2017 ABQB 192
Alberta Court of Queen's Bench

R. v. Piasecki

2017 CarswellAlta 456, 2017 ABQB 192, [2017] A.W.L.D. 1787, [2017] A.W.L.D. 1789, [2017] A.W.L.D. 1809

Her Majesty the Queen (Crown) and Mathew Richard Piasecki and Brett Christopher Vergo (Accuseds)

A.W. Germain J.

Heard: March 6, 2017; March 7, 2017
Judgment: March 21, 2017
Docket: Edmonton 140686775Q2

Counsel: Jared Bialowas, for Crown
Clayton Rice, Q.C., for Defendant, Piasecki
Anna M. Konye, for Defendant, Vergo

Subject: Constitutional; Criminal; Human Rights

VOIR DIRES to determine admissibility of evidence in trial of accused charged with possession of controlled drugs.

***A.W. Germain J.*:**

I. Introduction

1 Mr. Piasecki and Mr. Vergo are on trial for the unlawful possession of controlled drugs and substances for the purpose of trafficking and other charges. The evidence against them was collected in numerous ways over a period of time in 2014. The defendants challenge the collection of some of the evidence alleging violation of their *Charter* rights. The key challenge to the admissibility of evidence is the assertion that the information to obtain a search warrant dated June 19, 2014 [the "ITO"] was insufficient to entitle the granting of a search warrant. Incriminating evidence obtained from the searches should all be suppressed.

2 This ruling issued mid-trial deals with three alleged breaches of the accuseds' *Charter* rights.

Voir Dire #1 - Did the 'garbage pull' from an Edmonton row house condominium on June 16, 2014 violate Mr. Piasecki's privacy rights under section 8 of the *Charter*?

Voir Dire #2 - was Mr. Piasecki's privacy under section 8 of the *Charter* violated by video surveillance taken across the street from his mother's residence?

Voir Dire #3 - was the ITO utilized to obtain the search warrant defective, such that the warrant should be quashed with the result that the items seized pursuant to the warrant are excluded from evidence?

3 These three *voir dire* analyses are interrelated, since the ITO that is challenged in *Voir Dire* #3 is in part based on the evidence collected by police activities challenged in *Voir Dire* #1 and #2.

II. The Conduct of the Voir Dires

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4 Counsel reached an agreement that I should handle the three *voir dires* as distinct procedures rather than in an omnibus fashion. Counsel agreed that I could defer the ruling on *Voir Dires* #1 and #2 until the conclusion of *Voir Dire* #2, with a request that the outcome of my ruling on *Voir Dire* #1 and #2 then be provided.

5 My conclusion on the first two *voir dires* would influence the argument on the warrant, because the prevailing state of the law in Alberta is generally that information obtained without *Charter* compliance should be read out of the ITO to determine whether sufficient information remains that could lead a reasonably informed judicial officer to grant the requested warrant. In each case, counsel understood that I would be releasing detailed reasons supporting my court disclosed conclusions. This procedure was followed, and these are the reasons.

III. Voir Dires #1 and #2

A. Background Facts

1. 'The Garbage Pull'

6 In 2014 the Edmonton Police Service ["EPS"] became interested in Mr. Piasecki. They had staked out a condominium townhouse in south Edmonton, which they believed Mr. Piasecki was using as his home. Sgt. Nayowski gave evidence that on June 16, 2014, he saw Mr. Piasecki come out of the front door of his unit carrying two white garbage bags. Mr. Piasecki walked around to the back, down a lane between two rows of units and entered a garage that had been configured as the garbage receptacle for the townhouse complex. Mr. Piasecki was observed with the two white garbage bags in his hand entering the garage. However, Mr. Piasecki left the garage empty handed, and he then departing in his vehicle.

7 Approximately seven minutes after Mr. Piasecki was observed going into the garage, Sgt. Nayowski entered the unlocked garage and observed four large industrial garbage bins: two for recyclables, and two for waste garbage. They were nearly empty, but at the bottom of one were the two white bags. They were the only white bags in the garbage containers. The two white bags were seized and searched. The most relevant finding was that they contain four little baggies: two clear and two dark. Some white residue powder was observed at the bottom of all four baggies. The quantity of the white residue was too small to analyze, but the ITO deponent asserted the material was consistent with either powder cocaine or methamphetamine, based on his investigative experience.

