. 207-209*

53. Cst. Clark's April ITO referred to the camera at 28 Joe Shuster Way:

> A covert camera has been installed in the hallway outside of Ken Ying Mai's apartment at 38 Joe Shuster Way, on the 17th floor since 30th of January 2014. The camera is positioned in a location where people captured could only have emerged from Ken Mai's apartment or the neighboring apartment. It does not identify exactly which of the two apartments are attended. The camera has captured images of several people attending the area carrying bags and leaving with bags.

This was followed by six still photographs from the hallway camera; two separate incidents on February 2, 2014, prior to issuance of the first authorization, and incidents on February 28 and April 2, 2014, after the first authorization. The ITO refers to information caught by the camera on ten other dates:

> A covert camera is installed on the 17th floor to observe the comings and goings of people in the area of the unit 1719 used by Ken Ying Mai. During the investigation it was learned that Ken Ying Mai was regularly leaving 38 Joe Shuster Way, Unit 1719 for as little as twenty minutes and as long as one and half hours. What drew their attention was the fact that he was leaving without his jacket in the cold winter months. It was believed that he was attending another unit with 38

> Joe Shuster Way. **Ken Ying Mai was observed doing this on January 30, February 27, March 2, March 4, March 5, March 12, March 13, March 16, March 26, and March 29, 2014.**

Two of these dates preceded Clark's first ITO. Asked why he had not included this information in his first ITO, Clark again testified: "**I, I don't know**".

> *Second Affidavit of Cst. Clark, Joint Appeal Book, pp. 1829-1830; 1834-1835*
> *Testimony of P.C. Clark, Vol. 3, p. 211*

iii) The Application Judge's Reasons

54. Code J. held that Cst. Clark's failure to disclose the two covert cameras in his first affidavit was a breach of his duty to make full, fair and frank disclosure. He wrote:

> [T]he fact of the two consent installations was a relevant and important investigative step and it should have been disclosed to McMahon J. As previously noted, video surveillance is intrusive and it engages s. 8 interests. The investigators' success in obtaining permission from condominium management to install these two cameras was relevant, at a minimum, to the s. 186 investigative necessity criterion…the successful installation of the two cameras should have been disclosed to McMahon J. because it might have assisted in deciding what minimization terms to impose.
>
> *R. v. Brewster*, 2016 ONSC 8038, at para. 71

55. Code J. rejected the argument that the non-disclosure of the cameras was material:

> The legal flaw in the Applicants' argument is that it is premised on the reviewing judge re-assessing the balance between law enforcement and privacy interests anew, on the expanded record filed by the Applicants, or even quashing the general warrant, because the issuing judge had no opportunity to carry out this balancing on the full factual record. Mr. Foda submits that the deferential standard of review set out in *R. v. Garofoli* [citation omitted] only applies to the "reasonable grounds" criterion in s. 487.01 and does not apply to the "best interests of the administration of justice" criterion. He submits that these two criteria are quite different, as the former involves an objective assessment of the sufficiency of evidence whereas the latter involves a nuanced balancing of competing factors. The former is said to require a deferential standard of review but not the latter.

Code J. held that the deferential standard of review applied to all the statutory criteria in s. 487.01 and concluded that the breach was immaterial because McMahon J. could have granted the General Warrant, had he known about the two consent installations of hallways cameras:

> At most, the non-disclosure of the two consent installations supports an argument that the minimization conditions *might* have been different, but even this argument is speculative. The most important minimization condition imposed by McMahon J., in accordance with the requirements of s. 487.01(4), directed that the cameras "shall be installed so as to *minimize* capturing any observations *within* private units" [emphasis added]. The police complied with this condition by not pointing the cameras into any unit, with one minor exception involving a unit at the end of a hallway (see para. 34 above). The fact that the interferences with third party privacy were so few, and so minor, suggests that the minimization terms imposed by McMahon J. worked. Mr. Foda fairly and reasonably conceded that it is difficult to install a hallway camera without inevitably capturing occasional glimpses into the doorways of one or two units, as the occupants either enter or leave their premises. No means or device was suggested, in the course of submissions, as to how to completely prevent this from occurring.
>
> *R. v. Brewster*, 2016 ONSC 8038, at paras. 78; 81-82

iv) Arguments on Appeal

56. Having found that Cst. Clark breached his duty to be full, frank, and fair, Code J. should have excised the references to the Joe Shuster Way camera in the April ITO. This information was highly material. Absent the camera footage of the Appellant Mai leaving unit 1719 without his coat in the winter, the officers would not have surmised that he was attending unit 1420, and thus would not have targeted that unit or drawn the conclusion that he was using unit 1719 as a stash house, all of which would have had an impact on the April General Warrants. Had all the footage of other named persons attending the unit been excised, the grounds for naming Mai would be undermined.

