CITATION: R. v. Hall, 2014 ONSC 708
COURT FILE NO.: J-12
DATE: 2014-01-30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: R. v. Jeremy Hall

BEFORE: The Honourable Mr. Justice G. E. Taylor

COUNSEL: Dirk Derstine and Stephanie DiGiuseppe, Counsel, for the Applicant

Craig Fraser and Stephen O'Brien, Counsel, for the Respondent

HEARD: January 17, 20, 21, 22 and 23, 2014

RULING RE ADMISSIBILITY OF WIRETAP EVIDENCE

Introduction

[1] Jeremy Hall is charged with two counts of counselling to commit murder. The evidence that the Crown intends to introduce to prove the guilt of Jeremy Hall includes the interception of private communications gathered by way of electronic surveillance under the authority of two Authorizations obtained pursuant to s. 184.2 of the Criminal Code. Dwayne Utman was a consenting party to the two Authorizations.

[2] Jeremy Hall seeks to have the evidence obtained by way of the wiretap Authorizations excluded from evidence at his trial on the basis that his right to be secure from unreasonable search and seizure guaranteed by s. 8 of the *Charter of Rights and Freedoms* was violated and that the introduction of the evidence thereby obtained would bring the administration of justice into disrepute.

Evidence on the Application

[3] The evidence presented on this application included the Application Record which contained two Authorizations to intercept the private communications of Jeremy Hall dated June 30 and July 21, 2010, the affidavits in support of the Authorizations, excerpts from police notes, reports and Will States of certain police officers and transcripts of two statements made by Dwayne Utman on May 18, 2010. The evidence also included certain documents that were filed

on consent during the hearing of the application. Lastly, with the consent of the Crown, the affiant was cross examined on the Application.

[4] Sometime in late February, 2006 Billy Mason disappeared. He was believed to have been abducted and murdered by Jeremy Hall. Jason Lusted was also suspected to be involved in the abduction and murder of Billy Mason.

[5] On July 22, 2009 an Authorization to intercept the private communications of Jeremy Hall and Jason Lusted was granted. The Authorization was issued pursuant to section 184.2 of the *Criminal Code*. Two undercover police officers and the girlfriend of Jason Lusted were the consenting parties. The undercover police officers were placed in a holding cell at the John Sopinka Courthouse in Hamilton together with Jeremy Hall, Jason Lusted and two other men. This investigative technique was largely unsuccessful because one or more of the men in custody suspected that there were undercover police officers in the cell.

[6] On August 4, 2009 a second Authorization was granted to intercept the private communications of Jeremy Hall. This Authorization was also issued pursuant to section 184.2 of the Criminal Code on the basis that Jason Lusted and his girlfriend were consenting parties. Insufficient evidence to charge Jeremy Hall with the murder of Billy Mason was obtained during the currency of the second Authorization.

[7] On June 29, 2009 Jeremy Hall was charged with pointing a firearm at Tony Yaworski. Angelo Salciccioli was a witness to that alleged offence.

[8] In March, 2010 Hamilton Police were contacted by Dwayne Utman. Dwayne Utman was known to the police to be a career criminal. On March 8, 2010, Dwayne Utman left a voicemail message for Detective Peter Thom advising that he was at the Niagara Detention Centre sharing a cell with Jeremy Hall. He said he had information about Mason and wanted to make a deal. Detective Thom then contacted Dwayne Utman's mother who clarified that her son wanted to provide information about Billy Mason.

[9] Dwayne Utman had previously contacted the police with information about the murder of Billy Mason and the involvement of Jeremy Hall in that murder. This was in June 2009. At that

time Dwayne Utman said that the source of his information about the Billy Mason homicide was a cousin of Jeremy Hall.

[10] On March 10, 2010, Detective Thom met with Dwayne Utman at the Niagara Detention Centre. At that time Dwayne Utman advised that Jeremy Hall had confessed to the killing of Billy Mason, that he intended to kill Jason Lusted and that he was going to kill Tony Yaworski.