8 The seizure of the bags was a warrantless search. These are the underlining and critical facts for the *Voir Dire* #1 analysis.

2. The Camera Van Surveillance

9 On May 9, 2014, the EPS investigators obtained a tracking order to put a tracking device on Mr. Piasecki's vehicle. They did so, and they observed the car going frequently, but for short periods of time, to an address in south Edmonton, which they identified as the home of Mr. Piasecki's mother.

10 The police then placed a van with a surveillance camera across the street, capturing an image of the front of Mr. Piasecki's mother's home. Their intention was to use the van camera to survey Mr. Piasecki as he entered and left his mother's home. They would know this was happening through information from the tracking device. Although the device was capable of 24/7 video surveillance, they were in fact not monitoring the video and it was only when Sgt. Nayowski accessed a remote viewing program on his iPad that he could capture a screenshot showing Mr. Piasecki in the vicinity of his mother's house. The relevant screenshot occurred on June 13, 2014. Mr. Piasecki is seen going into his mother's home at 10:14 empty-handed. He emerges from the home at 10:21, carrying what appears to be a heavy white plastic bag.

11 No warrant for this video surveillance was obtained, per *Criminal Code*, s 487.01(4).

B The Position of Counsel

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12 The parties filed excellent written briefs. My short summary will not fully capture those briefs, but the penultimate positions are reproduced in these comments.

1. The Crown [all voir dires]

13 The Crown acknowledges that garbage pull, and the video surveillance were without warrant. Therefore the Crown must show that these warrantless searches do not violate the privacy interests of Mr. Piasecki.

14 The Crown asserts that the garbage pull without a warrant made from the garbage garage was conducted on the common property of the condominium. The EPS activity is permitted by the Supreme Court of Canada: *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579 (S.C.C.) ["*Patrick*"]

15 On the video surveillance, the Crown asserts that the peace officer involved reasonably considered whether a warrant was necessary, and concluded no warrant was needed:

> 1. the video surveillance was being conducted in the least intrusive way without permanent recording;
>
> 2. the video monitoring, in any practical sense, was only activated when Mr. Piasecki was in the neighborhood of his mother's home; and
>
> 3. the video equipment captures nothing more than what could have been obtained by an investigator across the street with a camera.

Not all video searches require a warrant, and this one does not.

16 Any tracking of Mr. Piasecki, to the extent that he was in his vehicle, was lawfully authorized because the tracking device was permitted by approved warrant. This allowed the EPS to track Mr. Piasecki's movements, so his privacy interests in his movement to and from within his vehicle in the neighborhood of his mother's home was significantly diminished. This is another reason why a *Criminal Code*, s 487.01(4) warrant was not necessary.

17 The Crown's fallback position on both of these arguments is that, at least from an evidentiary point of view, the contested *voir dire* evidence is still admissible at trial, because *Charter* s 24 analyses should lead the court to conclude that the evidence obtained from these searches is nevertheless admissible. The Crown acknowledges that if the searches are held to not be *Charter*-compliant, then a corresponding few paragraphs from the ITO will have to be excised.

18 As it relates to the ITO and whether it was sufficient to obtain a warrant, the Crown asserts that it was full, frank, and appropriate in terms of its width, breadth and scope and fairly disclosed the entire case to be met to obtain the warrant. Evidence obtained pursuant to the warrant is admissible. In written argument, the crown asserts that even if the Crown failed in the applications involved in *Voir Dire* #1 and #2, the width and breath of the ITO is still so overwhelming that it led to a validly issued search warrant.

19 The Crown takes the position that the information to obtain discloses a clear, credibly-based probability to support the search warrant for the vehicles and residences. The Crown argues that disputed portions of the information to obtain challenged by Mr. Piasecki should be not excised. There was no breach of Mr. Piasecki or Mr. Vergo's section 8 *Charter* rights.

20 However, even if all the disputed information were removed, the remaining information would still be sufficient to justify the issuance of the search warrant. (Crown Brief, at para 13)

2. The Defence Position on Voir Dires #1 and #2.

21 Mr. Piasecki's counsel took the lead role on *Voir Dires* #1 and #2 as it is the privacy rights of Mr. Piasecki that were affected by the garbage pull and the video surveillance. In a nutshell, the accused argue on the garbage pull the factual

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differences between *Patrick* and this case are such that notwithstanding that the garbage may have been abandoned, the entry by the police without warrant into what is effectively a private garage, in a condominium complex, means that Mr. Piasecki's right to territorial privacy was violated without an appropriate warrant or court order.

