NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Creelman*, 2007 NSCA 51

Date: 20070501
Docket: CAC 262402
Registry: Halifax

Between:

Paul Kenneth Creelman

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Bateman, Cromwell and Oland, JJ.A.
Appeal Heard:	January 25, 2007 in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; Bateman and Cromwell, JJ.A. concurring.
Counsel:	Warren Zimmer, for the appellant James Martin and Susan Y. Bour for the respondent

Reasons for judgment:

Introduction

[1] The appellant, Paul Creelman, flew into the Halifax International Airport (the "Airport") on February 6, 2003. In advance of his arrival, the Halifax Regional Police Service had obtained a search warrant authorizing the interception, inspection and seizure of his luggage. His luggage was checked by the police on the secure side of the luggage return area, resealed, and put on the conveyor belt. It proceeded to the baggage area where the appellant retrieved it. He subsequently put the bags in his green 2002 Chevrolet pick-up truck (the "Truck") in the Airport parking area. When the appellant started to leave, the police stopped and arrested him. Their search of his luggage revealed 28.2 kilograms of marijuana.

[2] The appellant was subsequently charged with possession of cannabis marijuana for the purpose of trafficking, in excess of three kilograms contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (*C.D.S.A.)*. His trial commenced with a *voir dire* on the validity of certain search warrants. In a decision reported in 2005 NSSC 353, Justice Walter R. E. Goodfellow of the Nova Scotia Supreme Court (the "reviewing judge") refused his application pursuant to the provisions of the *Canadian Charter of Rights and Freedoms*, to quash the search warrants, and to exclude from his trial evidence obtained as a result of the execution of those warrants. The appellant was convicted of possession for the purpose of trafficking.

[3] He appeals pursuant to s. 675(1) of the *Criminal Code* against conviction. The sole issue on appeal is whether the reviewing judge erred in dismissing the appellant's application.

Background

[4] The police suspected the appellant of trafficking in cannabis marijuana and other narcotics in the Halifax Regional Municipality. On January 29, 2003, the primary investigator in relation to the appellant, Cst. Michael Sanford, obtained a general warrant (s. 487.01 of the *Code*) to obtain future airline records of Canjet.

The following day, he sought and obtained four warrants from Judge William B. Digby of the Provincial Court (the "issuing judge"). In support of his request, the officer submitted four Informations to Obtain which he had prepared. The warrants authorized by the issuing judge were:

(a) a general warrant for future records of Air Canada-Tango-Jazz;

(b) a general warrant for the search of the appellant's luggage at the Airport;

(c) a warrant (s. 487 of the *Code*) for the search and seizure of past airline records of Canjet; and

(d) a warrant (s. 487) for the search and seizure of past airline records of Air Canada-Tango-Jazz.

[5] Essentially the same information appeared in the Informations to Obtain submitted for the four warrants issued on January 30, 2003. It was agreed at trial that if one warrant was valid, all were; similarly, if one was not, then none was valid. The focus of the *voir dire* at the commencement of the appellant's trial was on the general warrant which permitted the police, for a period of 60 days, to intercept and search his luggage while travelling, at the Airport.

[6] During the *voir dire*, each of the parties called evidence. The appellant called Constables MacLauglin, Seebold and Pattison, and Sergeant Merrick. The prosecution called Constables Sanford and Astephen, Sergeant Chatterton, and Blair MacDonald and Jeffrey Rafuse who were employed by the Canada Customs and Revenue Agency.

[7] At the *voir dire*, the appellant argued that certain requirements for the issuance of a warrant had not been met and, in particular, that the information contained in the Information to Obtain was misleading and unreliable, and that there were material non-disclosures which effectively were misleading. The reviewing judge considered the record which had been before the issuing judge, and the additional evidence presented at the *voir dire*, in determining the sufficiency of the grounds to obtain the search warrant. He decided that the warrant was properly issued and that the appellant's rights under s. 8 of the *Charter* were not infringed. In addition, he held, in the alternative, that such evidence would be admissible under s. 24(2) of the *Charte*r.

Standard of Review

[8] In *R. v. Shiers*, [2003] N.S.J. No. 453 (C.A.), this court outlined the appropriate standard of review for an appellate court when considering a trial judge's ruling on the validity of a search warrant. The standard set out in *R. v. Shiers* was recently adopted, in *R. v. Durling*, [2006] N.S.J. No. 453, 2006 NSCA 124:

> . . . 9 The issue here is not whether the Court of Appeal believes that the Information was sufficient. The issue is whether the reviewing judge applied the appropriate standard of review to the issuing judge's determination that the Information was sufficient.
>
> 10 Whether the reviewing court applied the appropriate standard of review to the decision of the lower tribunal is an issue of law which is reviewable by this Court under the principles stated in **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235 at para 8 - 9 and **Dr. Q. v. College of Physicians and Surgeons of British Columbia,** [2003] S.C.J. 18; 2003 SCC 19, at para. 43 - 44.

