NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Payne*, 2025 NSCA 10

Date: 20250220
Docket: CAC 530549
Registry: Halifax

Between:

His Majesty the King

Appellants

v.

Joshua David Maxwell Payne

Respondents

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	December 11, 2024, in Halifax, Nova Scotia
Facts:	The case involves a series of judicial authorizations for searches of the Respondent's home and property, leading to charges of serious drugs and weapons offences. The Respondent challenged the validity of the warrants, arguing that his s. 8 Charter right against unreasonable search and seizure was violated due to deficiencies in the Informations to Obtain (ITOs) used to secure the warrants (paras 2-4).
Procedural History:	*R. v. Payne*, 2024 NSPC 12: The Provincial Court of Nova Scotia found that the Respondent's s. 8 Charter rights were violated due to deficient ITOs and excluded the evidence, leading to the Respondent's acquittal on all charges (paras 4, 11).
Parties Submissions:	Appellant (Crown): Argued that the trial judge erred in her conclusions about the deficient ITOs and the finding of a s. 8 Charter violation. The Crown contended that the

judge overstepped her boundaries and improperly expanded her task. It also argued that even if the judge's determinations were correct, the proper application of the *Grant* factors should not have resulted in the exclusion of the evidence (para 6).

Respondent (Mr. Payne): Asserted that the trial judge correctly applied the law and that her assessments led to the appropriate outcome. The Respondent argued that the affiant failed in their duty to make full and frank disclosure, which justified the exclusion of the evidence (paras 12, 16).

Legal Issues: Did the trial judge err in her treatment of the ITOs and the finding of a s. 8 Charter violation?

Was the trial judge's s. 24(2) Charter analysis correct in excluding the evidence obtained through the warrants?

Disposition: The appeal was dismissed. The Court of Appeal upheld the trial judge's decision to exclude the evidence and found no errors in her analysis.

Reasons: Per Beaton J.A. (Van den Eynden and Derrick JJ.A. concurring):

- The trial judge did not err in her treatment of the ITOs. She correctly identified deficiencies in the ITOs and properly exercised her discretion in excising erroneous information. The judge's approach was consistent with the principles established in *R. v. Garofoli* and *R. v. Araujo*, and she did not substitute her view for that of the issuing judge (paras 45-56).

- The trial judge's s. 24(2) Charter analysis was thorough and balanced. She correctly applied the Grant factors, particularly focusing on the seriousness of the Charter-infringing conduct. The judge's conclusion that the evidence should be excluded was supported by her findings on the first and second *Grant* factors, despite the third factor favoring admission (paras 58-68).

- The Court of Appeal found no basis for appellate intervention, as the trial judge's decision was well-

reasoned and did not disclose any errors of law or misapprehension of evidence (paras 69-71).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 71 paragraphs.

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Judges:	Van den Eynden, Derrick and Beaton, JJ.A.
Appeal Heard:	December 11, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beaton, J.A.; Van den Eynden and Derrick, JJ.A. concurring
Counsel:	Monica McQueen and Maile Graham-Laidlaw, for the appellant Michael Lacy and Marcela Ahumada, for the respondent

Reasons for judgment:

[1] What is the role of a reviewing judge when considering a *Garofoli* application challenging the validity of a warrant (*R. v. Garofoli*, [1990] 2 S.C.R. 1421)? The appellant Crown and the respondent Mr. Payne take differing views, not with respect to the law, but regarding its application to the respondent's case.

[2] The respondent was the subject of a series of judicial authorizations ("warrants") for searches of his home and property, each issued by a Justice of the Peace ("the issuing judge"). He was eventually charged with a host of serious drugs and weapons offences.

[3] At trial before the Honourable Judge Elizabeth Buckle ("the judge") in the Provincial Court of Nova Scotia, the respondent moved for a *Garofoli voir dire*. That required the judge to review the sufficiency of the evidence in a series of Informations to Obtain ("ITOs") which had been put before the issuing judge as the basis to secure the warrants.

[4] The judge's review of the ITOs served as the catalyst to her determination the respondent's s. 8 *Charter* right to be secure against unreasonable search and seizure had been violated. She was next persuaded, on the application of s. 24(2) of the *Charter*, that the evidence needed to be excluded.

[5] The judge was not to repeat the task undertaken by the issuing judge. It was not for her to, in effect, rehear the applications for judicial authorization, nor to decide whether she would have issued the warrants. Rather, as the reviewing judge she was to undertake a contextual analysis, to consider "whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65 at para. 51).