[11] After the meeting on March 10, 2010, Dwayne Utman and Detective Thom spoke by telephone on 12 occasions up to and including April 26, 2010. Dwayne Utman continued to supply information about Jeremy Hall and the murder of Billy Mason and the stated intention of Jeremy Hall to kill or have killed a number of people including Tony Yaworski, Angelo Salciccioli and Jason Lusted. Dwayne Utman said he had been offered $5000 by Jeremy Hall to kill Tony Yaworski and Angelo Salciccioli and that they had discussed plans about how to carry out the murders.

[12] By May 18, 2010, Dwayne Utman had agreed to attend court and be a Crown witness in relation to charges against Jeremy Hall for murdering Billy Mason and counseling the murders of Tony Yaworski and Angelo Salciccioli. He had also discussed the possibility of becoming a police agent for the purpose of garnering further evidence with respect to the Billy Mason homicide and the counseling to murder Tony Yaworski and Angelo Salciccioli. Two separate interviews were conducted of Dwayne Utman on May 18. One statement was in relation to him being a witness and the second statement was for the purpose of assessing his suitability to become a police agent. Both statements were given under oath and were audio and video taped.

[13] In the first statement, Dwayne Utman advised the police that he suspected that Jeremy Hall was somehow involved with, or responsible for the death of his sister. He told the police about a letter he had received from his sister before she died wherein she alleged that she had been held hostage by Jeremy Hall and others who had tortured her. Dwayne Utman went on to tell the police that when he first made contact with Jeremy Hall at the Niagara Detention Centre, they discussed the topic of his sister's death and her being held hostage and tortured. Jeremy Hall denied any involvement with Dwayne Utman's sister. Dwayne Utman accepted this denial.

[14] In the second interview on May 18, 2010 Dwayne Utman was encouraged to admit all prior criminal activity in which he was involved, regardless of whether charges were ever laid. This was in anticipation of him becoming a police agent. At the urging of the police interviewers, Dwayne Utman advised that he had committed multiple offences for which he was never charged including two robberies, in excess of 200 break and enters, a kidnapping and forcible confinement and multiple car thefts, sometimes as many as six or seven cars a day. Dwayne Utman stated that he provided for himself financially by committing break and enters. He admitted to smuggling large quantities of drugs into the institution when he was incarcerated. He indicated that on one occasion he had made a false complaint against a Brantford corrections officer. He advised the officers was currently on methadone as result of a morphine addiction.

[15] After the May 18, 2010 interviews, Dwayne Utman contacted Detective Thom by telephone on nine occasions up to and including June 30, 2010. He continued to supply information about Jeremy Hall's involvement in the Billy Mason homicide and the plan to kill Tony Yaworski and Angelo Salciccioli.

[16] On June 30, 2010 an Authorization to intercept the private communications of Jeremy Hall, on the basis of Dwayne Utman's consent, was granted pursuant to section 184.2 of the *Criminal Code*. The Authorization was granted in relation to the murder of Billy Mason and the counseling to commit murder of Tony Yaworski and Angelo Salciccioli. This Authorization was based on the affidavit of Detective Sgt. Mark Johnstone sworn June 28, 2010.

[17] On July 2, 2010 Dwayne Utman signed a Service Provider's Contract pursuant to which he became a police agent for the investigation of the murder of Billy Mason and counseling to commit murder of potential Crown witnesses.

The Affidavit of Detective Sgt. Johnstone

[18] What follows is a summary of the affidavit of Detective Sgt. Johnstone.

[19] Mark Johnstone was a Detective Sgt. with the Ontario Provincial Police. Since November 2006 he had been assigned to the Investigation and Support Bureau, Technical Coordination Unit. His responsibilities included drafting applications for wiretap Authorizations and related the warrants and orders.

