COURT OF APPEAL FOR ONTARIO

CITATION: R v. Reid, 2016 ONCA 524

DATE: 20160630

DOCKET: C59670

Juriansz, Watt and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Erik Reid

Appellant

John Norris, Breese Davies and Owen Goddard, for the appellant

Alexander Hrybinsky, for the respondent

Heard: December 17, 2015

On appeal from the convictions entered on June 13, 2013 and the sentence imposed on June 20, 2013 by Justice Eugene G. Ewaschuk of the Superior Court of Justice, sitting without a jury.

Watt J.A.:

[1] Ian McCulloch had some guns. He kept them lawfully in a storage locker in Port Perry.

[2] Lawrence Wray had some guns too. He kept his guns lawfully in a storage locker in Port Perry.

[3] In late October one year, somebody broke into both storage lockers. And stole about thirty guns, most of them handguns.

[4] About a week later, police found about three dozen guns in another locker. Erik Reid's locker. Along with 5,000 rounds of ammunition. All the guns came from the Port Perry lockers. So did two other handguns found in Reid's home, along with some more ammunition and Ian McCulloch's coin collection and identification.

[5] Police charged Reid with nearly 100 firearms offences. At Reid's trial, his lawyer asked the judge to exclude all the evidence found in his storage locker and at his home. Reid's lawyer said that the searches were unreasonable and the evidence gathered, inadmissible.

[6] The trial judge did not agree with Reid's lawyer. The search was lawful. The evidence found during the searches was admissible. A little later, the judge convicted Reid of more than three dozen firearms offences on the basis of an Agreed Statement of Facts prepared by Reid's lawyer and the trial Crown.

[7] Erik Reid asks us to set aside his convictions, or, if we are not prepared to do so, to substantially reduce the lengthy penitentiary sentence the trial judge imposed upon him.

[8] These reasons explain why I would dismiss the appeal from conviction, but allow the appeal from sentence to the extent of awarding enhanced credit to Reid for pre-disposition custody, thereby reducing the *remanet* of his sentence.

The Background

[9] The issues raised on the appeal from conviction do not require any elaboration of the circumstances underpinning the offences charged beyond those necessary for an understanding of the grounds of appeal advanced.

The Unrelated Arrest

[10] About a week after the Port Perry gun thefts, police arrested Reid on an unrelated and outstanding warrant. When searched incident to his arrest, Reid had several .22 calibre bullets in his pocket. He was not charged in connection with this ammunition.

The Locker Search Warrant

[11] The day after Reid's unrelated arrest, police obtained a warrant to search a storage locker leased to him at a Toronto address. In that locker, officers found 22 handguns, 13 long guns, and over 5,000 rounds of ammunition. All the handguns and six of the long guns came from the storage lockers in Port Perry.

[12] The information to obtain (ITO), which provided the basis for the warrant's issuance, recited the circumstances of Reid's recent arrest and what he told investigators in a post-arrest interview. He denied any knowledge of the ammunition in his pocket but admitted a familiarity with firearms through his deceased father.

[13] The core of the ITO consisted of information provided by a confidential informant (CI) known to the Toronto Police Service. In the copy of the ITO provided to defence counsel, the trial Crown redacted not only biographical details of the CI but also all the information the CI had provided.

[14] The balance of the ITO disclosed observations a police officer made of the storage facility unit leased to Reid. Through a slim door opening, the officer could see cases of razors stacked on the floor along with something else covered with a dark tarp. Some of this paragraph was also redacted.

The Search Warrant for Erik Reid's Home

[15] After police had executed the search warrant for Reid's storage locker and found the cache of stolen guns and ammunition there, they sought and obtained a second warrant to search the home Reid occupied with his mother. Execution of that warrant yielded two more stolen handguns, more ammunition, and various items belonging to Ian McCulloch. The issuance of this warrant was not directly challenged at trial.

The Challenge at Trial

[16] Trial counsel for Reid challenged the issuance of the search warrant for the storage locker. He invoked s. 8 of the *Canadian Charter of Rights and Freedoms* and contended that under *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the warrant could not have issued on the basis of the material included in the ITO.

[17] As part of the appellant's s. 8 application, trial counsel sought leave to cross-examine the author of the ITO. Counsel sought to establish that the police had not been forthcoming in the ITO about the timing of the information received from the CI as well as about the CI's reliability and criminal antecedents. After

all, trial counsel argued, the redacted ITO made it clear that issuance of the warrant depended entirely on the reliability of the information provided by the CI.