22 The evidence obtained from that garbage pull should be excised from the ITO to support the granting of the warrant, and the evidence from the garbage pull itself should not be admitted at trial.

23 Mr. Piasecki argues that the EPS video surveillance was an intrusion into his activities in which he has a reasonable expectation of privacy.

24 In dealing with the potential fallback analysis under section 24 of the *Charter*, the defense position is that the admission of this evidence in light of the *Charter* breaches that led to its collection would bring the administration of justice into disrespect, and on that basis it should be excluded.

3. The Defense Position on Voir Dire #3

25 Defence counsel assert that the ITO as a whole was defective, and that is even more true if the information challenged in *Voir Dires* #1 and #2 are excluded. The ITO is defective, should be ruled invalid, and the evidence obtained pursuant to the warrant cannot be admitted at trial. The defence relies heavily on the recent reasoning from the Alberta Court of Appeal in *R. v. Quilop*, 2017 ABCA 70 (Alta. C.A.).

26 On the issue of the validity of the warrant, both counsel challenge the facial validity of the ITO and submit that the ITO is compromised by weakness in the quality of the information provided by the informant, and lacks independent confirmation of critical elements of that information.

27 As asserted on page 5 of Mr. Vergo's brief (and adopted by Mr. Piasecki):

> The applicant argues that the information deposed in the Information to Obtain (ITO) was insufficient to support the issuance of search warrants for [the properties] in Edmonton Alberta. Without a valid warrant, the search violated their right to be free of unreasonable search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms. In particular, the [defendants] argue(s) that the facts set out in the ITO do not support a credibly based probability that drugs would be found at [the property].

IV. Analysis

A. The Garbage Pull

28 In *Patrick* the Supreme Court of Canada dealt with a warrantless search of garbage deposited in the garbage receptacles of a home, but not yet removed to the city recycling facility. The key issue is whether that admittedly warrantless search related to materials in which the accused had a reasonable expectation of privacy.

29 The Supreme Court of Canada in *Patrick* framed the issue as: first did the appellant have a reasonable expectation of privacy; and if so, was it violated by the police conduct?

30 In conducting this analysis, the Supreme Court of Canada invited judges to consider a checklist established in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 (S.C.C.), and consider the "totality of the circumstances": *Patrick*, at para 26. This claim may involve aspects of personal privacy, territorial privacy, or informational privacy. Frequently, the claimant will assert overlapping interests. The assessment always requires close attention to context.

31 In *Patrick* at para 25 the Supreme Court of Canada described when, factually, material is abandoned:

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> . . . The question is whether the claimant to s. 8 protection has acted in relation to the subject matter of his privacy claim in such a manner as to lead a reasonable and independent observer to conclude that his continued assertion of a privacy interest is unreasonable in the totality of the circumstances.

32 An analytical framework is helpful (para 26), and this was then illustrated by a series of questions, tailored to these circumstances (para 27). The Supreme Court then reviews these factors that one might consider in such an analysis. These provide the contextual nuance for a judge to determine whether, in the totality of the circumstances, there remains a privacy interest that is potentially protected by section 8 of the *Charter*.

33 I recognize, however, that all these factors may not be interchangeable, or applicable in all cases, or even arise based on the facts of a case. The specific facts of the case and relevant factors are capable of different interpretation and weight. There is a tension between the focus on whether there has been an abandonment of the seized item, in fact, versus the strongly guaranteed territorial privacy that surrounds a home or residence.

34 This tension is evident in this case. On one hand Mr. Piasecki clearly threw out the garbage into a communal dumpster, remote from his actual home. That suggests he abandoned it. However, the communal dumpster was located in a garage structure that is much more private and removed from the public than the garbage cans beside the alley that were discussed in *Patrick*.

35 Three factors, 'the subject matter of the search', 'the element of concealing illegal objects', and 'a subjective expectation of privacy' do not need to be dwelt on in this ruling because my analysis simply parallels the common sense elements of the Supreme Court of Canada *Patrick* decision as it dealt with these three factors.

36 I accept that the applicant had a direct interest not only in the garbage itself, but in particular its informational content, as concluded by the Supreme Court of Canada in *Patrick* at para 31.