[20] The affidavit refers to the two prior Authorizations from the summer of 2009. It explains that a new Authorization was being requested because Dwayne Utman, who had previously been a confidential informant had agreed to work with the police to obtain evidence to support charges against Jeremy Hall. Paragraphs 12 and 13 of the affidavit are as follows:

> In April 2010, Investigators developed a confidential source of information. Over the course of several weeks, significant and compelling information was received from this individual directly linking Jeremy Hall to the murder of Billy Mason as well as learning of Hall's intent to have other individuals killed that includes two crown witnesses that are expected to testify against him in future judicial proceedings.
>
> The confidential source, Dwayne Utman has waived his informant privilege and has agreed to work with the police in this matter. Mr. Utman and Jeremy Hall have discussed in great detail how Utman is to kill the individuals once he is released from custody at Niagara Detention Centre. Police intend to use undercover officers with Mr. Utman once he is released from custody to assist him with the endeavors that Jeremy Hall expects to occur. Prior to Mr. Utman's release from custody, it is the intention of the investigators to install a listening device within the cell they share with one another to capture their conversations regarding these plans. This will corroborate and substantiate the information provided to police by Dwayne Utman respecting the allegations made against Jeremy Hall.

[21] Paragraphs 14 to 62 (with the exception of paragraph 54) are drawn almost verbatim from the affidavit in support of the July 22, 2009 Authorization. These paragraphs set out the information received from a number of individuals regarding the Billy Mason homicide. Paragraph 55 summarizes the information provided by Dwayne Utman in June 2009 which he had learned through discussion with Michael Hall, the cousin of Jeremy Hall.

[22] Paragraph 63 deals with the information provided by Jason Lusted in an interview conducted on July 7, 2009 regarding his participation in the killing of Billy Mason. In the affidavit in support of the July 22, 2009 Authorization, Jason Lusted was referred to as confidential informant #10. On page 2 of the affidavit under the heading "Investigative Overview" it is stated that that Jason Lusted came forward and provided police with firsthand knowledge regarding the murder of Billy Mason.

[23] Paragraphs 64 to 73 of the affidavit then deal with the success or lack thereof in gathering evidence with respect to the Billy Mason homicide based on the 2009 Authorizations.

[24] Under the heading "New Information" the affidavit deals with the information received from Dwayne Utman in his communications with Detective Thom from March 17, 2010 to June 15, 2010. Absent from the affidavit is any mention of the first communication from Dwayne Utman in 2010 when he initiated contact with Detective Thom and indicated he wanted to make a deal. Also absent from the affidavit is any mention about the two under oath recorded statements given by Dwayne Utman on May 18, 2010.

[25] In five different locations in the affidavit Dwayne Utman is referred to as a police agent. At page 2 Detective Sgt. Johnstone said that Dwayne Utman "has since waived his privilege to become a "Police Agent" ". The headings before paragraphs 75, 87, 88 and 89 referred to Dwayne Utman as either a police agent or an agent. The body of paragraph 75 reads "This individual has now come forward and has agreed to work as a "Police Agent" ". Nowhere in the affidavit is it explained that Dwayne Utman has not yet become a police agent.

[26] Page 42 of the affidavit is missing from the Application Record. The parties agreed that the affidavit contained in the Application Record was a copy of the affidavit obtained from the sealed packet. No explanation was put forward as to why page 42 was missing. I therefore must conclude that the content of page 42 was not considered by the issuing justice. That said, it is possible to determine with a reasonable degree of certainty what was actually contained on page 42 of the affidavit. Detective Sgt. Johnstone swore an affidavit on July 21, 2010 in support of the Authorization granted on the same day. The affidavit closely follows and is almost identical to the affidavit in support of the previous Authorization. The last paragraph on page 41 of the earlier affidavit is identical to the last paragraph on page 42 of the subsequent affidavit. The second affidavit contains a page 43. That page contains a paragraph entitled "Reasons for Believing Agent – Dwayne Utman". Therefore, it can reasonably be concluded that the issuing justice did not have the benefit of the opinion of Detective Sgt. Johnstone on the credibility of Dwayne Utman.

[27] The credibility and reliability of Dwayne Utman was dealt with at paragraphs 87, 88 and 89 of the affidavit. Those paragraphs are reproduced below:

Reasons for Not Believing Agent – Dwayne Utman

Although Dwayne Utman has a very lengthy criminal record dating back to 1992, I have no reason to believe that he is not telling the truth regarding this matter. I note that Dwayne Utman has never been charged for the offences of perjury or obstruct justice, which in my view is a very important factor in determining his credibility.