[18] The trial judge dismissed the application to cross-examine the author of the ITO. The trial judge concluded:

> In this case, it seems to me that the proposed cross-examination is essentially directed at undermining the reliability of the CI. At the same time, it also seems to me that the proposed cross-examination would likely tend to narrow the class of possible informants, given the short timeframe involved and thereby tend to indirectly identify the CI. The need to protect the identity of confidential informers remains a valid ground for denying cross-examination of the affiant in this area.
>
> In the end, the accused has failed to satisfy me that the proposed cross-examination as to the CI's information would tend to undermine one of the statutory preconditions to the issuance of the search warrant. Alternatively, there is no basis indicating that the affiant's own credibility is material to undermining one of the statutory preconditions to the issuance of the search warrant. Accordingly the application for leave to cross-examine the affiant is hereby dismissed.

[19] After the trial judge ruled on trial counsel's application to cross-examine the author of the ITO, the trial Crown acknowledged that the redacted ITO could not support the issuance of the warrant to search the storage locker. The Crown invoked step six of *Garofoli* and provided the trial judge with a draft summary of the redacted parts of the ITO. The trial judge reviewed the draft and provided it to defence counsel.

[20] Defence counsel complained that the summary was so devoid of information that he could not make any submissions on his *Garofoli* application. Counsel did not challenge the constitutional validity of step six in *Garofoli* under s. 7 of the *Charter* or on any other basis.

The Ruling of the Trial Judge

[21] The trial judge was satisfied that the summary provided to trial counsel was adequate to permit Reid to make full answer and defence on his *Garofoli* application. The trial judge relied on the redacted portions of the ITO and found that the warrant could have been issued in reliance upon them. The

judge dismissed the application to exclude the evidentiary fruits of the search of Reid's storage locker.

The Trial Proceedings

[22] After the trial judge had dismissed the s. 8 application, counsel prepared an Agreed Statement of Facts that summarized the Crown's case. Reid pleaded not guilty and agreed that findings of guilt could be recorded on about three dozen of the 98 counts: one count of possession of a firearm for the purpose of trafficking, one count of possession of an unregistered firearm with ammunition readily accessible, and 35 counts of possession of unlicensed firearms. The trial judge recorded the findings of guilt, entered convictions on those counts, and subsequently sentenced Reid to a net sentence of nine years in the penitentiary. The Crown withdrew the remaining counts.

The Grounds of Appeal

[23] Erik Reid (the appellant) appeals his convictions and seeks leave to appeal his sentence.

[24] On the appeal from conviction, the appellant seeks to challenge, for the first time in this court, the constitutional validity of step six of *Garofoli* which he says offends s. 7 of the *Charter*. In the alternative, he submits that the trial judge erred in dismissing the *Garofoli* application at trial by relying on redacted portions of the ITO when the judicial summary provided to him (the appellant) did not make him sufficiently aware of the nature of the excised material to permit him to effectively challenge it by evidence or argument.

[25] On the appeal from sentence, the appellant says that the trial judge imposed a demonstrably unfit sentence because of his singular focus on denunciation and deterrence and his failure to accord appropriate weight to various mitigating factors and the appellant's rehabilitative prospects. The appellant contends that the trial judge also erred in failing to award him adequate credit for time spent in pre-disposition custody by granting credit on a 1:1 rather than a 1.5:1 basis.

The Appeal from Conviction

Ground #1: The Constitutional Validity of Step Six of *Garofoli*

[26] In accordance with the directions of the case management judge, counsel filed written submissions on whether the appellant should be permitted to raise the constitutional validity of step six of *Garofoli* in this court, for the first time. We permitted brief oral submissions on the issue then retired to consider whether we would permit the appellant to advance the argument. We concluded that we would not permit the appellant to pursue the constitutional challenge.

[27] It is sufficient in these circumstances to summarize briefly the positions of the parties, set down the governing principles, and explain why the application of those principles yielded the conclusion we reached.

The Arguments on Appeal

[28] The appellant begins with an acknowledgement of the incontrovertible. As a general rule, appellate courts will not entertain grounds that were not raised at trial. This general prohibition applies equally to constitutional and non-constitutional arguments that see their first sunrise in the appellate court.

[29] But, the appellant continues, the rule is general, not universal or unyielding. Appellate courts have the discretion to permit pursuit of new arguments, constitutional or otherwise, for the first time on appeal. New arguments are more likely to be countenanced where those arguments can be fully, fairly, and effectively addressed on the record of the trial court that is before the appellate court.

