NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Simon*, 2020 NSCA 25

Date: 20200312
Docket: CAC 486721
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Sean Dale Simon

Respondent

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	December 3, 2019, in Halifax, Nova Scotia
Subject:	**Unreasonable Search and Seizure. Sections 8, 9, 24(2) *Canadian Charter of Rights and Freedoms.* Search Incident to Arrest.**
Summary:	Based on information received from two confidential informants, the police stopped Mr. Simon's car and placed him under arrest for possession for the purpose of trafficking under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 5(2). Mr. Simon's vehicle was searched incident to the arrest and the officer found 13 Dexadrine capsules and one codeine pill. After the arrest and search of Mr. Simon's vehicle, the police prepared an Information to Obtain a Search Warrant (ITO) to search Mr. Simon's home. The Warrant was issued and executed. No illegal drugs were found in the Simon residence. Mr. Simon, relying on s. 8, s. 9 and s. 24(2) of the *Canadian Charter of Rights and Freedoms*, argued his arrest was

unlawful and in violation of his s. 9 right to be free from arbitrary detention. He also argued that the search of his vehicle violated his s. 8 right to be free from unreasonable search or seizure.

Finally, he argued that the warrant issued for the search of his house was improperly obtained and that all of the evidence obtained from the searches was inadmissible.

The trial judge determined that the arrest was unlawful and, therefore, the search incident to the arrest was also unlawful.

He also determined that the Search Warrant should not have been issued on the information provided and that the evidence obtained in the searches was excluded.

The Crown appealed the trial judge's findings.

Issues: (1) Were there reasonable and probable grounds to arrest Mr. Simon?
(2) If Mr. Simon's arrest breached s. 9 of the *Charter*, should the evidence be excluded?

Result: Appeal dismissed. The police did not have reasonable and probable grounds to arrest Mr. Simon and, therefore, the search incident to his arrest was also unlawful.

The Search Warrant for Mr. Simon's house was also invalid.

The trial judge properly found that the evidence should be excluded.

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Judges:	Farrar, Hamilton and Bryson, JJ.A.
Appeal Heard:	December 3, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Hamilton and Bryson, JJ.A. concurring.
Counsel:	David Schermbrucker, for the appellant Robyn L.M. Fougere, for the respondent

Reasons for judgment:

[1] On August 30, 2017, the police stopped the vehicle of the respondent, Sean Simon in Port Hastings, Nova Scotia and arrested him for possession for the purpose of trafficking. The officer proceeded to search Mr. Simon's vehicle incident to the arrest, and located 13 Dexedrine capsules and one codeine pill in a container in the back of his vehicle. After the stop and search, the police prepared an Information to Obtain a Search Warrant (ITO) for the appellant's residence.

[2] A warrant was issued and executed. The attending officers did not locate any illegal drugs in the Simon home. They did locate a cash counter in a box wrapped in black plastic and two scales in the rafters of the garage.

[3] Mr. Simon, relying on ss. 8, 9 and 24(2) of the *Canadian Charter of Rights and Freedoms* argued: his arrest was unlawful and in violation of his s. 9 right to be free from arbitrary detention; the search of his vehicle violated his s. 8 right to be free from unreasonable search or seizure; the warrant issued for the search of his house was improperly obtained; and, therefore, the evidence obtained from the searches was not admissible under s. 24(2).

[4] The matter was heard before Justice Frank C. Edwards. By decision dated February 26, 2019 (reported as 2019 NSSC 69) he determined the arrest was unlawful and, therefore, the search incidental to arrest was also unlawful.

[5] He also determined that the search warrant for Mr. Simon's home should not have been issued based on the information in the ITO.

[6] Finally, pursuant to s. 24(2) of the *Charter*, he excluded all the evidence seized.

[7] The Crown appeals all of the trial judge's findings.