Motivation for Agent – Dwayne Utman to Provide Information

Dwayne Utman has self admittedly advised Detective Peter Thom that he is motivated to assist the police in this matter because he believes what Jeremy Hall did to Billy Mason was wrong. Utman was a friend of Mason's and didn't believe he deserved to die. Utman has expressed a genuine desire to try to change his life around and believes this to be a good start for him to do so.

Criminal Record of Agent – Dwayne Utman

Dwayne Utman has roughly 50 registered criminal convictions dating back to 1992 when he was a young offender. I note that the majority of the convictions registered are property related thefts however he does have convictions for robbery and assault.

Information from Jason Lusted

[28] As previously mentioned, Jason Lusted was a confidential informant with respect to the Authorization issued on July 22, 2009. In the affidavit in support of the June 30, 2010 Authorization he was identified by name. The information provided by Jason Lusted contained in the June 28, 2010 affidavit was similar but not identical to the information attributed to confidential informant #10 in the earlier affidavit. In both affidavits it is stated that that the information was provided by Jason Lusted on July 7, 2009. On that date Jason Lusted was taken to a farm property near Alma, Ontario where he showed the police officers where Billy Mason had been killed by Jeremy Hall and where the body had been burned. He admitted to assisting Jeremy Hall in abducting Billy Mason from his apartment and transporting him to the farm near Alma. He also admitted to assisting in the incineration of the body.

[29] On June 3, 2009, Detective Thom and another police officer spoke to Jason Lusted who was in custody. They told him that they believed he had knowledge about the Billy Mason homicide. They told him that Jeremy Hall "was going down for it". They suggested that Jason Lusted might want to be on the side of the police.

[30] Over the next several days Detective Thom had contact with Jason Lusted and his lawyer about making a deal in return for information about his knowledge of the Billy Mason homicide. On June 19, 2009 Jason Lusted said he did not have any direct involvement in the murder but he had been told about it by Jeremy Hall. On July 3, 2009, Jason Lusted provided an under oath audio and video recorded statement in which he said he was called to Jeremy Hall's farm and was shown the body of Billy Mason. Later that day, Jason Lusted admitted that he had lied under oath.

[31] Detective Sgt. Johnstone's affidavit of July 22, 2009 makes no reference to the fact that Jason Lusted had originally said he had been told about the murder of Billy Mason by Jeremy Hall and that he had provided a false statement under oath. In that affidavit under the heading "Reasons not to believe C.I. #10" he said there are no reasons not to believe the information provided by C.I. #10. The affidavit of June 28, 2010 makes no reference to the fact that Jason Lusted had lied under oath and does not comment about the credibility or reliability of Jason Lusted.

Cross Examination of Detective Sgt. Johnstone

[32] Detective Sgt. Johnstone testified that at the time of preparing the affidavit in support of the June 30, 2010 Authorization, he was aware of the content of both of Dwayne Utman's statements on May 18, 2010 and had reviewed the content of both statements. He said he did not refer to the May 18, 2010 statements because they were essentially a repetition of the information which had been provided to Detective Thom and was recorded in his notes or Criminal Intelligence Reports. He testified that in hindsight it would have been appropriate to mention in the affidavit that he reviewed the May 18, 2010 statements but found that they contained nothing different than what he observed in Detective Thom's notes, Criminal Intelligence Reports and in conversation with Detective Thom.

[33] Detective Sgt. Johnstone testified that he was aware that Dwayne Utman had a suspicion that Jeremy Hall had tortured his sister and had something to do with her death. He was also aware that Dwayne Utman had been assured by Jeremy Hall that he was not involved in the torture or death of Dwayne Utman's sister. He said he relied on the assurance by Dwayne Utman in the first May 18, 2010 statement that his suspicions about his sister's torture and death

were not a motivation for him coming forward and agreeing to be a police agent for the purpose of gathering evidence against Jeremy Hall.