[30] Here, the appellant says, the proposed ground relates to the basis on which the case for the Crown was challenged at trial. The appellant contested the constitutional validity of the search of the storage locker and seizure of its contents. The ITO was targeted. The attack was both facial and subfacial. The constitutional challenge proposed on appeal fastens upon the procedural mechanism invoked by the Crown to rebuff the challenge. The nexus is sufficient to oust the operation of the general rule and to permit consideration of the proposed argument made here for the first time.

[31] Besides, the appellant contends, the trial record is adequate to permit advancement of the argument and adjudication of its considerable merit. The respondent will suffer no prejudice.

[32] The respondent rejects any suggestion that we should depart from the general rule, invoke the exception, and take on the constitutional challenge proposed by the appellant.

[33] The respondent submits that the evidentiary record before this court is inadequate. It is not the functional equivalent of what would have been put in place had the argument been advanced at trial. The respondent reminds us that the constitutional infringement alleged at trial was a breach of s. 8, not a claim that a procedural component of the inquiry offended s. 7. The argument advanced was highly contextual. The argument proposed here is of a more general nature, seeking to strike down step six on the ground it fails to accord with the principles of fundamental justice. What is proposed is an entirely new argument, and one that cannot be advanced, much less decided, in the abstract. What is required is a record compiled to reflect the highly contextual nature of the challenge and including s. 1 materials. This argument cannot be legitimately characterized as supplementary to that advanced at trial.

[34] The respondent points out that whether an argument proposed for the first time on appeal is important is not dispositive of whether the general rule should give way to the exception. This is not an issue that will escape appellate review if not heard in this case. It will emerge in future cases in which *Garofoli* applications are mounted and step six is involved: its constitutional validity will be assailed, the necessary evidentiary foundation developed.

[35] The respondent also notes that the s. 7 challenge to step six of *Garofoli* invites us to overturn, as unconstitutional, a procedural step created by the Supreme Court of Canada in *Garofoli* and considered by this court recently in a decision that contained no query about constitutional vulnerability. Nothing has occurred since either decision was rendered to warrant further consideration.

[36] The respondent concludes by questioning the claim of merit advanced by the appellant. The essence of the argument for the appellant rests on a claim that invokes the disclosure obligations of the Crown, the right to make full answer and defence, and authorities involving national security and security certificates. The right to make full answer and defence is not absolute. Neither it nor an accused's entitlement to disclosure can trump CI privilege. What will be required to meet the commands of s. 7 will vary with the context in which the claim arises.

The Governing Principles

[37] The principles that control whether an appellate court will entertain on appeal an argument not raised at trial are not controversial.

[38] The general rule is preclusive but not unyielding.

[39] The general rule is that courts of appeal will not permit an issue to be raised for the first time on appeal: *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 16, *per* L'Heureux-Dubé J. (dissenting in part); *R. v. Brown*, [1993] 2 S.C.R. 918, at pp. 923-924, *per* L'Heureux-Dubé J. (dissenting); *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at paras. 18-19; and *R. v. Roach*, 2009 ONCA 156, 246 O.A.C. 96, at para. 6.

[40] The general rule arises out of several concerns that include but are not limited to the following:

> i. prejudice caused to the other side which lacks the opportunity to respond and adduce evidence at trial;
>
> ii. the absence of a sufficient record from which to make findings of fact essential to a proper determination of the issue;
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> iii. societal interest in finality and the expectation that criminal cases will be disposed of fairly and fully at first instance; and
>
> iv. the important responsibility of defence counsel to make decisions that represent a client's best interests and to advance all appropriate arguments throughout the trial.

See *Warsing*, at paras. 16-17 and *Brown*, at pp. 923-924.

[41] The general rule applies to constitutional arguments or challenges raised for the first time on appeal, regardless of whether an appellant invokes the remedial powers of s. 24 or the declaratory or nullifying authority of s. 52(1): *Roach*, at para. 6.

[42] The burden is on the party who seeks to raise the new issue on appeal to bring the argument to be advanced within the exception to the general prohibition. It is incumbent on that party to demonstrate that all the facts necessary to address the proposed issue are as fully before the appellate court as they would have been had the issue been argued at trial: *Kaiman*, at para. 18. As the evidentiary disputes generated by the materials first filed on appeal mount, the likelihood that an appellate court will hear the argument diminishes: *Roach*, at paras. 7-8.