[6] The Crown argues the judge erred both in her conclusions about deficient ITOs, and in finding a s. 8 *Charter* violation due to evidence gained through the faulty warrants. The Crown asserts the judge's written reasons (*R. v. Payne*, 2024 NSPC 12) demonstrate she overstepped the boundaries of and improperly expanded her task. Alternatively, it says that even if the judge's determinations were correct, proper application of the "*Grant* factors" (*R. v. Grant*, 2009 SCC 32 at para. 71) ought not have resulted in exclusion of the evidence.

[7] For the reasons that follow, I am not persuaded by the Crown's arguments. I conclude the judge did not commit any errors. I would dismiss the appeal.

Background

[8] The first warrant issued in the investigation of the respondent was a tracking warrant to monitor a vehicle. Judge Buckle determined certain portions of the ITO used to secure it should be excised, to remove erroneous information provided by a Source. When executed, that tracking warrant had generated information then used to secure a series of warrants, beginning with a Production Order to require a storage company to produce certain account information and video. Each subsequent warrant issued in relation to the respondent had the evidence used to secure the tracking warrant as the basis of its ITO, augmented by additional evidence garnered from the execution of each warrant in turn.

[9] Despite her conclusion that portions of the tracking warrant ITO needed to be excised, the judge determined what remained satisfied the "reasonable suspicion" standard to permit issuance of that warrant. The judge next concluded the subsequent ITO, used to secure the Production Order, could not meet the reasonable and probable grounds test required for its issuance. Flowing from that, the ITOs that resulted in the authorization of warrants to search the respondent's residence, vehicle, storage locker and two cell phones were found by the judge to be insufficient, as they did not meet the requisite reasonable and probable grounds test for issuance.

[10] Having satisfied herself the ITOs that came after the tracking warrant were lacking sufficient reliable information, the judge turned to the question of the respondent's s. 8 *Charter* right against unreasonable search and seizure. She was satisfied his right had been violated, given the deficient warrants used to investigate him. As required, the judge then weighed the three *Grant* factors to determine whether the evidence generated as a result of those warrants could be admitted at trial, notwithstanding the s. 8 breach.

[11] The judge concluded the first and second *Grant* factors tipped the scale in favour of exclusion of the evidence, despite the third factor weighing heavily in favour of admission. The judge's final balancing of the factors caused her to conclude the evidence generated by the warrants should be excluded. At that point, there remained insufficient evidence, in relation to all the respondent's

charges, upon which the Crown could satisfy its burden of proof beyond a reasonable doubt. The respondent was acquitted of all charges.

[12] While the Crown and the respondent agree the judge correctly articulated the law in her decision, the Crown says she wrongly applied it. The respondent asserts the judge not only correctly applied it, but her assessments led to the appropriate outcome.

The judge's decision

[13] To provide better context for the issues raised, I will canvass in more detail the analytical exercise the judge conducted and the conclusions she provided in her reasons. I will look first at the judge's review of the ITOs, followed by her analysis of s. 24(2) of the *Charter*.

[14] The chronology of events that framed the respondent's dispute with the ITOs on the *Garofoli* application were recounted by the judge:

> [23] On September 2, 2021, the affiant applied for a warrant under s. 487 of the *Criminal Code* to search Mr. Payne's residence (JPC #21-1458, Tab 1). That warrant was denied because the Justice of the Peace (JP) was not satisfied there were reasonable grounds to believe that cocaine would currently be found in the residence. […]
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> [24] On November 18, 2021, the affiant applied for an authorization under s. 492.1(1) to track the location of Mr. Payne's vehicle (JPC #21-1899, Tab 2). That authorization was granted. In the ITO to support that authorization, the affiant added information obtained after September 2nd but also modified her description of the information that had been included in the ITO for the earlier warrant that had been denied. The ITOs filed in support of the subsequent authorizations all included the same modified grounds that had been included in the ITO in support of the November 18th Tracking Warrant but also included additional information that had been obtained in the intervening period (Tabs 3 - 6).
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> [25] The ITOs all included information from the same two confidential sources ("A" and "B"). One of the areas modified by the affiant related to the information provided by Source A. That modification was the focus of argument. Other modifications were less significant but are relevant to whether they disclose a pattern of strategic and misleading edits.
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> [26] In her ITO sworn on September 2nd, the affiant stated that Source A provided information to Cpl. Andy Bezanson, the Source's handler, about "vetted

> name" (Tab 1, para. 19). It is agreed that the name vetted from the ITO is not "Joshua Payne" or a variant of that name and that Source A did not use the name "Joshua Payne" or a variant of that name when the source reported information to Cpl Bezanson (Ex. 2). In the ITO, the affiant then stated that Cpl. Bezanson was able to determine that "vetted name" is Joshua David Maxwell Payne and set out the steps he took to arrive at that conclusion (para. 19).
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> [27] In her ITO sworn on November 18th and all subsequent ITOs, in each case where she reports information provided by Source A to Cpl. Bezanson, she substituted the name Joshua Payne or variants such as "Josh", "Payne" etc. for "vetted name" (Ex. 2; and, see for example, Ex. 1, Tab 2, para. 22).
>
> [28] She also removed the paragraph explaining how Cpl. Bezanson had determined that "vetted name" was Joshua Payne.