[34] Detective Sgt. Johnstone testified that he was aware that Dwayne Utman had a far more extensive criminal background than was contained in his criminal record. He said he thought Dwayne Utman was coming clean about his past. He did not have an explanation as to why Dwayne Utman's admission about his total criminal antecedents was not included in the affidavit.

[35] Detective Sgt. Johnstone testified that he was aware that Dwayne Utman had smuggled drugs into the penitentiary when he was serving a sentence which was not included in the affidavit. He further testified that although he was aware that Dwayne Utman was on a methadone treatment program this was not included in the affidavit because it was not a concern of his at the time due to Dwayne Utman being in custody.

[36] Although Detective Sgt. Johnstone was aware the time of swearing his affidavit in support of the June 30, 2010 Authorization that Dwayne Utman had not yet officially become a police agent, in his mind, at the time of drafting the affidavit, Dwayne Utman was a police agent.

[37] Detective Sgt. Johnstone testified that he was aware that Jason Lusted was looking for consideration on outstanding charges in return for providing information. He was aware of the meeting on June 19, 2009 when Jason Lusted told Detective Thom that he had no direct involvement in the killing of Billy Mason and that he had only heard about it from discussions with Jeremy Hall. He said he was aware of the under oath statement of Jason Lusted on July 3, 2009 and that Jason Lusted subsequently admitted to lying during the course of that statement. He acknowledged that Jason Lusted did not come forward on his own to provide information to the police but rather was approached by the police who suggested it would be wise for him to cooperate. He agreed that, in hindsight, some mention should have been made in the affidavit about Jason Lusted not being truthful while under oath, that Jason Lusted was first approached by the police as opposed to coming forward on his own and that he provided information in return for consideration on outstanding charges.

[38] Detective Sgt. Johnstone acknowledged that the credibility and reliability of Dwayne Utman and Jason Lusted were relevant factors for the justice to consider when deciding if the Authorization should be granted.

The Law

[39] Wiretap Authorizations with the consent of one of the parties may be issued pursuant to section 184.2 of the *Criminal Code*. The issuing judge must be satisfied that:

a) there are reasonable grounds to believe that an offence has been or will be committed;

b) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and,

c) there are reasonable grounds to believe that information concerning the offence will be obtained through the interception sought.

[40] Section 184.2 (2) provides that application for a consent Authorization is to be made to a judge on the basis of an affidavit sworn by a police officer.

[41] It is without question that a one-party consent Authorization is subject to being compliant with section 8 of the *Charter of Rights and Freedoms*.

[42] In *R. v. Araujo*, [2000] 2 S.C.R. 992, the Supreme Court of Canada set out the requirements for an affidavit in support of a wiretap application paragraphs 46 and 47 which read as follows:

> Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an ex parte Authorization is full and frank disclosure of material facts. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as À la recherche du temps perdu, as lively as the Kama Sutra, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the Authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.

> A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an Authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong -- and much right -- with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping Authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions. [Citations omitted]

[43] In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the Supreme Court of Canada described the task of a judge reviewing an affidavit in support of a wiretap Authorization as follows at paragraph 56:

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

[44] In *Araujo* the Supreme Court of Canada went on to describe the function of the reviewing judge at paragraphs 57, 58 and 59 as follows:

> In *Bisson*, our Court gave very short reasons but also affirmed the reasons of Proulx J.A. in the Quebec Court of Appeal. In his judgment, Proulx J.A. was clear that a court must look at non-disclosure of any material fact [TRANSLATION] "with respect to the affidavit considered as a whole, or even with respect to the remaining parts of it". He quoted from the Ontario Court of Appeal in *Church of Scientology*, "[T]he function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue" (emphasis added). In *Bisson*, of course, the recanted information obviously had to be excised entirely and the remaining information then assessed in the totality of the circumstances. Where the erroneous information results from a simple error and not from a deliberate attempt to mislead the authorizing judge, amplification may be in order. Nonetheless, there would be no need to seek to amplify the record if sufficient reliable material remains even after excising the erroneous material.