37 I also acknowledge that in this case, if one assumes that the white powder found in the bags was in fact residue of illicit controlled substances and drugs, but the garbage otherwise provided no other identified personal information, then the garbage bag search provided weak circumstantial evidence that Mr. Piasecki was either using or possessing illicit drugs. This was similar in *Patrick*.

38 The third factor of analysis, 'a subjective expectation of privacy' is similarly handled in this case. There is no direct evidence of a subjective expectation of privacy to the contents of the garbage but assumptions about that privacy concern can be made. In *Patrick*, the court observes this is not a high hurdle and concludes that to its depositor the garbage may never have ceased to have a subjective expectation, reasonable or not, in the privacy of that garbage.

39 The fourth factor begins with the threshold and a presumption in favor of Mr. Piasecki that he intended, reasonable or not, to have a privacy interest in the garbage. Thus, the fourth factor is whether his expectation of privacy was objectively reasonable. To assist in the analysis of the reasonableness of this expectation of privacy, the Supreme Court of Canada encourages an additional seven point assessment focused on the objective reasonableness of the expectation of privacy. In *Patrick* at paras 38-40, the Court develops some factual elements to help inform this issue.

40 When modified to our case, these are:

> 1. That the garbage was put out by Mr. Piasecki for collection in the customary location for removal.
>
> 2. Was the location at or near the property line? This is not similar to our situation here, as we do not know the property line of the condominium plan. I can observe only that the garbage garage was likely on common property and immediately adjacent to a lane in which a garbage removal truck could travel. Whether the lane was city property or not was not established, and with that lack of proof I must conclude that this area was part of the common property of the condominium.

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3. In *Patrick*, the garbage was in an unlocked receptacle with no manifestation of any continuing assertion of privacy or control. Here again, our facts are different. The garbage was in a less public location, which was more, notionally a private area consisting of a garage with an unlocked man door and a double door that could open to allow a truck to remove garbage. While this facility was not locked, it is clearly more definable and arguably more private than garbage cans sitting at the back of a yard waiting for the city garbage collectors to pick them up.

4. The police took the white garbage bags to search for information about activities involving Mr. Piasecki as part of a continuing criminal investigation.

41 This factual review helps define the reasonableness of an expectation of privacy. The facts do not all line up like the winning numbers in a lottery but on balance the placing of garbage in a communal dumpster in a building removed from the unit under exclusive residential possession leans to a conclusion that any assertion to an expectation of privacy was not objectively reasonable. While Mr. Piasecki may not have expected the police to be rooting through those dumpsters, this was a space freely accessible to many other persons in his townhouse complex. It was almost like a municipal dump but only for the property occupants.

42 The fifth element for this analysis is 'the place where the search occurred'. Here, the garage was arguably more private then the garbage location in *Patrick*. In *Patrick*, it was a true situation of garbage sitting near the back alley, although still technically on the land of the individual asserting privacy. Here again there are competing factors. One is the strong assumption that the garage is a building of more substance and more potential security, and likewise more private than a person's backyard cut out for garbage cans. However, Mr. Piasecki's privacy interest in the secured area is very limited. Even if he were a unit owner, he would at best have a shareholders interest in the common property. This interest is not exclusive. He did not own or control where the garbage was located. Nor could Mr. Piasecki prevent others from entering into the garage or accessing the dumpsters. The door was not locked and the police officer simply entered the garage - following the trail of the garbage.

43 One can rationalize and articulate in this case, similar to that found by the majority in *Patrick* at para 45, that:

. . . while territorial privacy is implicated in this case, the physical intrusion by the police was relatively peripheral, and viewed in context, it is better considered as part of the totality of circumstances in a claim that is preferably framed in terms of information privacy.

44 The next *Patrick* factor is whether this was a perimeter search. This analysis is of little application since in this case the common area property included what were clearly identified as lane ways that the public could access. There was public parking provided very close to the garbage garage. The lane ways have all of the characteristics in this complex that ordinary city back alleys have to other occupants living in other areas of the city. Sgt. Nayowski was clearly well inside the common area of the property, but in what would be considered its free access areas. In other words, any member of the public could walk through these areas. There was no evidence about the detailed plans and layout of the condominium. A condominium plan was not entered into evidence but I can take reasonable notice that since the garbage garage was found near the public parking areas of the complex members of the public were clearly not excluded from walking down the laneway. That is what happened here and the target was the garbage disposal area, not any region or building where Mr. Piasecki could reasonably expect to have an expectation of privacy. Confined to the narrow notional perimeter of his own, personally occupied unit, no such perimeter search was conducted.