[15] The judge explicitly recognized it was the respondent's burden to prove, on a balance of probabilities, that his s. 8 *Charter* right to be secure from unreasonable search and seizure was violated (*R. v. Collins*, [1987] 1 S.C.R. 265 at para. 21), and that a "reasonable" search is one authorized by law and conducted in a reasonable manner (*Collins*, para. 23).

[16] The judge summarized the parties' positions before her:

> [4] Mr. Payne argued that the affiant who prepared the Informations to Obtain (ITOs) for the authorizations failed in her duty to make full and frank disclosure by deliberately misrepresenting and removing necessary information. He submitted that this failure was so subversive of the pre-authorization process that I should exercise my residual discretion to quash the authorizations, even if the grounds were sufficient. Alternatively, he argued that I should excise the misleading information and what remained was insufficient for their issuance.
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> [5] The Crown argued that while the affiant used a bad drafting technique, there was no evidence of any bad faith that would justify quashing otherwise valid authorizations. Further, the Crown submitted that the impugned information was not erroneous or misleading so should not be excised. In the alternative, the Crown argued that even if the impugned information was excised, the justices could have issued the authorizations based on the remaining content.
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> [6] The Crown and the Defence also disagreed on whether the evidence should be excluded if the police did violate Mr. Payne's s. 8 rights. The focus of their disagreement was on the first *Grant* factor - the seriousness of the *Charter* offending conduct.

(i) The ITOs

[17] A reviewing judge who is satisfied that an ITO suffers from deficiencies can consider whether and how to resolve them. In *R. v. Morelli*, 2010 SCC 8, the Supreme Court of Canada discussed two of the options to resolving deficiencies, being excision or amplification of the ITO. *Morelli* concerned an ITO that was "carelessly drafted, materially misleading and factually incomplete" (para. 4). It was used in support of the search and seizure of a personal computer and its contents from a home, to further an investigation into possible child pornography-related offences. The Court described those options:

> [41] The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the reviewing court may have reference to "amplification" evidence — that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO — so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.

A reviewing judge is imbued with a "broad discretion" as to whether to excise or amplify (*R. v. Maric*, 2024 ONCA 665 at para. 154).

[18] Early in her decision the judge identified options open to her when faced with a problematic ITO:

> [18] Where an affiant has not made full and frank disclosure, a reviewing judge may choose to 'correct' the ITO to achieve that and then assess whether the issuing justice could have issued the warrant based on that corrected ITO. For example:
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> - Minor, inadvertent or technical errors made in good faith can be corrected through the process of amplification *(Araujo,* para. 59; *Morelli,* para. 41; and, *Booth,* para. 59);
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> - Erroneous information that should not have been in the ITO or that does not meet the requirements for amplification must be excised *(Araujo,* paras. 57 & 58; *Morelli,* para. 45; and, *Booth,* para. 58); and,
>
> - Where material facts are omitted that might have detracted from the grounds, the omitted information can be,

> essentially, 'read in' by the reviewing court *(Morelli,* para. 60; and, *R. v. Paryniuk,* 2017 ONCA 87, para. 45).
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> [19] However, in some cases, an affiant's errors or omissions are so egregious and subversive to the pre-authorization process that a reviewing judge may declare the warrant invalid, regardless of whether it could have been issued had there been full and frank presentation of the information *(Morris,* para. 92; *R. v. Paryniuk*, 2017 ONCA 87, para. 45, leave to appeal dismissed [2017] SCCA 81; and, *Booth,* paras. 64 - 65). This residual discretion to invalidate a warrant on review was described by Cromwell, J.A. (as he then was), in *Morris,* para. 92:
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> > Fraudulent or deliberately misleading material in the information does not automatically invalidate the warrant. However, it may have this effect if the reviewing judge concluded, having regard to the totality of the circumstances, that the police approach to the prior authorization process was so subversive of it that the warrant should be invalidated...

[19] Before the judge, the Crown relied on *R. v. Plant*, [1993] 3 S.C.R. 281 and *R. v. Feizi*, 2022 ONCA 517 to argue the substitution by the affiant (as described at para. 14 herein) was "unfortunate", but not erroneous or misleading, and would have led to the same result had the ITO been differently drafted.