[9] In *Durling*, supra MacDonald, C.J.N.S. considered the reviewing judge's role when considering the issuing judge's decision to authorize a search warrant. He stated at ¶ 15 that:

> What then was the judge's role when reviewing the JP's decision to issue a search warrant? Simply put, he was to consider not whether he would have issued the warrant but instead whether the warrant *could* have been issued based on the relevant information provided.

and noted at ¶ 17 that:

> In what circumstances could a warrant be justified? The prescribed test is an objective one. The issuing JP would have to have reasonable and probable grounds that an offence had been committed and that the search would uncover material evidence. In other words, a *credibly-based probability* must replace suspicion. . . .

[10] Later in this decision, I will review what is required to establish this "credibly-based probability."

Analysis

[11] In order to determine whether the reviewing judge applied the appropriate standard of review to the issuing judge's determination that the information was sufficient to authorize a search warrant, it is necessary to examine and consider the evidence before the reviewing judge, the errors alleged by the appellant, and the applicable case law. I begin with the Information to Obtain, on which the issuing judge relied in authorizing the search warrant, and which was the central focus of the *voir dire* before the reviewing judge.

The Information to Obtain

[12] In his Information to Obtain, Cst. Sanford stated that there were reasonable grounds to believe that the appellant had unlawful possession, for the purpose of trafficking, cannabis marijuana contrary to s. 5(2), and that he believed on reasonable grounds that evidence of the offence was in the Airport premises. As to his "Grounds for Belief," he referred to Appendix "A".

[13] Appendix "A" reads in part:

Appendix A

> 1. THAT Constable Michael Sanford, Peace Officer and member of the Halifax Regional Police, (hereinafter referred to as the Informant), has personal knowledge of the matters hereinafter deposed to except where same are stated to be on information and belief, and where so stated I do verily believe the same to be true.
>
> 2. THAT Paul Kenneth Creelman, who resides at a residence situated at 188 Moores Road, Antrim, Halifax Regional Municipality, Province of Nova Scotia Date of birth of the 5th day of February, 1964, (hereinafter referred to as Paul Creelman), is trafficking in large quantities of Cannabis Marihuana and other narcotics in the Metro Halifax area.

3. AND FURTHER THAT the Informant has received information from a confidential human source, (hereinafter referred to as Source "A") that Paul Creelman utilizes air travel to various destinations within Canada and various other International destinations. Paul Creelman travels abroad for the purposes of Conducting drug transactions and transporting or arranging transportation of Narcotics to the Metro Halifax Area.

4. AND FURTHER THAT The Informant has Known Source "A" for approximately two years. Source "A" has provided information that has been used successfully in Controlled Drugs and Substances Act (hereinafter referred to as the CDSA) and other warrants. Source "A" freely associates with people who use and sell narcotics and the information that Source "A" has provided has been corroborated by other sources and investigative techniques.

5. THAT the Informant had been contacted on several occasions within the last year by Mister Ron Nault, (hereinafter referred to as Mr. Nault) Canada Customs Regional Intelligence officer, who was aware of the Informants interest in Paul Creelman and advised that he had been contacted by a casual source, who stated that Paul Creelman would be departing on a certain date from Halifax to an unknown destination and returning to Halifax on a certain date.

6. THAT on several occasions over the past several months the Informant has conducted surveillance on Paul Creelman and has observed him departing and arriving at Halifax International Airport.

7. AND FURTHER THAT while conducting surveillance on Paul Creelman the Informant has observed him meeting with known drug traffickers.

8. THAT the Informant received information from a confidential human source, (hereinafter referred to as Source "B"). Source "B" is a past proven reliable source, the Informant has known Source "B" for three years and has acted on the information provided by Source "B" approximately ten times. This Information has led which have led [sic] to search warrants being granted and charges laid under the Controlled Drugs and Substances Act and Criminal Code. Source "B" freely associates with people who use and sell narcotics and the information that Source "B" has provided has been corroborated by other sources and investigative techniques.

9. AND FURTHER THAT Source "B" states that Paul Creelman utilizes air travel to various destinations within Canada and various other International destinations.