[8] For the reasons that follow, I would dismiss the appeal. I am of the view that the trial judge did not err in finding the arrest and search incident to arrest were unlawful. His application of s. 24(2) was also without error. It is not necessary to address whether the search warrant of Mr. Simon's house was valid. The Crown acknowledged that if the arrest and search incident to arrest was unlawful, then the search warrant must fail. That was an appropriate concession.

Issues

1. Were there reasonable and probable grounds to arrest Mr. Simon?
2. If Mr. Simon's arrest breached s. 9 of the *Charter*, is the evidence inadmissible under s. 24(2) of the *Charter*?

Standard of Review

[9] Whether there were reasonable and probable grounds to arrest involves applying a legal standard to the facts of the case. While the judge's findings of fact are entitled to deference, whether those facts amount at law to reasonable and probable grounds to arrest is reviewed for correctness (*R. v. Shepherd*, 2009 SCC 35, ¶20).

[10] The Supreme Court of Canada in *R. v. Côté*, 2011 SCC 46 addressed the scope of appellate review of a s. 24(2) decision to exclude evidence, stating:

> [44] The standard of review of a trial judge's s. 24(2) determination of what would bring the administration of justice into disrepute having regard to all of the circumstances is not controversial. It was set out by this Court in *Grant* and recently affirmed in *R. v. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248. Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review (*Grant*, at para. 86, and *Beaulieu*, at para. 5).
>
> [Emphasis added]

[11] With these standards of review in mind, I will turn to the issues I have identified.

Analysis

Section 9 of the Charter

[12] Section 495(1)(*a*) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 requires a peace officer to have reasonable grounds to believe a person has committed or is about to commit an indictable offence to arrest that individual without a warrant (*R. v. Storrey*, [1990] 1 S.C.R. 241, p. 249).

[13] The leading case on the meaning of "reasonable and probable grounds" is *Storrey*. Justice Cory provides a summary at pp. 250-251:

> In summary, then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a *prima facie* case for conviction before making the arrest.

"Reasonable and probable grounds" also means "credibly-based probability" (*R. v. Holmes*, 2019 BCCA 138, ¶41; *R. v. Dhillon*, 2016 ONCA 308, ¶25).

[14] Where an officer's reasonable and probable grounds were based on confidential information, the leading cases are *R. v. Debot*, [1989] 2 S.C.R. 1140 and *R. v. Garofoli*, [1990] 2 S.C.R. 1421. While *Debot* and *Garofoli* did not deal with grounds to arrest, but rather to search, they are consistently applied in the arrest context when tips are involved – especially *Debot* (see *R. v. LeBlanc*, 2009 NSSC 99, ¶57; *Dhillon*, ¶30).

[15] In *Debot*, Justice Wilson, (concurred with by the majority on this issue) explained whether there were reasonable and probable grounds must be assessed from the "totality of the circumstances", having specific regard to whether the information was compelling, credible, and corroborated:

> In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two. (Pg. 1168)

[Emphasis added]

[16] Justice Wilson found each detail provided by the confidential informant need not be confirmed "so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence". Further, that "the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed

or where fewer details are provided and the risk of innocent coincidence is greater" (*Debot*, p. 1172).

[17] In *Garofoli*, Sopinka J. identified the following principles from *Debot* and *R. v. Greffe*, [1990] 1 S.C.R. 755:

> (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
>
> (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances." There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors, including:
>
> (a) the degree of detail of the "tip";
>
> (b) the informer's source of knowledge; and
>
> (c) indicia of the informer's reliability, such as past performance or confirmation from other investigative sources.
>
> (iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information. (pp. 1456-1457)

[18] If there are no reasonable and probable grounds to arrest, then the arrest is unlawful, and any ensuing search is not a search incidental to a lawful arrest (*R. v. Quilop*, 2017 ABCA 70, ¶35; *LeBlanc*, ¶77).

Application to the facts of this case

[19] Considering the principles outlined above and the facts of this case, I am satisfied the trial judge made no error in finding the police did not have reasonable and probable grounds to arrest the respondent. I will explain by going through the *Debot* factors of whether the information the informants gave was compelling, whether they were credible and reliable, and the extent to which the information was corroborated.