45 The next factor is 'Was the subject matter of the search in public view'? It was not. First, the internal contents of the garbage bags were not in public view, and the garbage itself had been placed in a garbage bin at the bottom of the bin to be co-mingled with other garbage. It was not in public view, unless one entered the garage and actually looked into the bins. This factor trends more toward a territorial privacy interest than existed in *Patrick*.

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46 The next factor considers factually whether the subject matter of the search was abandoned. This is a factual determination. I am satisfied that Mr. Piasecki unconditionally and irrevocably abandoned the garbage when he took it to the dump area. I base this on the following uncontradicted evidence:

1. The townhouses were all served by a common and remote area in which occupants could place their garbage.

2. The location was not accessible from individual residential units as residents had to walk outside to get to the dump area.

3. A person, therefore, is clearly observable, intending to part with his garbage when he has to walk outside, and a considerable distance to a garbage receptacle.

4. Further the white garbage bags were not placed in individually identified personal containers, such as by example if Mr. Piasecki had a garbage can on his balcony or front step. Here the garbage was comingled with any other garbage in a multiuser bin.

From a factual point of view, this garbage was clearly abandoned!

47 I conclude this section of my analysis by observing that the communal garage for all of the garbage from the townhouses and its remoteness from the individual units creates a significantly diminished territorial privacy interest, while conversely the fact that the garbage deposit location is still a semiprivate (although readily accessible) building would create a stronger territorial privacy interest argument. Balancing both these factors with the clear intention to abandon the garbage by allowing it to be co-mingled in a common garbage holding area militates against a privacy interest.

48 In *Patrick*, the Supreme Court of Canada also had to deal with the issue argued there that the information could already have been in the hands of third parties. Here, this issue was not argued, but even if it had been argued it could reasonably be said that once the garbage was surrendered and co-mingled with that of other occupants and placed in common property, its possession had been given up to third parties, namely the directors of the condominium corporation.

49 An important element discussed in *Patrick* was whether the police conduct was intrusive in relation to the privacy interest. In this case, the police conduct was more intrusive than simply reaching across a legal property line "with the long hand of the law" to grab up a garbage bag. Here, the police officer arguably was on common property (albeit a public lane). He walked down the lane. He went into a building that was closed by opening an unlocked door. Thus, he entered property that belong to the condominium corporation of which, Mr. Piasecki may or may not have been a shareholder.

50 The last two factors are identified as a determination about whether the police technique (that of seizing garbage) was objectively unreasonable; and last, whether the gathering of this evidence exposed intimate details of the appellant's lifestyle or information of a biographical nature. In *Patrick*, the Supreme Court of Canada determined that it was the appellant's conduct in abandoning the garbage that tipped the balance of the analysis in favor of the police technique being objectively reasonable. And finally, that the exposure to the release of biographical and other information was the act of abandonment, not an intrusion by the police into a subsisting privacy interest. Similar observations can be made in this case.

51 In the end, and balancing all the factors identified in *Patrick*, I conclude that this search without a warrant was justified The strong evidence of abandonment more than cancels out the private location in which garbage was stored in the townhouse complex.

52 It is a reasonable extension of *Patrick* that this search in the facts of this case can occur without warrant. The garbage had clearly been abandoned. Although technically the garbage that was seized was on the common property of all the unit holders, the territorial configuration of the property is less important than the clear and unequivocal factual

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assessment that the garbage was abandoned. In my view garbage that is factually abandoned can be seized without warrant when it is in an area that is neither controlled nor controllable by the target under surveillance, and which is generally accessible to the public. Those conditions existed here. The 'garbage pull' evidence is admissible.

B. The Camera Van Video Surveillance

53 Section 487.01(4) of the *Criminal Code* allows and encourages police officers to obtain warrants for video surveillance. However, that is " . . . in circumstances in which the person has a reasonable expectation of privacy...".

54 This means that not all video surveillance *requires* a warrant. In my view, whether a warrant is required or not depends on the degree of intrusion, the location of the video surveillance, and the practical considerations about whether it is a constant and all intrusive surveillance or simply snapshot surveillance when appropriately triggered.