> 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.
>
> When using amplification, courts must strike a balance between two fundamental principles of search and seizure law that come into a rather unique tension in these kinds of situations. As a result of this tension, the cases disclose divergent attitudes to incomplete or incorrect affidavits and amplification thereof. The danger inherent in amplification is that it might become a means of circumventing a prior Authorization requirement. Since a prior Authorization is fundamental to the protection of everyone's privacy interests, amplification cannot go so far as to remove the requirement that the police make their case to the issuing judge, thereby turning the authorizing procedure into a sham. On the other hand, to refuse amplification entirely would put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made some minor, technical error in the drafting of their affidavit material. Courts must recognize (along with investigative necessity) the two principles of prior Authorization and probable grounds, the verification of which may require a close examination of the information available to the police at the time of the application for a wiretap, in considering the jurisprudence on amplification. The approach set out earlier to erroneous information in an affidavit on a wiretap application attempts to reconcile these principles. Courts should take a similar approach to amplification. [Citations omitted]

[45] In *R. v. J.J.*, [2009] O.J. No. 6141, relying on the above passages from *Araujo*, Trafford J said the following at paragraph 20:

> In an application like this one, if the reviewing Court is satisfied a statement in the affidavit is false, erroneous or otherwise misleading it is to be deleted from the affidavit unless there was in the affidavit evidence of a reasonable basis for a belief of the affiant in the accuracy of the statement. False, erroneous or otherwise misleading statements made with a negligent, reckless or intentional disregard for the truth must be deleted from the affidavit. See *R. v. Adair*, [1994] O.J. No. 3265 (Gen. Div.) at para. 19. Extrinsic evidence called by the Applicant is used by the reviewing Court, if at all, to establish such a false, erroneous or otherwise misleading statement in the affidavit. The extrinsic evidence is not read into the affidavit. In some cases it is appropriate for the reviewing judge to amplify the record, that is, the affidavit, at the request of the Crown, relying upon other extrinsic evidence.

[46] More recently, the Supreme Court of Canada in the majority judgment in *R. v. Morelli*, [2010] 1 S.C.R. 253 again dealt with the role of the reviewing judge on an application such as the present at paragraphs 41 to 43 as follows:

> 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".
>
> Rather, reviewing courts should resort to amplification evidence of the record before the issuing justice only to correct "some minor, technical error in the drafting of their affidavit material" so as not to "put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made" such errors. In all cases, the focus is on "the information available to the police at the time of the application" rather than information that the police acquired after the original application was made. [Citations omitted]

[47] Also in *Morelli*, the majority judgment dealt with an affiant's obligation to make full and frank disclosure to the issuing justice at paragraph 58 as follows:

> When seeking an ex parte Authorization such as a search warrant, a police officer -- indeed, any informant -- must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present all material facts, favourable or not. Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.

<u>Analysis</u>

[48] The issuing justice was unaware that Dwayne Utman suspected Jeremy Hall had some involvement in the death of his sister and had tortured her before she died. The issuing justice was not told that in the initial contact with Detective Thom in March, 2010, Dwayne Utman was seeking consideration on his outstanding charges. The issuing justice, although aware of Dwayne Utman's extensive criminal record, did not have before him the complete picture of

Dwayne Utman's criminal antecedents. The issuing justice was unaware that Dwayne Utman was taking methadone as result of an addiction to morphine. In my view all of this was important information for the issuing justice to consider in deciding whether to grant the Authorization.

[49] Detective Sgt. Johnstone was an experienced affidavit writer for the purpose of wiretap Authorizations. He was aware of his obligation to make full and frank disclosure to the issuing justice. In my view he failed to do so in the background information about Dwayne Utman that he omitted to provide to the issuing justice regarding matters which could potentially affect the extent to which the issuing justice was prepared to rely on the information provided by Dwayne Utman.