[20] Before doing so, more context is necessary. The evidentiary foundation for the police officer's reasonable belief that Mr. Simon had committed or was about to commit an indictable offence came before the trial judge in a somewhat unusual manner. Corporal Curtis Kuchta, the arresting officer, was the first to give evidence on behalf of the Crown. Through him, the Crown introduced the ITO. The ITO set out the grounds for believing that an indictable offence had been committed and that a search of Mr. Simon's home was justified on the information.

However, the testimony of Corporal Kuchta was that the information contained in the ITO was also the basis upon which he formed the grounds for arresting Mr. Simon without a warrant. In other words, the information in the ITO was also intended to establish that there were reasonable grounds to believe Mr. Simon had committed or was about to commit an indictable offence while driving in Port Hastings.

[21] The only other person to give evidence on the *Charter* motion was Constable Darren Legere. Constable Legere was the drafter of the ITO. The information contained in the ITO was from his knowledge and on information to him by Corporal Kuchta.

[22] Therefore, to assess whether the trial judge erred in his finding the arrest (and corresponding search) was unlawful, it is necessary to look at the ITO in some detail. Under the heading "Grounds for Belief", the ITO provides:

> **Grounds for Belief**
>
> 11. In this Information to Obtain a Search Warrant, unless otherwise stated;
>
> 11.1. Sean Dale SIMON is referred to as "Sean SIMON" by the confidential human sources;
>
> 11.2 Sean Dale SIMON and Sean SIMON are the same person;
>
> 11.3 All officers listed in this Information to Obtain are members of the RCMP;
>
> 11.4 All addresses listed are in Inverness County in the Province of Nova Scotia;
>
> 12. On February 22, 2017 I performed a traffic stop on Sean SIMON's grey 2007 Hyundai Tucson vehicle;
>
> …
>
> 13. On February 23, 2017 Sean SIMON entered into a Recognizance before a Judge, Judge Alain J. BEGIN, Order #1953480 with conditions;
>
> 13.1 Keep the peace and be of good behavior;
>
> 13.2 Reside at 16 Oak Crescent, Port Hawkesbury, NS;
>
> 13.3 Not possess or consume illicit drugs or prescription drugs without a valid prescription;
>
> 14. On May, 2017 Cpl KUCHTA spoke to **Source "B"** and learned the following information;
>
> 14.1 Sean SIMON is selling cocaine;

14.2 Sean SIMON is driving a grey Hyundai SUV;

14.3 **Source "B"** knows this from speaking to Sean SIMON in the past 12 hours;

15. On August 10, 2017 Cpl KUCHTA spoke to **Source "A"** and learned the following information;

15.1 Sean SIMON is selling cocaine in Port Hawkesbury by the gram;

15.2 Sean SIMON is getting his cocaine from Sylvain LANDRY;

15.3 **Source "A"** knows this from speaking to Sean SIMON in the past 12 hours;

16. On August 19, 2017 Cpl KUCHTA spoke to **Source "A"** and learned the following information;

16.1 Steve MACEACHERN is supplying Sean SIMON with cocaine;

16.2 Sean SIMON is selling cocaine by the gram and multi gram;

16.3 **Source "A"** knows this from speaking to Sean SIMON in the last 6 hours;

17. On August 28, 2017 Cpl KUCHTA spoke to **Source "B"** and learned the following information;

17.1 Sean SIMON is selling cocaine and prescription pills;

17.2 Sean SIMON lives at 16 Oak Crescent, Port Hawkesbury, Nova Scotia;

17.3 Sean SIMON stores most of his cocaine and pills in his house, shed or garage;

17.4 **Source "B"** knows this information from speaking to Sean SIMON in the past 12 hours;

18. On August 30, 2017 Cpl KUCHTA spoke to **Source "A"** and learned the following information;

18.1 Sean SIMON has a quantity of dexies which he is selling;

18.2 **Source "A"** knows this from speaking to Sean SIMON in the past 6 hours;

(From my experience as a police officer I know "dexies" to be the street term for the prescription drug Dexedrine)

Was the information compelling?