55 The police had come to know that Mr. Piasecki from time to time was seen in the area of his mother's home. They had lawfully (by tracking warrant) placed a tracking device on his vehicle and by tracking the vehicle they would know when the vehicle was in the vicinity of the targeted home. Across the street from the targeted home, they had set up a video surveillance vehicle. While the camera was on all the time, the only way that an actual observation and recording of what the camera was viewing could be taken is if Sgt. Nayowski turned on his iPad and viewed the electronic feed that was coming from the video camera. If he saw something of interest he would take a screen shot.

56 Apparently two screen shots were taken in both cases, which illustrate Mr. Piasecki walking to and from the front of the home. The location and position of the camera was such that areas generally considered private to the home, such as its backyard and inside the home, could not be seen, although had the garage doors been opened some viewing of what was inside the garage might have been possible.

57 Learned defense counsel brought to my attention *R. v. Wong*, 2017 BCSC 306 (B.C. S.C.) in which a judge ruled as unreasonable a warrantless search on a home under surveillance through a video camera that was recording 24/7 the backyard of a house, and into a storage tent. I distinguish that case by pointing out that here:

> 1. the actual surveillance was taking place only when tracking information showed the vehicle owned by Mr. Piasecki was in the area, and
>
> 2. only when the officer wished to view the video.

58 The EPS investigators were not making a long-term and permanent recording of discrete and private areas of the home. The kind of recording that occurred is no different from the record that would result if a police investigator was standing on the other side of the road with a camera. The surveillance in this case is a direct parallel to an investigator on the other side of the road with a camera taking pictures from time to time. This type of search may be conducted without a warrant: *R. v. Bryntwick*, [2002] OTC 685, (2002), 55 W.C.B. (2d) 207 (Ont. S.C.J.) [2002 CarswellOnt 3106 (Ont. S.C.J.)]. As Dunn J observed in that case at para 21:

> . . . Objectively, walking to and from your front door to a car or a garage, as the case may be, in the plain view of any passers by, pedestrians or motorists in the street, is not an activity which would justify Charter scrutiny.
>
> I agree.

59 I also note that the situation here is very different from the leading case on whether video surveillance is unlawful and a breach of *Charter*, s 8: *R. v. Wong*, [1990] 3 S.C.R. 36, 120 N.R. 34 (S.C.C.). In that case surreptitious video recording was made of a private hotel room being used for gambling, and that was accessed to the public. That obviously is very different from observations made by police of a person who is in full view and where the observer is in an ordinary public location.

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60 There is also an issue of whether Mr. Piasecki has status to raise a privacy issue relating to his mother's home. There was no evidence given about his relationship with his mother, or his freedoms and entitlements to the home. In the ITO [Exhibit 2] his mother is reported to have advise the police that her son mostly lived with his girlfriend, but was only there at her house part-time. There is no other evidence on this issue. Mr. Piasecki's vehicle is identified by vehicle tracking as coming to the home and leaving it after short periods of time. I have some serious doubt whether he has standing or status to bring this type of application in relation to his mother's home and any expectation of privacy associated with that location. Despite this, I will put his argument on its highest plane and assume he has at least a personal privacy status.

61 Of equal importance is an argument about his personal privacy as a visitor to the home. Here because there was a tracking device on his car, there is limited additional privacy in information flowing from what he is actually bringing into the home or removing from it. The ITO reveals one occasion when he entered the home empty handed and left holding a white garbage bag.

62 I therefore conclude this surveillance, limited as it was to incidents when his vehicle arrived at his mother's house, did not require a warrant under all the circumstances. The warrantless search did not violate any *Charter*, s 8 right of Mr. Piasecki. This application is also dismissed.

V. Charter, s 24(2)

63 In case I am incorrect on my conclusion in relation to *Voir Dires* #1 and #2 I will continue to briefly examine whether the challenged evidence should still be admitted at trial per *Charter*, s 24(2), if it had been unlawfully obtained.

64 *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (S.C.C.) provides the current procedure and criteria to apply *Charter*, s 24(2). Evidence obtained in breach of the *Charter* is presumptively excluded, if " . . . having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

65 *R. v. Grant* sets out a number of factors that together permit a trial judge to evaluate whether the admission of the evidence " . . . would bring the administration of justice into disrepute." The first factor is to evaluate the seriousness of *Charter*-infringing conduct. Minor or technical breaches favour inclusion. Deliberate and willful state misconduct favours strict court scrutiny and action. Here, there is no question that the EPS investigators attempted to operate in good faith, and whatever missteps they might have made were minor. The *Charter*-infringing conduct is therefore not serious, and certainly not intentional. That favours admission.