[20] In *Plant*, the officer investigating possible drug offences had implied in an 1TO that an informant had identified a complete address, when in fact the source only provided a partial address. The Alberta Court of Appeal found that even with that omission "the Provincial Court judge would still have issued the search warrant" (para. 8). That finding was not disturbed by the Supreme Court of Canada. In *Feizi* the affiant investigating drug importation incorrectly concluded and stated the intended delivery address of a package, instead of describing the basis of his belief that it was the intended address (para. 4). The judge was satisfied the error was made in good faith and permitted amplification evidence, and the Ontario Court of Appeal agreed.

[21] In the respondent's case, the judge viewed the affiant's lack of full and frank disclosure as "more significant" than was found to be the case in both *Plant* and *Feizi*. The judge distinguished the inaccuracies in the ITOs used in those cases from the situation before her, where she was of the view "the affiant's misrepresentation could reasonably have misled the JPs in a way that improved the grounds."

[22] The judge recognized the question of the affiant's intent was "central" to her determination of whether erroneous information in the ITO, leading to deficient grounds, could be corrected, depending upon the nature of the deficiency.

[23] Her reasons reflect the judge clearly understood the implications of the question of the affiant's intent for the case before her. She said:

> [53] The question of bad faith versus good faith turns on the affiant's intent. There is a range of possibilities. At one end, a finding that she deliberately misrepresented the information with the intent to deceive or mislead the JP to improve her grounds would amount to bad faith. At the other end, a finding that she was simply attempting to edit her ITO to make it more concise without intent to deceive or improperly strengthen her grounds would not amount to bad faith (see *Plant*, p. 298-299). However, the latter finding would not necessarily amount to good faith for amplification purposes. As the Supreme Court said in *Morelli*, "[c]oncision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure" (para. 58).
>
> [54] The Defence did not seek leave to cross-examine the affiant and the Crown did not seek to call her for the purpose of amplification. As a result, I have no direct evidence of what was in the affiant's mind when she edited the ITO. The only evidence is in the documents themselves and the ASF.[1] So, I have to determine whether the Applicant has established bad faith and whether the Crown has established good faith based on the inferences I can draw from that evidence.

[24] When the judge examined the changes made by the affiant between the (first) tracking warrant ITO and those that followed, and their effect, she was prepared to attribute the differences to "careless drafting and inattention" rather than an effort by the affiant "to deceive or mislead". The judge found the affiant had been "at the very least careless" in presenting accurate information and thus "was not properly focused on her duty to make full and frank disclosure". The cumulative impact of that early tracking warrant ITO deficiency on each successive ITO led to the judge's conclusion "the affiant was generally careless in her preparation" of each of them.

[25] The judge explained her concern that the issuing judge had been presented with information in which the affiant made the "bald conclusory statement" that the "vetted name" was the respondent's name, without providing reasons for that conclusion. The judge saw it as problematic that the issuing judge would have had no way of knowing the affiant's statement was conclusory, because the issuing

[1] ASF is an acronym for Agreed Statement of Facts.

judge would have understood from the affiant that Source A had in fact used the respondent's name, which was not the case.

[26] The judge concluded "the substitution of the name 'Joshua Payne' or a variant thereof for 'deleted name' was erroneous and could reasonably have misled" the issuing judge. While she agreed with the Crown it was clear Source A was reporting on an identifiable person, her view was the gaps in the ITOs could not permit the unequivocal conclusion the person was "obviously" Mr. Payne.

[27] Having concluded the erroneous use of the respondent's name was information that had to be excised from the later ITOs, the judge turned to consideration of whether the Crown could amplify the evidence (as was done in *Plant* and *Feizi*) by including information found in the first ITO for the tracking warrant.

[28] The judge did not accept the affiant's error was "minor and technical". While she was satisfied it was not made in bad faith, she was not persuaded it had been made in good faith. She found the affiant had been "negligent toward her duty to make full and frank disclosure" and that "[s]he should have known that she could not depose that Source A had named the subject of the investigation when that was not the case". On that basis, the judge declined to permit correction of the erroneous information by amplification.

[29] The judge then had to assess the sufficiency of the grounds found in the revised ITOs. She recognized that at that stage it was not her task to substitute her view for that of the issuing judge. Given the revised evidence before her as a result of excision, her more discrete consideration was whether the warrants *could* have, not *would* have issued (*R. v. Durling*, 2006 NSCA 124 at para. 28; *R. v. Sadikov*, 2014 ONCA 72 at para. 69).

[30] There were differing standards in play for issuance of each type of warrant that was sought over the course of the investigation into the respondent. The judge correctly identified the tracking warrant required "reasonable grounds to suspect", framed in terms of "possibilities rather than probabilities", and that each subsequent warrant attracted the higher standard of "reasonable grounds to believe", meaning "more than mere possibility or reasonable suspicion, but less than proof beyond a reasonable doubt". The judge also recognized each ITO was to be assessed by viewing each piece of information found in it in the context of the ITO as a whole, to achieve the contextual analysis referred to earlier (para. 5).