[23] Source "B" identified the respondent by name, gave his address, and what car he drove; named the types of drugs the respondent was allegedly selling two

days before the arrest (cocaine and prescription pills); and alleged that the respondent stored his cocaine and pills in his house, shed or garage (ITO, ¶14, ¶17).

[24] Source "A"'s information was marginally more specific with respect to the alleged criminal conduct. On the date of the arrest, Source "A" identified the specific prescription drug (dexies) and provided, albeit very generally, the location of the criminal activity (Port Hawkesbury area) (ITO, ¶15, ¶18).

[25] Earlier in August, Source "A" identified a different drug (cocaine) the respondent was allegedly selling, two of the respondent's alleged cocaine suppliers (Sylvain Landry and Steve MacEachern), and provided the amounts in which the respondent was selling it (gram and multi-gram) (ITO, ¶15-16).

[26] No other details were given. Corporal Kuchta testified that neither source stated the respondent was selling out of his vehicle or at his workplace. Neither provided details in terms of how the respondent was selling (for what price, the manner in which he was conducting the sales or the specific location of the drug deals). Only Source "A" stated the units in which he was selling cocaine, and this was a different drug than the one he identified on August 30, 2017 (the day of the arrest).

[27] In addition to specificity, the source of the informant's knowledge is relevant to assessing how compelling the information is (*R. v. Chioros*, 2019 ONCA 388, ¶19).

[28] The trial judge took issue with the source of the informant's knowledge and appears to have discounted the source of the information entirely (2019 NSSC 69, ¶28-37). The ITO in ¶14-18 deals with the issue of Source "A" and "B"'s reliability and uses the following phrase in all five paragraphs: "Source "A" [or "B"] knows this from speaking to Sean SIMON in the last 6 [or 12] hours" (2019 NSSC 69, ¶28-37). While I agree this phrase could have been more specific or, better yet, that the officer should have clarified the purported source of the informants' knowledge, I disagree that it should be discounted entirely. This phrase indicates the informants personally knew the respondent and that they gained this knowledge as a result of statements he made, rather than hearing it elsewhere. This helps alleviate concerns about perpetuating rumours (*Dhillon*, ¶35).

[29] That said, I would not describe the information provided as compelling. While the assertions were more detailed than the information at issue in *LeBlanc*,

the lack of detail in the ITO renders the assertions of criminal conduct mere conclusory statements (ITO ¶14-18).

Were the confidential sources credible and reliable?

[30] Once again, I will return to the ITO and set out what is contained therein:

> **Source Qualifications**
>
> 9. Cpl Curtis KUCHTA (Cpl KUCHTA) and I have a believed reliable source who associates freely with persons involved in criminal activity and whom I believe. The source has provided information with the expectation that I keep their identity confidential;
>
> 9.1 I have known this source, referred to as **Source "A"** since July 2017, in the capacity of a source;
>
> 9.2 **Source "A"** has a criminal record and is currently charged with Criminal Code offences. **Source "A"** does not have any convictions for public mischief or perjury;
>
> 9.3 **Source "A"** is known to use controlled drugs and substances;
>
> 9.4 **Source "A"** has provided information that is consistent with other source information and police investigation on other CDSA investigations;
>
> 9.5 **Source "A"** has provided information about controlled drugs and substances on 20 occasions;
>
> 9.6 **Source "A"** has personal knowledge of the information contained herein, unless otherwise stated;
>
> 9.7 **Source "A"** has been paid financial awards on 1 occasion to date;
>
> 9.8 **Source "A"** has provided information which has been used in Criminal Code investigations which led to charges;
>
> 9.9 The motivation for **Source "A"** to provide information is financial;
>
> 9.10 **Source "A"** has not received special benefits or promises from the RCMP in return for the information provided;
>
> 9.11 **Source "A"** has not testified in court on any information provided, nor is **Source "A"** willing to testify in court on the information provided in his affidavit;
>
> 9.12 I believe the information provided by **Source "A"** to be truthful and reliable