[43] A party who seeks to escape the grip of the general prohibition against raising issues for the first time on appeal must meet or satisfy three preconditions:

> i. the evidentiary record must be sufficient to permit the appellate court to fully, effectively and fairly determine the issue raised on appeal;
>
> ii. the failure to raise the issue at trial must not be due to tactical reasons; and
>
> iii. the court must be satisfied that no miscarriage of justice will result from the refusal to raise the new issue on appeal.

See *Brown*, at p. 927, *per* L'Heureux-Dubé J. (dissenting).

[44] A final point. The decision whether to grant or refuse leave to permit a new argument is a discretionary decision informed by a balancing of the interests of justice as they affect all parties: *Kaiman*, at para. 18.

The Principles Applied

[45] In combination, several reasons persuaded us that this was not a case in which we should depart from the general injunction against permitting issues to be raised for the first time on appeal.

[46] First, we are not satisfied that the facts are as fully developed as they would have been had the constitutionality of step six been raised at first instance.

[47] For all practical purposes, the evidentiary record consists of the redacted ITO and the judicial summary of the redacted portions of the ITO provided to defence counsel. The focus of the inquiry at trial was on whether the judicial summary provided made the appellant sufficiently aware of the nature of the excised material that he was able to challenge it in argument or by the introduction of evidence. The issue was whether the Crown could invoke step six or was confined to the admittedly inadequate redacted ITO. An evidentiary record adequate for this purpose provides no such nourishment to sustain a claim that step six is constitutionally impotent because it fails to accord with the principles of fundamental justice.

[48] Second, the proposed argument is not supplementary to the position advanced at trial. There, trial counsel contended that the Crown could not rely on step six, not because it was unconstitutional, but because the summary provided

did not meet its requirements. The proposed argument is a claim that step six has no place in a *Garofoli* application because this step is itself constitutionally flawed.

[49] Third, to the extent that the proposed argument is grounded on a claim that the right to make full answer and defence trumps confidential informer privilege, such a claim is unsustainable. In a similar way, the invocation of the principles elucidated in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, is of little value in this context since that case makes it clear that s. 7 does *not* require a particular type of process but one that is fair in light of the nature of the proceedings and the interests at stake: *Charkaoui*, at para. 20.

[50] Finally, the appellant invites a reassessment of a common law procedure put in place by the Supreme Court of Canada to deal with applications to exclude evidence allegedly obtained by a breach of s. 8 of the *Charter*. A part of the procedure – the conditions precedent to obtaining leave to cross-examine the affiant – has been held constitutionally sound under s. 7: *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 38. Besides, step six has received extensive analysis recently in this court without any suggestion of constitutional infirmity: *R. v. Crevier*, 2015 ONCA 619, 330 C.C.C. (3d) 305.

GROUND #2: The Inadequacy of the Judicial Summary

[51] The appellant targets the judicial summary provided to defence counsel at trial. He says that the summary fell short of what step six in *Garofoli* requires. An assessment of this complaint requires a brief sketch of some features of the ITO and judicial summary and a snapshot of the trial judge's ruling on the *Garofoli* application.

The ITO

[52] The core of the ITO was the information provided by the CI. Absent this information, the trial Crown conceded, the warrant could not have issued.

[53] The copy of the ITO provided to defence counsel at trial was redacted, barren of the information provided by the CI.

The Judicial Summary

[54] The trial Crown provided the trial judge with a proposed summary of the redacted portions of the ITO. In open court, in the presence of defence counsel,

the trial Crown and the trial judge discussed the adequacy of the summary. The trial judge was satisfied with its adequacy and provided a copy to defence counsel. The trial Crown and trial judge retained a copy of the unredacted ITO.

[55] The summary tracked the paragraphs and subparagraphs of the ITO in language that was, of necessity, somewhat general in order not to disclose information that might reveal the identity of the CI. Among other things, the summary made it clear that the ITO contained no information about:

- the criminal record, if any, of the CI;
- any outstanding charges the CI may have been facing; and
- the CI's prior involvement, if any, in providing information to a police force.

[56] The summary describes the currency of the information provided by the CI by reference to the same season of the same year in which the ITO was completed and the warrant issued. Further, the summary discloses that the ITO includes specific facts relating to a storage facility at a disclosed location. The facts include description of specific objects in the storage facility, how the facts became known to the CI and when those facts became known. Additional parts of the summary explain the basis upon which the author of the ITO undertook certain investigations and discuss corroboration of the information provided by the CI.