[31] The judge was satisfied the tracking warrant met the requisite reasonable suspicion standard. As to each subsequent warrant, the judge noted the evidence of an offence came primarily from a Source whose details she interpreted as not having demonstrated direct knowledge, nor having provided corroboration. She concluded the revised record for each ITO subsequent to the tracking warrant did not contain sufficient credible and reliable information to support the reasonable grounds standard required for each of those warrants.

[32] The Crown had properly conceded before the judge that if either the tracking or production warrant was determined invalid, then evidence generated by them would of necessity be excised from the subsequently drafted ITOs used to secure warrants to search the respondent's cellphones, storage locker, residence and vehicle.

[33] Consequent to that excision, the judge concluded the respondent's s. 8 rights had been violated because:

> [7] […] The affiant failed in her duty to make full and frank disclosure. While that failure was not sufficiently egregious to justify quashing the authorizations, it did require the excision of erroneous and misleading information. What remained was not sufficient to support the issuance of the authorizations to produce documents from the self-storage facility or to search the storage locker, Mr. Payne's apartment, vehicle, and cell phones.

[34] The judge's excision had effectively gutted the subsequent ITOs.

(ii) The s. 24(2) analysis

[35] Once the judge concluded the difficulties with the warrants meant the respondent had met his burden to establish a violation of his s. 8 *Charter* right against unreasonable search and seizure, she moved to consideration of s. 24(2) of the *Charter*. She had to ask if the respondent had met his burden to establish, on a balance of probabilities, the admission of the evidence gathered through the impugned warrants would bring the administration of justice into disrepute.

[36] There is no controversy concerning the judge's obligation to approach her inquiry by utilizing the three factors provided in *Grant*. That decision requires the judge considering an application to exclude *Charter*-offending evidence to:

> [71] […] …assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. […]

[37] In relation to the three factors, the Crown made critical concessions before the judge:

i) concerning the second factor, the Crown agreed the respondent had:
   - a high expectation of privacy in each of the storage locker, his apartment and his phone, which strongly favoured exclusion of the evidence; and
   - a lower expectation of privacy in both the documents from the storage company and in his vehicle, which carried lesser favour for exclusion of evidence.

ii) concerning the third factor, the Crown agreed the public would have a heightened interest in the determination of serious drugs and weapons charges on their merits, but also a "vital interest" in a justice system that is "above reproach".

[38] Thus the dispute between the Crown and the respondent was limited to the first *Grant* factor - the seriousness of the *Charter*-infringing conduct. That required the judge to ask whether the police had engaged in misconduct from which the court should disassociate itself to preserve public confidence in the rule of law (*Grant* at para. 72).

[39] The judge determined that although the third factor strongly favoured admission of the evidence, her conclusions on the first and second factors tipped the balance in favour of exclusion. She was satisfied the admission of the evidence "would bring the long-term administration of justice into disrepute". That finding effectively terminated the Crown's prosecution of the respondent's charges.

Standard of Review

[40] The standard of review on an error of law is correctness (*Laframboise v. Millington*, 2019 NSCA 43 at para. 14). Recently, in *R. v. Hodgson*, 2024 SCC 25

the Supreme Court of Canada explained the limit on Crown appeals from acquittal, which are confined to errors of law:

> [33] Consequently, the scope of the Crown's right of appeal of an acquittal depends on what qualifies as a legal question. This assessment will generally turn on the character of the alleged error, rather than on its severity (*R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 17). […]
>
> [34] In other situations, drawing the line between questions of law and questions of fact or of mixed fact and law can become more challenging. This is often the case when the alleged error concerns a trial judge's assessment of the evidence. As this Court explained in *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, "[a]n appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof"….

[41] *R. v. Brown*, 2017 NSCA 44 identifies the standard of review on appeal from the decision of a reviewing judge, and the deference to be afforded, quoting from the Ontario Court of Appeal decision in *R. v. Grant*, [1999] O.J. No. 327, leave to appeal to the Supreme Court of Canada ref'd, [1999] SCCA No. 168:

> [18] This court is also a reviewing court and the test in *Garofoli* is applicable on this appeal. In addition, the usual deference is owed to the findings of the trial judge in her assessment of the record "as amplified on the review" and her disposition of the s. 8 application. In the absence of an error of law, a misapprehension of the evidence or a failure to consider relevant evidence, this court should not interfere with the trial judge's conclusion.
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> (Emphasis added)

See also *Sadikov* at para. 89.

[42] Deference is also owed when examining a judge's s. 24(2) analysis, because the judge is "in the best position to determine whether admission of the evidence, in the circumstances as she found them, would bring the administration of justice into disrepute" (*R. v. Campbell*, 2018 NSCA 42 at para. 44).