10. Cpl KUCHTA and I have a believed reliable source who associates freely with persons involved in criminal activity and whom I believe. The source has provided information with the expectation that I keep their identity confidential;

10.1 I have known the source, referred to as **Source "B"** since July 2016, in the capacity of a source;

10.2 **Source "B"** has a criminal record but is not currently charged with Criminal Code offences, and does not have any convictions for public mischief or perjury;

10.3 **Source "B"** is known to use controlled drugs and substances;

10.4 **Source "B"** has provided information that is consistent with the other source information and police investigation on other CDSA investigations;

10.5 **Source "B"** has provided information about controlled drugs and substances on 50 occasions;

10.6 **Source "B"** has personal knowledge of the information contained herein, unless otherwise stated;

10.7 **Source "B"** has been paid financial awards on 7 occasions to date.

10.8 **Source "B"** has provided information which has been used in Criminal Code investigations which led to charges;

10.9 The motivation for **Source "B"** to provide information is financial;

10.10 **Source "B"** has not received special benefits or promises from the RCMP in return for the information provided;

10.11 **Source "B"** has not testified in court on any information provided, nor is **Source "B"** willing to testify in court on the information provided in this affidavit;

10.12 I believe the information provided by **Source "B"** to be truthful and reliable.

[31] In my view, the record does not support a finding that the informants were credible and reliable. Although the tips were not anonymous and neither informant had a criminal record for public mischief or perjury (ITO, ¶9-10), there were, as the trial judge noted (2019 NSSC 69, ¶15-19, 21-24), minimal if any objective indicators of their credibility and reliability.

[32] Corporal Kuchta's testimony that the informants had previously provided information multiple times, once leading to a charge, reveals—without more detail—little, if anything, about the informants' credibility or reliability.

[33] This case differs in this respect from those such as *R. v. Spence*, 2011 BCCA 280 and *R. v. Whyte*, 2011 ONCA 24 where the informant, in both cases, had provided information that led to significant seizures of contraband and, in *Spence*, to six arrests. The courts in *Spence* and *Whyte* were also given the specifics of those arrests and seizures.

Was the information corroborated?

[34] The two informants in this case corroborated each other only in that they both asserted the respondent had been selling cocaine in the past and that at the end of August 2017 he was selling prescription pills. This level of corroboration lacks the significant overlap present in other cases such as *Dhillon*.

[35] The only information the police corroborated was the respondent's name, address, what car he drove, his plate number, and his being in the Port Hawkesbury area on August 30, 2017. While the respondent was known to the police and had a criminal record (ITO, ¶19), there was no information before the court as to whether the respondent's criminal record included drug-related offences. It was also clarified on the *Charter* motion that the other time the police had stopped the respondent resulted in cocaine being found on a passenger in his car—not in the respondent's possession (2019 NSSC 69, ¶39). Corporal Kuchta testified that the charges against Mr. Simon relating to that stop were withdrawn.

[36] Given the weaknesses of the first two factors, it is significant that the police did not see the respondent engage in any criminal or suspicious activity in the slightest, nor did they see him with either of the two alleged cocaine suppliers. Police surveillance merely involved: driving by the respondent's workplace, Island Concrete, located on Highway 105 on August 30, 2017; seeing the respondent's vehicle at his workplace; waiting for an hour or two at the rotary near Highway 105; and seeing the respondent enter the rotary at 5:11 p.m. that day. Nothing suspicious or criminal was observed before pulling the respondent over, arresting him for possession for the purposes of trafficking, and searching him incident to that arrest.