The Positions of the Parties at Trial

[57] Trial counsel for the appellant focused his submissions on the adequacy of the judicial summary. He contended that the summary was so generic that he could not make submissions about whether the requirements of *R. v. Debot*, [1989] 2 S.C.R. 1140, for information from informants – compelling information, a credible source, and corroboration by police investigation – had been met.

[58] The summary provided no information about the degree of detail and was significantly deficient because it omitted, deliberately, any information about the CI's criminal record, outstanding charges, and previous involvement with law enforcement. In the end, counsel said, the summary failed to provide him with adequate information to challenge the ITO.

[59] The trial Crown emphasized the nature of the judicial summary required by step six of *Garofoli*. The summary must be such that it makes the *Garofoli* applicant "sufficiently aware of the nature of the excised material to challenge it in argument or by evidence": *Garofoli*, at p. 1461. The summary need not provide the specifics of the excised material. To impose such a requirement or standard would be at once unfaithful to the benchmark mandated by *Garofoli* and disloyal to the near absolute nature of the CI privilege.

[60] Further, the trial Crown argued, the ultimate issue on the hearing was whether, on the basis of the ITO, as amplified on review, the warrant could have been issued. This test and the nature of the inquiry itself – a hearing to determine the admissibility of evidence – help to define the scope of disclosure required. It is in this narrower context, a threshold evidentiary hearing to determine the admissibility of items seized under a warrant as evidence, that the nature and scope of the judicial summary must be considered.

[61] In the end, the trial Crown said, the summary was adequate. It pointed out the defects in the ITO – the absence of any mention of the CI's criminal record and prior history – and demonstrated a sufficient basis upon which trial counsel could argue and the trial judge decide whether the information was reliable and sufficiently corroborated by police investigation to overcome the effect of the omissions.

The Ruling of the Trial Judge

[62] The trial judge described that the nature of his task at the threshold stage was to determine whether the judicial summary of the redacted portions met the standard required by step six of *Garofoli*. He concluded that the summary met this standard by its references to the following:

- the background of the CI;
- the CI's motivation;
- the shortcomings in connection with the CI's criminal record (if any) and prior history as an informer;

- the currency of the information about the storage locker and the accused's circumstances;

- the description of the contents of the storage locker; and

- the source of the CI's knowledge.

[63] The trial judge went on to consider whether, on the basis of the unredacted ITO, the warrant could have been granted. He concluded as follows:

In this case, I find the information provided by the CI, and in turn by the affiant, to the issuing judge to have been highly detailed and compelling. The information was current within a tight timeframe. Furthermore, the police corroborated the CI's information as to the location of the storage locker, its description, and various items found in or on the locker. The CI also indicated how he/she came to be aware of the information, that is whether it was first or second hand information. The police verified with the facility manager that the accused, Reid, had indeed rented the locker. The locker was, furthermore, padlocked.

In the end, I find that there was a sufficient evidentiary foundation for the judge to have issued the search warrant, based on the compelling detail provided by the CI in corroboration of much of that detail.

The Arguments on Appeal

[64] The appellant begins with a reminder that the Crown's resort to step six of *Garofoli* is circumscribed. To take advantage of this extraordinary step, which allows recourse to materials that have not been disclosed to an accused, Crown counsel must satisfy the reviewing judge that the judicial summary makes the accused sufficiently aware of the nature of the excised material that she or he may challenge it in argument or by evidence. In this case, the appellant says, the summary falls short of what is required.

[65] The appellant acknowledges the difficulty in including any specifics about the information provided by the CI in the summary since those specifics, even what appears to be an innocuous detail, may tend to reveal the identity of the CI, thus impermissibly breach the CI privilege. But the appellant says that the compromise reflected in step six does not eradicate an accused's right to make full answer and defence by challenging the admissibility of evidence proposed for admission by the Crown.

[66] What happened here had that effect. The summary, generic in nature, left the appellant unaware of the source of the CI's information – first hand observation, hearsay, or rumour – as well as his or her motivation. For all practical purposes, the appellant lacked the ability to challenge, by argument or evidence, whether the *Debot* requirements had been satisfied. The trial judge should not have permitted the Crown to rely on step six because the judicial summary failed to meet the standard required to invoke this extraordinary procedure.

[67] The respondent rejects the appellant's claim that the judicial summary fell short of what is required by step six of *Garofoli*.