[43] In its recent decision in *R. v. Scott*, 2024 ONCA 608 (*sub nom R. v. Pike*) the Ontario Court of Appeal states that deference to the judge's weighing of the s. 24(2) factors may be displaced, and a "fresh analysis" undertaken when "the trial judge overlooks or disregards relevant factors, errs in law or principle, or makes an unreasonable determination". Drawing on *Hodgson*, the Court reiterates the Crown's "heavy burden" to "show to a reasonable degree of certainty that the

verdict would not necessarily have been the same but for the legal error" (para. 124).

[44] With these standards of review contemplated, I turn to the two issues in this case: (i) the judge's decision to excise the ITOs, and how that informed the respondent's s. 8 *Charter* rights, and (ii) the judge's s. 24(2) *Charter* analysis.

Issue 1 - Did the judge err in her treatment of the ITOs?

[45] The Crown does not suggest the judge erred in excising evidence from the ITOs. It says that regardless, there remained sufficient grounds for all the warrants to issue. Tracking the language of *Durling*, it argues the lack of seriousness of the affiant's error and the low expectation of privacy in all of the respondent's locations (save his residence) *could* have led to the admission of all the evidence excluded by the judge.

[46] The Crown references criticisms the judge had about the evidence found in the ITOs, which it says demonstrate her improper focus and inappropriate conclusions. Chief among them, it says the judge was wrong to look for corroboration of individual source statements, rather than looking at the ITOs as a whole to consider whether the warrants could have issued. The Crown objects to what it says was the judge's duplication of the error committed by the reviewing judge in *Durling*. It asserts the judge erroneously considered whether she *would* have issued the warrants, as demonstrated by her having conducted her own weighing of the evidence.

[47] The judge did not commit the error the Crown suggests. She specifically referenced her obligation to assess each ITO as a whole, "with each piece of information viewed in the context of the whole". Relying on *R. v. Debot*, [1989] 2 S.C.R. 1140 (at page 1172) the judge looked at whether Source B's information was compelling, credible and confirmed by independent information. She specifically articulated the need to examine those "three C's" together, not separately. The judge's approach reflects the direction found more recently in *R. v. Chaisson*, 2024 NSCA 11 (at para. 37) that "the reliability of the information contained in the ITO is assessed by recourse to the totality of the circumstances, including its degree of detail, the informer's source of knowledge and indicia such as the informer's past reliability and confirmation from other sources."

[48] *R. v. Booth*, 2019 ONCA 970, relied on by the judge, reminds us the requirement for "full and frank disclosure of material facts" required in *Araujo* reflects the *ex parte* nature of a warrant application and is a "corollary of the privilege of being the only party" providing evidence (para. 54). The respondent correctly observes that all the judge had before her was unsourced information from a single Source. Not knowing where the information came from, it was difficult for her to determine if it might be compelling. Since it would have been an error for the judge to simply assume that Source B was speaking from personal knowledge, it was important to look for corroboration because "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* at page 1172). I see no error in the judge having approached her analysis as she did.

[49] The judge was properly focussed on whether what remained in each ITO met the requisite standard for its issuance. She concluded that even though the information from Source B rose to the level of credibly-based possibility, it could not rise to the level of credibly-based probability. I interpret her reasons as having assessed Source B's evidence as a whole, while conscious of her inability to assess that person's credibility.

[50] The judge viewed as a whole each of the ITOs coming after the tracking warrant ITO, based as they were on the evidence of a single informant upon whom the judge was not prepared to rely. It was her task to assess whether there was sufficient credible and reliable evidence before her upon which she could have issued any of the warrants. She explained why she was not so satisfied. I do not accept this Court is now positioned to interfere with the judge's exercise of discretion. The judge reached her conclusions based upon the evidence that remained in the excised ITOs.

[51] I agree with the Crown that following excision a reviewing judge must not apply a different test to each distinct portion of the evidence, as excision does not require greater scrutiny of what remains. That said, here the judge found the information provided by Source B to be problematic, and provided specific examples to explain why she took that view. That does not lead to an assumption she was engaged in a piecemeal weighing of the evidence. I read the judge's decision as having taken a holistic view of the evidence before her, while providing examples of Source deficiencies to illustrate her assessment of the overall quality of the Source information.