57. Had the camera been disclosed to McMahon J. in February, Cst. Clark would have been required to disclose that it captured private information inside the unit of a third party and the fact that, according to Code J.'s interpretation of Cst. Clark's evidence, it had yet to gather any useful evidence. Likewise, had the Valley Woods Road camera been disclosed in February, three months after it was installed, the officers would have been required to disclose that it had not produced any usable evidence. Had the gaps in the ITO before the issuing justice been filled with

evidence that despite weeks of constant surveillance, the cameras had provided little usable information while capturing considerable private information about third parties, the issuing justice could not have found that the interests of law enforcement outweighed the privacy interests of the individual and thus could not have issued the General Warrant for the cameras.

58. Cst. Clark also breached his duty to be full fair and frank in his second ITO. Referring to the camera outside unit 1719, he swore that it was "positioned in a location where people captured could only have emerged from Ken Mai's apartment or the neighboring apartment. It does not identify exactly which of the two apartments are attended." This assertion is patently false. The camera clearly shows two doors, neither of which were unit 1719, which was, along with another unit, out of view around the corner. This misrepresentation in the April ITO should have been excised. The remaining information about the camera would not have been sufficient to allow an issuing justice to grant the warrant.

59. Moreover, the inaccuracy of Clark's affidavit suggests either negligence or bad faith. He would not have included false information in his ITO if he had been diligent and/or if the sub-affiants who provided him with the information had acted with diligence and integrity. The misinformation in the ITO about the positioning of the camera suggested a deliberate attempt to conceal the extent of the incursion into the private lives of third parties. Also, to the extent that these inaccuracies suggested that the affiant was unreliable, they cast doubt on the reliability of the remaining information in the ITO and thereby altered its character.

PART IV: ORDER REQUESTED

60. It is respectfully submitted that the Appellant's appeal against his conviction be allowed and that a new trial should be ordered.

James Lockyer
James Lockyer
Counsel for the Appellant

Eva Taché-Green
Counsel for the Appellant

ALL OF WHICH is respectfully submitted this 30th day of July, 2018.

SCHEDULE A: AUTHORTIES CITED

1. *R. v. Agensys International Inc.* (2004), 187 C.C.C. (3d) 481 (Ont. C.A.)
2. *R. v. Araujo*, 2000 SCC 65, 149 C.C.C. (3d) 449
3. *R. v. Arsenault*, 2012 ONSC 2499
4. *R. v. Boucher* (2006), 225 C.C.C. (3d) 45 (Que. C.A.), leave to app' to S.C.C. ref'd [2006] 2 S.C.R. vi
5. *R. v. Ebanks*, 2009 ONCA 851, 249 C.C.C. (3d) 29, leave to app. ref'd [2010] 1 S.C.R. ix
6. *R. v. Fedossenko*, 2014 ABCA 314, 316 C.C.C. (3d) 223
7. *R. v. Donnelly, 2016 ONCA 988, 345 C.C.C. (3d) 56*
8. *v. Lising*, 2005 SCC 66, 201 C.C.C. (3d) 449
9. *R. v. M. (N.N.)* (2007), 223 C.C.C. (3d) 417 (Ont. S.C.J.)
10. *R. v. Morelli*, 2010 SCC 8, 252 C.C.C. (3d) 273, at para. 60
11. *R. v. Nguyen,* 2011 ONCA 465, 273 C.C.C. (3d) 37
12. *R. v. Noseworthy* (1997), 116 C.C.C. (3d) 376 (Ont. C.A.)
13. *R. v. Paryniuk*, 2017 ONCA 87(Ont. C.A.)
14. *R. v. Shayesteh* (1996), 31 O.R. (3d) 161(Ont. C.A.)
15. *R. v. Vivar*, 2009 ONCA 433
16. *R. v. Voong*, 2013 BCCA 527, 347 B.C.A.C. 278 (B.C. C.A.)
17. *R. v. Vu, 2013 SCC 60, [2013] 3 S.C.R. 657 (S.C.C.)*

SCHEDULE B: LEGISLATION CITED

- *The Criminal Code of Canada*
- *The Canadian Charter of Rights and Freedoms*

APPENDIX A

References to warrantless entries in Sgt. Tanabe's ITO

Date	Target	Address	Affidavit
October 7, 2013	Livingstone & Phan	1048 Broadview Ave	Police observed [vehicle description and license plate number] parked in space [redacted] in the underground parking lot at this address.
October 8, 2013	Livingstone & Phan	1048 Broadview Ave	Police observed both associated vehicles in the underground of [address]
October 17, 2 013	Livingstone & Phan	1048 Broadview Ave	Police observed [target] driving the [vehicle and license plate] out of the underground parking lot…The [vehicle] drove slowly through the lot and then continued to the underground parking lot at [address].
October 18, 2013	Livingstone & Phan	1048 Broadview Ave	Police observed both vehicles of interest in the underground parking lot.
November 7, 2013	Jaggernauth	525 Wilson Ave	[Target's vehicle and license plate] was not parked in the underground garage.
November 18, 2013	Jaggernauth	525 Wilson Ave	At 1:00 p.m. police conducted surveillance in the are of [address]. The associated parking space [redacted] was empty…At 8:04 p.m. police observed [vehicle and license plate] arrive in the underground parking and park in the space [redacted]. Police observed a female identified as [name] exit the driver's seat and [target] exit the passenger side rear seat…Police observed [female and target] walk into the elevator lobby.
December 5, 2013	Jaggernauth	525 Wilson Ave	Officers observed the associated [vehicle] parked in the underground parking garage.