[68] The respondent says the very term used in step six of *Garofoli* – "summary" – recognizes that what is supplied does not replicate the fine details of the unredacted version. And besides, an ITO that contains information from a CI must pay heed to the CI privilege with the inevitable consequence that the summary cannot include anything that may reveal the identity of the CI.

[69] The respondent invites our consideration of the purpose of the summary as a factor informing our assessment of the adequacy of the summary challenges here. Summaries are intended to provide an accused with as much information about the nature of the redacted material as is necessary to permit meaningful participation by an accused in the evidentiary challenge but not so much as to compromise the near absolute nature of CI privilege.

[70] Further, according to the respondent, our assessment of the sufficiency or, more accurately, adequacy of the judicial summary cannot ignore the reality of the challenge to admissibility. The appellant was not unarmed but for the summary. He also had the Crown disclosure. He had the opportunity to adduce defence evidence and to advance hypothetical and alternative arguments on the *Debot* issues, especially whether the omissions in the ITO negated the credibility of the CI and the compelling nature requirement of *Debot*.

[71] The respondent reminds us about the purpose and place in the trial process occupied by the summary. Summaries have to do with a pre-trial procedure the purpose of which is to determine the admissibility of evidence. They are not concerned with the trial on the merits or the adequacy of the Crown's proof of guilt. In this case, the summary satisfied the *Garofoli* step six requirement and permitted a challenge based on the *Debot* criteria.

The Governing Principles

[72] Several principles have their say in our determination of this ground of appeal. Some have to do with the scope of review, confidential informant privilege, and the right of those charged with a crime to make full answer and defence. Others focus more directly on step six of *Garofoli*.

The Scope of Warrant Review

[73] The reviewing judge does not stand in the same place and perform the same function as the issuing justice. The reviewing judge does not conduct a rehearing of the application for the warrant. He or she does not substitute his or her view for that of the issuing justice. The task of the reviewing judge is to determine whether, based on the record that was before the issuing justice – the ITO – as amplified by any evidence adduced on the review, the issuing justice *could* have issued the warrant. Provided the reviewing judge is satisfied on the basis of these materials that the warrant *could* have issued, then the reviewing judge must not interfere: *Garofoli*, at p. 1452; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 51.

[74] It is essential that the reviewing judge base his or her decision on reliable information. In other words, the test or standard is whether there was reliable evidence that might reasonably be believed on the basis of which the warrant could have issued: *Araujo*, at para. 54.

[75] A further point about what the *Garofoli* review does not do. A *Garofoli* review is an evidentiary hearing. Its purpose is to determine whether a judicial order, a warrant or authorization, can sponsor state activity that, without it, would offend the s. 8 guarantee against unreasonable search or seizure. The hearing is not intended to test the merits of any of the Crown's allegations in respect of the offence charged. The truth of the allegations in the ITO as they relate to the essential elements of the offence and an accused's participation in it remain to be established by the Crown on the basis of admissible evidence adduced at trial: *Pires*; *Lising*, at para. 30.

[76] As the *Garofoli* hearing commences, the reviewing judge will have a copy of the ITO, the warrant, and any materials filed in support of the application. When the ITO includes reference to information provided by a CI, that information will be redacted to guard against any breach of CI privilege. The record may become expanded by further information as, for example, by cross-examination of the author of the ITO. But cross-examination does not follow as a matter of right, an invariable component of the right to make full answer and defence. A requirement that the defence meet a threshold test before engaging in cross-examination, pursuing a specific line of inquiry, or eliciting evidence in

support of a full answer and defence is neither unique to a *Garofoli* application nor anomalous within the criminal justice system: *Pires*; *Lising*, at para. 37.

The Right to Disclosure and CI Privilege

[77] An accused's right to make full answer and defence, a principle of fundamental justice constitutionally protected under s. 7 of the *Charter*, includes the right to full and timely disclosure, the right to know the case to meet, the right to challenge the admissibility of the evidence proffered for admission by the Crown, and the right to cross-examination: *Crevier*, at para. 52.

[78] On the other hand, neither the right to make full answer and defence nor the right to disclosure is absolute. For example, however fundamental, the right to make full answer and defence does not reach so far that it issues a blank cheque to an accused to pursue any and every conceivable tactic and line of inquiry in service of defending him or herself against an allegation of crime: *Crevier*, at para. 53; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 64. Context and the presence and influence of other competing interests are of importance in establishing the outer boundaries of the right: *Crevier*, at para. 53.