[52] The Crown relies on *Sadikov* (at para. 88) for the principle that a reviewing judge's role is not to "draw inferences, or to prefer one inference over another". Therefore, it says, the question to be asked by the judge was "whether the facts laid out can support the inferences to be drawn". In that regard, the Crown maintains that the affiant "provided the issuing judge with ready-made and accurate inferences". However, this argument requires a magnified examination, which the Crown conducted during oral argument, of certain parsed passages of the judge's reasons. Respectfully, doing so obfuscates the guardrails around our task, also noted in *Sadikov*, which is to defer "to the findings of the reviewing judge in her assessment of the record" and "absent an error of law, a misapprehension of evidence or a failure to consider relevant evidence" it is not our role to interfere in her decision (*Sadikov* at para. 89).

[53] The Crown also says the judge placed improper focus on the affiant's error, rather than on what remained in the Production ITO after excision. It frames the affiant's error in placing Joshua Payne's name in substitution for the vetted name as "minor". With respect, that characterization seeks to have us ignore the judge's factual determination, to which we must defer, that "the substitution of the name 'Joshua Payne' or a variant for 'deleted name' was erroneous and could reasonably have misled the issuing JPs". I agree with the respondent's submission the judge's reasons illustrate she understood the review exercise required of her. This is demonstrated in her conclusion that "reasonable grounds to suspect" existed to justify the issuance of the tracking warrant, however "reasonable and probable grounds to believe" did not exist to justify issuance of the remaining warrants.

[54] The respondent reminds us that excision, to remove inappropriate material, and amplification, to augment or complete the record, are tools to "level the playing field" in an *ex parte* application such as a judicial authorization. He urges the Court to ignore the appellant's "microscopic dissection" of the judge's reasons. He asserts that post-excision, what the judge considered was a version of the ITOs which bore no resemblance to what had been put before the issuing judge.

[55] The judge's reasons demonstrate her appreciation of the distinction in roles and the difference in the record as between her and the issuing judge:

> [76] I must now assess the sufficiency of the grounds in the ITOs based on the revised record.

> [77] My role as the reviewing judge is to review the revised record and determine whether there is a basis upon which an authorizing judge, acting judicially, could grant it *(R. v. Garofoli,* [1990] 2 S.C.R. 1421). I am aware that, as the reviewing judge, I should not substitute my view for that of the authorizing judge (*Garofoli,* p.1452). However, in this case, the revised record has produced fundamentally different grounds so I have to consider whether the authorizations could have been issued on this record.

[56] In effect, this Court is being asked to substitute the Crown's view of the nature and quality of the evidence, following excision, for that of the judge. With respect, that is not our role.

[57] I would dismiss this ground of appeal.

Issue 2 - Section 24(2) Charter *analysis*

[58] The Crown asks the Court to conclude the judge did not take a sufficiently broad view when conducting the s. 24(2) balancing phase of the *voir dire*.

[59] Before turning to analysis of that aspect of the judge's decision there is a preliminary matter to address. The Crown takes a very different position on appeal than was argued before the judge on the issue of the application of the *Grant* factors.

[60] As indicated earlier, the judge began her *Grant* analysis by noting that only the first factor was in dispute. The Crown had conceded in its written argument to the judge that the parties did not disagree on the impact of the second and third factors. Once before the judge, the Crown confirmed that position:

> And I don't think that counsel are very far apart or don't really disagree at all on the rest of the 24(2) analysis, particular, the second and third *Grant* factors, I concede the points my friend makes. The balancing, of course… the final stage of *Grant* is going to depend heavily on this Court's assessment of the first *Grant* factor.

[61] The Crown now wishes to argue the judge was wrong in her assessment of all three *Grant* factors, despite not having contested the significance of the second and third factors during the application before the judge.

[62] I need only observe the Crown cannot now put forward on appeal a different case than it advanced at trial (*R. v. Barton*, 2019 SCC 33 at para. 47). Doing so

implicates the notion of double jeopardy as its "principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial" (*R. v. Varga*, [1994] O.J. No. 1111 at para. 26). Relying on *Varga*, this Court stated in *R. v. Hiscoe*, 2013 NSCA 48 that "…the Crown must live with its strategic decisions both at trial and on appeal" (para. 17). Both *R. v. Tweedie*, 2023 NSCA 11 (para. 8) and *R. v. Campbell*, 2024 SCC 42 (para. 143) recognize new grounds are permitted on appeal only in "exceptional circumstances", of which none were argued before us. And there is an additional problem: the absence of a sufficient record in relation to argument on the second and third *Grant* factors, which now leaves this Court "deprived of the trial court's perspective" (*R. v. J.F.*, 2022 SCC 17 at para. 40). Therefore, I will focus only on the judge's treatment of the first *Grant* factor.

[63] The Crown says it was a contradiction for the judge to have found the affiant's error was honest but not reasonable, yet when conducting the *Grant* analysis, said it was made more in bad faith than in good faith.