[37] In *Chioros*, there were insufficient grounds to justify an arrest despite the fact that the police saw Chioros engage in counter-surveillance techniques and with a suspected drug dealer (*Chioros*, ¶20). See also *R. v. MacDonald*, 2015 NSSC 297 where Arnold, J. found that the officer seeing the accused with the person the

informant alleged was supplying the accused drugs at the address identified by the informant was also insufficient to overcome the lack of specificity (¶36-38).

[38] While confirmation of criminal activity or suspicious circumstances is not necessary in all cases, in my view, such confirmation was necessary here in light of the fact that the informants had not been proven reliable nor credible and the information provided was not sufficiently detailed to be considered compelling.

[39] There was, therefore, no meaningful corroboration given that most of the confirmed information is readily available public information (*Chioros*, ¶19) and given that the respondent worked in the Port Hawkesbury area and presumably would be found there most days.

[40] Applying the *Debot* test, in my view, the totality of the circumstances falls short of establishing reasonable and probable grounds to arrest. The absence of detail, of any way to adequately assess the informants' credibility or reliability, and of any meaningful corroboration merely support, at most, a suspicion of drug trafficking. As such, it was insufficient as found by the trial judge.

[41] The arrest was unlawful and the search purportedly incident to that arrest was also unlawful (*Quilop*, ¶35; *LeBlanc*, ¶77).

Section 24(2) of the Charter

[42] The trial judge identified the factors to be considered under s. 24(2) of the *Charter* (*R. v. Grant*, 2009 SCC 32) and balanced those factors in excluding the evidence. His decision on this point is quite short and I will reproduce it in its totality:

> [47] The Supreme Court of Canada in *R v Grant*, 2009 SCC 32 [*Grant*], at paragraph 71, set out three considerations to evaluate whether or not the admission of evidence would bring the administration of justice into disrepute:
>
> (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.
>
> **1. The seriousness of the Charter-infringing state conduct:**

[48] Here the *Charter* infringing conduct was the Applicant's unlawful arrest and detention contrary to s. 9 of the *Charter*. The search incidental to the unlawful arrest would therefore violate s. 8 of the *Charter*. The police were acting without a warrant on the basis of very questionable source information. I would consider this to be a serious Charter breach which tips the scale toward inadmissibility of the evidence.

2. The impact of the breach on the Charter-protected interests of Applicant:

The Applicant had an expectation that he would not be subject to arbitrary arrest and detention. He had the right to drive from his place of employment to his home without the prospect of police interference. Though the expectation of privacy is not as great with one's vehicle as with one's home, it still exists. There was a significant impact on the Charter protected privacy interests of the Applicant. The weight is decidedly toward inadmissibility.

3. Society's interest in the adjudication of the case on its merits.

[49] The exclusion of the evidence would essentially leave the Crown without a case to present. Exclusion of the evidence would therefore seriously undermine the truth-seeking function of the trial. This factor thus weighs against exclusion of the evidence. While that is so, the law is clear that this factor must not take on disproportionate significance. (See ***R. v. MacDonald***, 2014 NSSC 218 at para. 84).

4, Balancing

[50] In ***MacDonald*** supra at Para. 86, Arnold, J. quotes [McLachlin] CJ in ***R. v. Harrison***, [2009] S.C.J. No. 34:

> 36 The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[51] In this case, police conduct was so unjustified that the Court should not in any way condone it. The long-term repute of the administration of justice demands that the Courts be vigilant in ensuring that police only interfere with citizens' rights when they have demonstrable appropriate grounds to do so. I would therefore exclude the evidence of the search incident to the Applicant's unlawful arrest.

[43] I can see no error in his identification of the factors to be considered and his balancing of them. I would also dismiss this ground of appeal.

Conclusion

I would dismiss the appeal. As noted earlier, it is not necessary to address the validity of the search warrant. However, by not doing so, I should not be taken as condoning or otherwise agreeing with the analysis undertaken by the trial judge in his review of the ITO.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Bryson, J.A.