[79] Nor is an accused's right to disclosure absolute. It is subject to the discretion of the Crown, a discretion which extends to the enforcement of CI privilege: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at pp. 335-36 and 339.

[80] Confidential informant privilege is a class privilege. The rule is of fundamental importance to the workings of our criminal justice system: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 105; *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 10.

[81] Informer privilege is of such importance that, once established, a court is not entitled to balance the benefit that enures from the privilege against countervailing considerations: *Leipert*, at paras. 12 and 14. The only exception to the rule is innocence at stake. No exception exists for the right to make full answer and defence: *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 28.

[82] Preservation of the near absolute nature of CI privilege has significant implications for the redaction process as well as for requests for further disclosure about the informant's sources of knowledge or the nature of the information provided. It is virtually impossible for a court to know what details may reveal the identity of a CI: *Leipert*, at para. 28; *World Bank Group v. Wallace*, 2016 SCC 15, 395 D.L.R. (4th) 583, at para. 129.

[83] An absolute CI privilege rule, subject only to the innocence at stake exception, is consistent with the protection the *Charter* accords to the right to a fair trial: *Leipert*, at para. 24; *Vancouver Sun*, at para. 28.

Step six of *Garofoli*

[84] In *Garofoli*, which involved a challenge to a conventional authorization under what is now Part VI of the *Criminal Code*, Sopinka J. set out a procedure to be followed when the Crown objects to disclosing part of the affidavit filed in support of an application for authorization: see *Garofoli*, at p. 1461. The same procedure applies to an ITO relied upon to support issuance of a search warrant: *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4, at para. 15; *R. v. Rocha*, 2012 ONCA 707, 112 O.R. (3d) 742, at para. 56.

[85] Step six of *Garofoli* may be invoked when the editing of the supportive affidavit or ITO to ensure compliance with the CI privilege rule renders the affidavit or ITO incapable of satisfying the conditions precedent for issuance of the warrant or authorization. Step six is in these terms, at p. 1461:

> 6. If, however, the editing renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the wiretap evidence.

The step six procedure attempts to balance conflicting interests. On the one hand, the interests of law enforcement, including the duty to ensure the protection of informers and preserve the near-absolute sanctity of CI privilege. On the other hand, the right of every person charged with a crime to make full answer and defence: see *Garofoli*, at p. 1458. The balancing is not a weighing of absolutes for, as we have already seen, neither the right to make full answer and defence nor CI privilege is absolute.

[86] Step six adopts a *quid pro quo* approach to this balancing process. This involves, on the one hand, permitting the Crown to rely upon the unredacted ITO, which has not been disclosed to the defence, to support the issuance of the

warrant. And on the other hand, permitting the defence to challenge the issuance of the warrant, and thus the reasonableness of the search, on the basis of the redacted ITO and a judicial summary of the nature of the redacted material. The Crown may only invoke step six, however, where the summary makes the accused sufficiently aware of the nature of the excised material to challenge it in argument or by evidence: *Crevier*, at para. 43; *Garofoli*, at p. 1461. A summary that fails to meet this standard disentitles the Crown to rely on the unredacted ITO to sustain the issuance of the warrant as the enabling search authority.

[87] Three points about the judicial summary are worthy of reminder.

[88] First, what is provided is a *summary*. By its very nature, a summary is general, not detailed. Its predominant characteristics are conciseness and brevity. A summary eschews detail. Indeed, were a summary to contain the last detail, it would not only exceed what is required by step six but also, in all likelihood, breach CI privilege.

[89] Second, and despite its general nature, the summary must provide an accused with a meaningful basis on which to challenge whether the author of the ITO made full and frank disclosure of the *Debot* factors relating to the CI: *Crevier*, at para. 83.

[90] Third, the summary need only make the accused aware of the *nature* of the redacted material, not its substance and not its details. The summary must be sufficient to allow the accused to mount a challenge to the redacted material by argument or evidence. But recall that the judicial summary is not the only means available to an accused to challenge the issuance of the warrant. An accused may seek leave to cross-examine the author of the ITO, may rely on other information that has been the subject of Crown disclosure, or may adduce other evidence: *Crevier*, at paras. 72, 77 and 83.

The Principles Applied

[91] Several reasons persuade me that we should not give effect to this ground of appeal.