66 The second factor is the impact of the breach on the *Charter*-protected interests of the accused. Unconstitutional state action that extracts a self-incriminating statement is an example of a deep and powerful impact which almost by necessity requires evidence be excluded; to do otherwise would bring the administration of justice into disrepute. However, privacy interests are relative. Mr. Piasecki had little, even notational privacy expectations as he walked in front of his mother's home. His abandoned and commingled garbage is little different. This second factor is a weak basis to exclude the evidence obtained.

67 The third and last consideration is society's interest in adjudicating the alleged criminal misconduct on its merits. Here, the court asks whether evidence is relevant and reliable. Physical evidence such as the baggies and powder residue meets those criteria. Observations of a person entering and exiting a residence are also concrete, potentially relevant facts, particularly when documented in a recorded pictorial form. The defendants face very serious charges.

68 Viewed as a whole I conclude the garbage pull and video observation evidence would be admissible per *Charter*, s 24(2).

VI. Voir Dire #3 - The Warrant

69 It is useful to begin with a brief overview of the law in this area. A warrant obtained to search premises or vehicles is presumptively valid unless it can be shown that it was improperly obtained based on a defective ITO, or obtained based

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on evidence obtained through *Charter* breaches. The job of the initial judicial officer granting the warrant is to determine to a level of a credibility-based probability whether the affiant has reasonable grounds to believe an offense has occurred and the search of a place or thing will provide evidence about that alleged offence. The material supporting the warrant must be reviewed and analyzed in its totality, and not on an isolated or exacting point analysis.

70 The law requires that an affiant must make full, fair, and frank disclosure of all material information available to him, including any information that detracts from the existence of reasonable grounds: *R. v. Morelli*, 2010 SCC 8 (S.C.C.) at paras 44, 58, 102.

71 A judge who reviews the ITO does so using the facts that existed and were known at the date the warrant was granted. This precludes a court from elevating the quality of the ITO based on the successful result of the warrant that flowed from it. However, this review is not a *de novo* process. I must answer one simple question as indicated in *R. v. Vu*, 2013 SCC 60 (S.C.C.) at para 16, [2013] 3 S.C.R. 657 (S.C.C.): Did the ITO contain sufficient credible and reliable information that may be believed and would permit the authorizing judge to issue the warrant?

72 The only evidence before me in the third *voir dire* was the warrant itself. There was no cross-examination of the affiant that would constitute any amplification. The ITO consists of 38 pages of material relating to the investigation of the two accused and incorporates a number of supporting components. One is a schedulized summary item of corroboration or confirmation for information obtained from the confidential informant. Exhibits summarize stops at the home of Mr. Piasecki's mother, and tracking device records of short stops made by Mr. Piasecki's vehicle. Exhibit B also contains the number of short stops at a second address in Edmonton. Overall, the ITO is a comprehensive, logical, and well laid out document.

73 The warrant was granted to search three residences and two vehicles. The thrust of the argument by lead counsel on this application (counsel for Mr. Vergo), and supported by counsel for Mr. Piasecki, focuses on the exclusion of evidence obtained from the three homes. There is no mention of the vehicles. Defence counsel confirmed that they intended their argument to support a submission that all evidence be excluded. The Crown confirmed that they were not taken by surprise with the submission.

74 I begin my comments by a reflection on *R. v. Quilop*, 2017 ABCA 70 (Alta. C.A.). This decision released on March 1, 2017 is binding on me as a decision of our Alberta Court of Appeal. It was received by learned counsel after they had prepared their written briefs. The court in *R. v. Quilop* overturned a trial judge who allowed evidence obtained by a warrant to be admitted at trial. The warrant in *R. v. Quilop* was obtained based on a tip from an unknown anonymous informant who had not had his reliability tested. Police also observed only two suspected street-level purchases. At para 29, the Court points out that:

> The only evidence which directly supported a credibility-based probability that the appellant was committing the offense was the hearsay evidence of the anonymous informant that the appellant was dealing in drugs. . . .

75 The Alberta Court of Appeal concluded that the evidence of the informant was not sufficient in those circumstances to allow the issuance of the warrant, and also commented on the surveillance conducted over two days. The police observed two events they considered to be consistent with the illegal drug activity: para 31.