Sgt. Tanabe's First Affidavit, Joint Appeal Book, pp. 2622-2624; 2633-2637

APPENDIX B
References to surveillance in Sgt. Tanabe's ITO that the parties later agreed included warrantless entries

Date	Target	Address	Affidavit	Surveillance Report	ASF
November 12, 2013	Jaggernauth	525 Wilson Ave	Det. Clark authored a report in relation to surveillance conducted on [target] at [address]. Police did not locate [target on this date].	[Vehicle was parked in the associated space [number] in the underground parking lot.	"6:40: Garage"

November 14, 2013	Jaggernauth	525 Wilson Ave	Det. Rabbito authored a report in relation to surveillance conducted on [target] at [address]. Police did not locate [target on this date].		"12:15: Garage"

First Affidavit of Sgt. Tanabe, Joint Appeal Book, pp. 2623
Surveillance Report, Joint Appeal Book, p. 5860
Agreed Statement of Facts, Joint Appeal Book, pp. 4721; 4722

APPENDIX C - References to warrantless entries in Cst. Clark's ITO

Date	Target	Address	Affidavit
October 29, 2013	Tran	18 Valley Woods Rd	A [vehicle and license plate number] was observed in the underground parking lot.
November 20, 2013	Tran	18 Valley Woods Rd	[Target] parked [vehicle] on level 1 of the underground of [address]
December 4, 2013	Tran	18 Valley Woods Rd	[Vehicle] was located in the underground parking spot.
December 10, 2013	Tran	5 Brookbank Drive	Both were seen attending a ground floor apartment on the south side of the building.
December 16, 2013	Tran	18 Valley Woods Drive	[Target] attended the underground parking lot of [address]

First Affidavit of Sgt. Clark, Joint Appeal Book, pp. 1079; 1083; 1085-1086; 1088

APPENDIX D - References to surveillance in Cst. Clark's ITO that the parties later agreed included warrantless entries

Date	Target	Address	Affidavit	Surveillance Report	ASF
October 26, 2013	Tran	18 Valley Woods Rd	"[police] conducted surveillance at [address]. The address was believed to be the home address of [target]. The condominium directory showed the last name of [target] associated to buzzer code [redacted]."	"No vehicles were observed."	"Unknown time: Garage"

November 12, 2013	Tran	18 Valley Woods Rd	"[Target and his girlfriend] were observed leaving in [vehicle and license plate]"		"9:30 Garage ...13:20 Visitor parking, not underground."
November 19, 2013	Tran	5 Brookbank Drive	"[Target and girlfriend] were observed inside the [vehicle]."[13]	"At this time parked and unoccupied in the covered parking garage spot..."	"12:45: Garage"
November 21, 2013	Tran	18 Valley Woods Drive	"[Police] conducted surveillance at [address] of [target]...[Target and his girlfriend] attended the following locations in [vehicle]"	"At this time parked and unoccupied in the covered parking garage are the two known vehicles."	"11:00: Garage"
November 27, 2013	Tran	18 Valley Woods Drive	"[Target] left [address] driving [vehicle]."	"At this time parked and unoccupied in the covered parking garage are the two known vehicles."	"12:00: Garage"
December 3, 2013	Tran	18 Valley Woods Drive	"[Target] left the address with [girlfriend] in [vehicle] ... [Target] attended [address] Drive and parked near the loading zone."	"The underground parking garage was checked and one vehicle... was located."	"10:27: Garage"
December 5/6, 2013	Tran	18 Valley Woods Drive	"[Target] left the address driving [vehicle]."		Photos taken in "Hallways, lobby, outdoor parking lot, curtilage and stairwell"
December 10, 2013	Tran	18 Valley Woods Drive	"[Target] left the address driving [vehicle]."	"[Vehicle] parked in underground parking spot."	"10:20: Garage...12:49: Garage"
December 30, 2013	Tran	18 Valley Woods Drive	"[Target] observed leaving in [vehicle]...[Target] attended [address]"	"[Vehicles] were parked unoccupied in the underground garage."	"8:57: Garage... 11:55:Garage"

First Affidavit of Sgt. Clark, Joint Appeal Book, pp. 1079-1081; 1083-1085; 1088-1089
Surveillance Reports, Joint Appeal Book, pp. 5810; 6000;
Testimony of Sgt. Clark, Vol. 3, pp. 180-184

[13] Appendix A of the Crown factum on the *Garofoli* application states that this occurred inside "Aprt. Blg. elevator & hallway – not his residence"