[92] First, the trial judge stated and applied the proper test in concluding that the judicial summary provided to the appellant made him sufficiently aware of the excised material so that he could (and did) challenge it. The inquiry in which the trial judge was involved is a fact-specific examination of all the circumstances. Inherent in this analysis are findings of fact and an assessment

of whether those findings satisfy the legal standard required of them. These findings are owed deference on appellate review.

[93] Second, the arguments advanced by the appellant are largely generic, more apt to a constitutional challenge to the procedure mandated by step six, a challenge we declined to hear for reasons already expressed, than a focused submission on the alleged deficiencies here.

[94] Third, it is important not to lose sight of the nature of the inquiry of which step six may be a part. The hearing is a pre-trial, threshold evidentiary hearing in which an accused challenges the constitutional integrity of an evidence-gathering device or technique. Guilt or innocence is not at stake. In the end, what the judge must decide is whether there is any basis upon which the issuing justice could have been satisfied that the statutory preconditions to the issuance of the warrant had been met.

[95] Fourth, the judicial summary provided in this case struck an appropriate balance between the right to make full answer and defence, on the one hand, and the preservation of the near absolute nature of CI privilege on the other. The innocence at stake exception was not invoked. The summary contained meaningful information that permitted the appellant to argue that the *Debot* requirements had not been met. These three factors are assessed on the totality of the circumstances, bearing in mind that a weakness in one, say the credibility of the source, may be made up in others, such as the compelling nature of the information or its corroboration by law enforcement authorities.

[96] A final point concerns the factors a trial judge should consider in assessing the adequacy of the judicial summary. There is no closed list of factors that require consideration. And whichever factors are considered, all sides must recognize that nothing is to be included in the summary that risks revealing the identity of the CI.

The Appeal from Sentence

[97] The appellant also seeks leave to appeal sentence. He received an effective sentence of 9 years after the trial judge had taken into account the principle of totality and awarded 36 months' credit for time spent in pre-disposition custody.

[98] The appellant says that the trial judge made three errors in determining the sentence he imposed:

i. he erred in principle by placing undue emphasis on denunciation and deterrence and excluding from consideration the appellant's rehabilitative prospects and the fact that he had not previously received and served a penitentiary sentence;

ii. he erred in imposing a sentence that was demonstrably unfit; and

iii. he erred in failing to award appropriate credit for time spent in pre-disposition custody.

[99] Although I would not give effect to either of the appellant's first two complaints, it is common ground that the trial judge gave inadequate credit for the time the appellant spent in pre-disposition custody in settling upon the net sentence he imposed.

[100] The trial judge was satisfied beyond a reasonable doubt that the appellant had the 37 firearms in his possession for the purpose of selling them to others engaged in unlawful activities. These firearms, especially the handguns, together with over 6,000 rounds of ammunition had no legitimate purpose. Handguns intimidate. Handguns injure. Handguns kill. This arsenal was capable of wreaking havoc in any community into which it made its way.

[101] Handgun crimes warrant exemplary sentences. Deterrence and denunciation must be and remain the predominant sentencing objectives. Realistic rehabilitative prospects cannot be ignored but must be subordinate to denunciation and deterrence. Here, the appellant's circumstances – a mature, 40 year old recidivist who has accumulated four dozen convictions over about two decades – equally warrant assignment of rehabilitation to a subservient place in the determination of a proportional sentence. Even accepting that the appellant's initial acquisition of the guns was fortuitous, the indelible fact remains that he was prepared to put them out on the street in the hands of those bent on unlawful activities. The inference that financial gain was at the root of this plan is irresistible.

[102] It may well be that the sentence initially mentioned by the trial judge – 15 years – was beyond the range of sentences appropriate for this offence and offender. But that is somewhat beside the point because the trial judge recognized the modifying effect of the totality principle. I would not characterize 12 years as unfit and that was what the application of the totality principle yielded.

[103] The parties agree that the trial judge should have awarded the appellant credit for the entire 31.5 months of pre-disposition custody at a rate of 1.5:1 to give effect to the decision in *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, a judgment of which the trial judge did not have the benefit at the time of sentencing. The application of the *Summers* principles reduces the net sentence by 11 months, to eight years and one month.

Conclusion

[104] I would dismiss the appeal from conviction, grant leave to appeal sentence, and allow the appeal from sentence by reducing the nine-year sentence imposed by the trial judge to a sentence of eight years, one month to reflect appropriate credit for pre-disposition custody.

Released: June 30, 2016 (RGJ)

"David Watt J.A."

"I agree R.G. Juriansz J.A."

"I agree L.B. Roberts J.A."