76 The *R. v. Quilop* case is distinguishable from this case. In our case, the informant was known to the police and had been historically reliable. The informant gave extensive information that was corroborative or confirmatory. He updated his information when circumstances involving Mr. Piasecki had changed. Thus, the quality of the informant in the case before me is significantly different to that of the anonymous and unproven informant in *R. v. Quilop*.

77 Second, the police investigation in the case before me was thorough and competently handled, and the lengthy ITO contained as a schedule approximately 15 points of confirmation or corroboration as identified by the affiant. In addition, and also attached to the ITO, are exhibits which document the stops taken by Mr. Piasecki's automobile vehicle. There is a pattern. He first stops at his mother's home and, secondly, stops in the general Edmonton area. Police assert

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that was consistent with selling drugs on the street out of the vehicle. Observations of several of these perceived drug transactions were actually witnessed by police.

78 The Crown asserts the information in the ITO is overwhelming. I conclude that does not over-state the strength of it. The ITO consists of 38 pages of material by which carefully, methodically, and logically the affiant goes through the reasons why a warrant for the three residences, and the two automobiles will provide evidence of possession of a controlled substance for the purpose of trafficking, and possession of the proceeds of crime. In this ITO is found extensive information provided by the confidential informant that is corroborated in numerous material particulars. Some of these are corroborative of benign facts such as place of residence and a cell phone number. Nevertheless, they reflect a deep knowledge and understanding, particularly about Mr. Piasecki and his association with the co-accused, and other third parties.

79 Mr. Piasecki was not an arbitrary target. He was already known to the police who had strong suspicion that he was a drug dealer. This was readily confirmed by his prior record.

80 Information Mr. Piasecki provided to public authorities, for example to get utilities, had additional letters inserted in his name, or the numbers of his address were changed discreetly to permit an innocent explanation if detected. Viewed as a whole, it would be a remarkable coincidence if these variations were not designed to throw the police off his trail.

81 In addition to the information provided by the informant, Mr. Piasecki was also subjected to lengthy surveillance and information gathering, which started in March 2014 and ended on June 19, 2014. Not once in that period of surveillance do Mr. Piasecki and Mr. Vergo ever appear to be going to a job. While they are being surveyed their lifestyle appears to be one of privilege with no visible employment. There are, however, numerous quick interactions between them and third parties. These often involve the vehicles that are identified in the warrant. These incidents are very difficult to explain, other than the explanation proffered by the affiant that they are drug deals, or cash exchanges, or the supply of bulk drugs.

82 One transaction that learned defense assert could well be innocent (and I accept that it well could be) is certainly a head scratcher. Mr. Piasecki is driving a high-end vehicle. His passenger is Mr. Vergo. He is seen parking at a shopping center and goes into the drugstore. An unidentified male then jumps in his driver seat and in about 20 seconds jumps out of the vehicle, but as he leaves the vehicle he is now carrying a couple of bags. The informant in the ITO identifies this as either a cash or drug exchange.

83 In this case there is a frequency of what could be reasonably articulable and probable grounds to believe that the two accused are dealing drugs out of the two vehicles identified in the warrant.

84 Here, the ITO evidence is so overwhelming in its 38 pages of information that clearly the evidence which was obtained from the garbage drop and the surveillance identified in *Voir Dires* #1 and #2 could be dropped from the ITO and a reviewing judge would still conclude that the evidence to grant the ITO was overwhelming.

85 In summary, the information provided by a reliable known informant satisfies me. It is highly reliable. This information was thoroughly corroborated or confirmed. The police then conducted a lengthy investigation in which they observed suspicious conduct on the part of both accused that led them to conclude, fairly and reasonably, that the accused through that suspicious conduct were trafficking in drugs. The attendances at the three addresses, including their timing and frequency, are most suspicious, and suggest drug trafficking activity occurring out of those bases.

86 The police lawfully obtained authorization to place a tracker on Mr. Piasecki's vehicle and the tracker also showed that his vehicle was being operated in a manner consistent with drug trafficking.

87 I conclude that the ITO was not negligently prepared, but instead was based on reliable, credible, and confirmed information, also supported by solid police investigation and observations of the two accused. Even had I been in error in my two earlier rulings excising those pieces of evidence from the ITO my error would not have changed the outcome.

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The warrant obtained in this case was validly obtained and constitutes a lawful warrant. The evidence obtained from it is admissible.

Order accordingly.

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