[50] Detective Sgt. Johnstone referred to Dwayne Utman throughout the affidavit is a police agent although he had not yet signed the Service Provider's Contract. Although by itself, this might not be categorized as materially misleading because it was anticipated the Service Provider's Contract would be executed in a very few days, it takes on added significance in light of the other information that was withheld from the issuing justice. It would be reasonable for an issuing justice to be comforted in knowing that a person such as Dwayne Utman had been deemed sufficiently reliable by the Ontario Provincial Police to be accepted as a police agent.

[51] I am drawn to the conclusion that Detective Sgt. Johnstone intentionally or negligently portrayed Dwayne Utman in a far more favourable light than he should have. In my view this conduct materially distorted picture that was placed before the issuing justice. This is not a case where the information that was not before the issuing justice can be considered by me as a result of amplification. Standing alone, amplification might have been appropriate to correct the erroneous statement that Dwayne Utman was already a police agent.

[52] In the result, because of the material omissions about Dwayne Utman's background and the more favourable portrayal of him as a police agent, I find that the facts provided by Dwayne Utman as contained in the affidavit in support of the wiretap Authorization must be excised.

[53] This was the third wiretap Authorization for the purpose of obtaining evidence regarding Jeremy Hall's involvement in the murder of Billy Mason. The first two Authorizations were

unsuccessful in obtaining evidence to justify the laying of a charge. What was different in that the application in June 2010 was that Dwayne Utman, a consenting party, who would likely be able to obtain evidence directly from Jeremy Hall with respect to the Billy Mason homicide. However, with the excision of the information provided by Dwayne Utman, there remains no foundation for the issuing justice to grant an Authorization to intercept the private communications of Jeremy Hall when speaking to Dwayne Utman. There would remain sufficient factual foundation, as there was in the affidavits in support of the first two Authorizations, for the issuing justice to conclude that there were reasonable grounds to believe that an offence had been committed. After excision, reasonable grounds to believe that information concerning the Billy Mason murder would be obtained through the interception of Jeremy Hall's private communications with Dwayne Utman no longer exist.

[54] The only facts contained in the affidavit about Jeremy Hall offering to pay Dwayne Utman to kill Tony Yaworski and Angela Salciccioli were from the information provided by Dwayne Utman. Similarly then, after excision, reasonable grounds no longer exist to believe that information about the offences of counseling to commit murder would be obtained through the interception of Jeremy Hall's private communications with Dwayne Utman.

[55] Therefore, I conclude that after excision of the information provided by Dwayne Utman, on the facts contained in the affidavit of Detective Sgt. Johnstone, the issuing justice could not have granted the Authorization. The Authorization will therefore be set aside.

[56] Because I have found that the materially misleading omissions and erroneous statements made in the affidavit of Detective Sgt. Johnstone regarding Dwayne Utman are sufficient to cause me to set aside the Authorization, it is not strictly necessary for me to deal with the information contained in the affidavit provided by Jason Lusted. However, I will explain briefly why I am also of the view that there was a material omission in respect of Jason Lusted.

[57] The issuing justice would have concluded that Jason Lusted gave one statement to the police on July 7, 2009. That was clearly not the case. He had previously provided information which was arguably inconsistent with his statement on July 7, 2009. The issuing justice was not aware that three days prior to the statement detailed in the affidavit, Jason Lusted had provided different information in a statement which was under oath. Those previous inconsistent

statements and in particular the fact that Jason Lusted had lied under oath were material facts which should have been before the issuing justice. It is not the role of an affiant in a wiretap application to decide which of multiple statements by an information source is the truthful one, and then only disclose the content of that statement.

[58] It is difficult for me to accept the testimony of Detective Sgt. Johnstone, an experienced affidavit writer, that it was an oversight on his part to fail to include in the affidavit any mention of Jason Lusted giving a false statement under oath. I accept the testimony of Detective Sgt. Johnson when he said that he believed the information provided by Jason Lusted on July 7, 2009 was the truth and that he had lied previously because he was fearful of Jeremy Hall. I suspect that the issuing justice, if he had been informed of the complete picture, could very well have come to the same conclusion. But the important principle is that it is the issuing justice who must address the credibility of Jason Lusted with knowledge of all pertinent facts, not Detective Sgt. Johnstone who makes that decision and then only discloses those facts which support his conclusion.