[64] It must be remembered the judge concluded the affiant's actions were not taken to deliberately mislead. Nevertheless, the judge was persuaded the affiant's conduct was "negligent" and "careless", and fell closer on the spectrum to *Charter*-offending conduct. In doing so, the judge referenced *R. v. Lambert and Bailey*, 2023 NSCA 8 (quoting from *R. v. Caron*, 2011 BCCA 56 at para. 38) that under the s. 24(2) analysis "bad faith equates with 'flagrant disregard' " but its absence " 'does not equate to good faith' " (para. 70).

[65] The judge's task when labelling the affiant's actions in relation to the analysis of the ITOs was a separate exercise from the purpose of her fact-finding on the s. 24(2) question. I adopt and reproduce the respondent's compelling response found in its factum:

> 46. The trial judge was correct to focus on the conduct of the affiant in obtaining judicial authorization as opposed to the fact that the police conducted search and seizures pursuant to judicial authorization when considering the seriousness of the *Charter* violation for the *Grant* analysis. To proceed as the Appellant suggests would completely gut the protections afforded by the *Charter*. Any time an affiant prepared a careless, negligent and misleading ITO and obtains judicial authorization where, amplified on review, such an authorization could not have issued the Appellant would characterize the *Charter* offending conduct as less serious because authorization was obtained. The flawed logic of the Crown's position is palpable. It fails to recognize that the affiant's actions led to the issuance of the very thing that then impacted on the *Charter* protected rights of

> the defendant. And it fails to recognize that the affiant and the executing officers in this case were all members of the Integrated Special Enforcement (Drug Unit) of the Halifax Police Service. The executing officers were, in effect, agents of the affiant in carrying out the searches that she requested be authorized.

[66] The Crown also asks us to conclude the judge failed to take into account the differing privacy interests associated with each location that was the subject of a warrant. Concerning the production warrant, it says the focus should have been on the nature of the privacy invasion that would have been permitted by its issuance. Given the car had a low privacy expectation, the locker had a low privacy expectation[2] and the apartment had a high privacy expectation, the Crown maintains the judge should have considered each of those warrants separately, owing to the differing privacy interests.

[67] Respectfully, I disagree. The judge's reasons make plain she did indeed take into account the differing privacy interests in play, even if she grouped them, rather than enumerating each one individually. On the second *Grant* factor she found:

> [155] Analysis of the second factor, the seriousness of the impact of the breach on the *Charter*-protected interests of the accused, requires me to evaluate the interests engaged by the infringed right and the degree to which that right has been violated within a spectrum of intrusiveness (*Grant,* para. 77).
>
> [156] The Crown concedes that Mr. Payne had a high expectation of privacy in the storage locker, his apartment, and his phones. So, for those, the degree to which his right was violated is high on the spectrum of intrusiveness. He had a lower expectation of privacy in the documents produced from the business and in the vehicle so the impact is also lower.
>
> [157] This factor strongly favours exclusion of the evidence seized from the storage locker, apartment and cell phones, and much less so for the documents obtained from the business and the evidence seized from the vehicle.

[68] I agree with the respondent's suggestion the Crown seeks to have this Court engage in a new s. 24(2) analysis, yet come to a different conclusion. It is an invitation we must resist. The application of the *Grant* factors is a question of law; deference is owed if the factors were properly considered, which I am satisfied they were.

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[2] The Crown's position about the respondent's privacy expectation in his storage locker is different on appeal than as argued before the judge. There, it asserted the privacy expectation was high; before this Court the Crown says it was low.

Conclusion

[69] This Court's decision in *Campbell* illustrates the Crown's problematic approach on this appeal. There, the reviewing judge concluded police negligence invalidated a warrant; upon the *Grant* analysis the evidence was excluded and an acquittal followed. In that case, the appellant Crown's assertion the judge's assessment was inadequate or unbalanced was rejected:

> [34] Two points can be made in relation to the authorities noted above. Firstly, any analysis with respect to the foundation for a search warrant, its execution, and any resulting argument arising under s. 24(2), is highly contextual. Secondly, police conduct, including the presence of negligence, can be a consideration when challenging the grounds for a warrant and when undertaking a s. 24(2) analysis. I do not accept the Crown's argument that the trial judge was prohibited from considering the existence of police negligence when determining the nature of the error on the face of the warrant.
>
> (Emphasis added)

[70] The judge's reasons in this case are cogent and thorough. Her identification of the law and guiding principles is not disputed by the appellant. The judge's analyses of the issues justify her conclusions and do not disclose error. Where the judge exercised her discretion, deference is owed.

[71] With respect, I am not persuaded the Crown's dissatisfaction with the outcome of the respondent's application before the judge equates to judicial error. There is no basis for appellate intervention. I would dismiss the appeal.

Beaton, J.A.

Concurred in:

Van den Eynden, J.A.

Derrick, J.A.