Exclusion of the Evidence

[59] In *R. v. Grant*, [2009] S. C. J. 32, the Supreme Court of Canada has provided guidance as to the approach to be taken when considering the exclusion of evidence pursuant to s. 24(2) of the *Charter*, following the finding of a breach of an accused's constitutional rights. The court provided an overview of the revised approach to the exclusion of evidence pursuant to s. 24(2) of the *Charter* at paragraphs 67 to 71 as follows:

> The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.
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> The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed

> of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.
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> Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.
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> Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.
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> A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

[60] *Grant* directs that in deciding whether to exclude evidence obtained in breach of the *Charter*, a balancing of the seriousness of the *Charter* breach, the impact of the *Charter* breach on the interests of the accused and society's interest in the adjudication of the case on the merits, is required.

[61] I consider the *Charter* breach to be serious. Detective Sgt. Johnstone either intentionally omitted material facts from the affidavit in support of the wiretap Authorization or he was grossly negligent. He was an experienced writer of wiretap affidavits who was aware of his obligation to make full and frank disclosure of all material facts to the issuing justice.

[62] In determining the seriousness of the *Charter* breach, I also take into account how Detective Sgt. Johnstone dealt with the information provided by Jason Lusted. I fail to understand how someone who knew the importance of making full and frank disclosure would not include the information about Jason Lusted to which reference has been made earlier in these reasons. He either has no true appreciation of the meaning of full and frank disclosure or he intentionally withheld relevant information from the issuing justice. In either case, to my mind, it makes the *Charter* breach more serious.

[63] The *Charter* breach had a significant impact on the interests of Jeremy Hall in that it was the private communications of Jeremy Hall that were intercepted. There is a high degree of privacy attached to one's private communications. As was stated in *Duarte* at paragraph 22:

> The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meeting.

[64] The exclusion of the wiretap evidence will undoubtedly have a negative impact on the Crown's case but it will still be possible for the Crown to seek a convictions based on the testimony of Dwayne Utman. The charges are very serious. On the other hand, society will not be deprived of a decision on the merits because the exclusion of the evidence will leave the Crown in a position of having no evidence to call.

[65] In balancing these three factors I find that the long term interest of maintaining the integrity of, and public confidence in, the justice system would be served by excluding the wiretap evidence obtained by way of the wiretap Authorizations of June 30. Neither party made specific submissions regarding the July 21, 2010 Authorization but it appeared that it was agreed that it was issued on the basis of the evidence gathered pursuant to the first Authorization. Therefore it follows that there was insufficient facts for the issuing justice to grant the second Authorization and the evidence obtained pursuant to it will also be excluded.

[66] The Crown relies on the decision of the Supreme Court of Canada in *R. v. Fliss*, [2002] 1 S.C.R. 535 in support of the submission that the transcripts of the intercepted, recorded private

communications between Jeremy Hall and Dwayne Utman should not be excluded pursuant to section 24(2) of the *Charter*. In *Fliss*, a police officer recorded his conversation with the accused under the authority of a one-party consent Authorization. The trial judge found that the Authorization had been improperly granted and therefore breached the accused's section 8 *Charter* right. The majority concluded that, on the facts of that case, the evidence ought not to have been excluded pursuant to section 24(2) of the *Charter*. In my view, *Fliss* does not stand for the broad proposition that notwithstanding the finding of a *Charter* breach in relation to an Authorization granted pursuant to section 184.2 of the *Criminal Code*, the evidence thereby obtained can never be excluded pursuant to section 24(2). Indeed the last sentence of the penultimate paragraph states as much: "In another case, the s. 24(2) hurdle may not be so readily surmounted".

Conclusion

[67] For the foregoing reasons the application is allowed and the evidence gathered as a result of the wiretap Authorizations will be excluded from evidence at this trial.

"G. E. Taylor"

G. E. Taylor J.

Date: January 30, 2014