10. AND FURTHER THAT Paul Creelman travels abroad for the purposes of Conducting drug transactions and transporting or arranging transportation of Narcotics to the Metro Halifax Area.

11. AND FURTHER THAT Source "B" stated to the Informant that Paul Creelman has the best price around on "B.C. Bud" (street slang for high quality Cannabis Marihuana, grown in British Columbia) and that he seems to have an unlimited supply.

12. AND FURTHER THAT Source "B" stated to the Informant that Paul Creelman is living beyond his means, on his involvement with the trafficking illegal narcotics and that he just purchased a new truck that he paid cash for.

13. AND FURTHER THAT the Informant on numerous occasions has observed Paul Creelman operating a 2002 Green Chevrolet, pick up truck, Nova Scotia License, DRW494.

14. AND FURTHER THAT on the 22nd day of January, 2003, the Informant queried on Registry of motor vehicle data base for Nova Scotia License, DRW494 and the data base indicated that this vehicle was registered to Paul Kenneth Creelman, Date of birth of the 5th day of February, 1964, who resides 188 Moores Road, Antrim, Halifax Regional Municipality, Province of Nova Scotia.

15. THAT on the 22nd day of January, 2003, the Informant checked the name of Paul Kenneth Creelman, Date of birth of the 5th day of February, 1964, on the Regionally Applied Police Information Delivery systems, (hereinafter referred to as RAPID) and the Canadian Police Information Centre, (hereinafter referred to as CPIC).

. . .

20. THAT on the 22nd day of January, 2003, the Informant was advised by Sergeant Doug Brown, Peace Officer and member of the Royal Canadian Mounted Police, (hereinafter referred to Sergeant Brown) who is assigned to the Truro Drug Section of Royal Canadian Mounted Police that Paul Creelman has been a target of their section in the past in relation to a major Marihuana cultivation operation. From discussions with Sergeant Brown and perusal of the CPIC system I believe that this investigation resulted in a conviction for possession of proceeds of crime under s. 19.1 of the Narcotic Control Act, which is the last noted entry on Paul Creelmans [sic] criminal record as set out above. Other charges against Paul Creelman in connection with this investigation were withdrawn.

21. THAT the Informant knows of no legitimate sources of income for Paul Creelman and has received information from numerous reliable sources and members of the criminal community that Paul Creelmans [sic] only source of Income is from illicit trafficking in Narcotics.

22. THAT on the 30th day of January 2003, the Informant was granted search warrants for Paul Creelmans [sic] record of air travel information and evidence of airline reservation transactions and activities of Paul Creelmans [sic] from the 1st day of January 2002, up to an including the 29th day of January 2003, inclusive.

23. AND FURTHER THAT the records retrieved from Air Canada-Tango-Jazz indicated that over the last twelve month period that Paul Creelman used these airlines thirty one times. Twenty one of the trips were to Montreal, Vancouver nine times since June 2002, one Trip to Toronto. The Majority of the trips were three days or less and some trips were to the destination from Halifax and back to Halifax in the same day.

24. AND FURTHER THAT on the 30th day of January, 2003, the Informant was in conversation with Marlene Schetange, security officer with Air Canada-Jazz-Tango, who explained the details of airline reservation transactions and she stated the majority of flights were booked and payed for at the ticket counter just prior to the flight departure.

25. THAT on the 29th and 30th day of January 2003, the Informant was granted search warrants for Paul Creelmans [sic] record of air travel information and evidence of airline reservation transactions and activities of Paul Creelmans [sic] from the 1st day of January 2002, up to and including the 29th day of January 2003, inclusive.

26. AND FURTHER THAT the records retrieved from CanJet indicated that between June 2002 and December 2002 that Paul Creelman used this airline nine times between Halifax, Toronto and Montreal.

27. THAT these travel patterns are consistent with someone who is transporting and trafficking in Controlled Substances.

28. THAT the Informant verily believes a search of information and evidence concerning the said offences will be obtained through the use of a certain device, investigative technique, procedure or doing of anything to wit: The interception, inspection and seizure of the contents or parts thereof, of luggage, other items and their contents transported by Paul Creelman or persons travelling with/or for Paul Creelman, while utilizing air travel by the Halifax Regional Police for information and evidence that will further assist the investigation by the Halifax

> Regional Police of the aforementioned offences will provide evidence to aid in the investigation of the said charge.

[14] The appellant argues that the material in the Information to Obtain, as amplified on review, did not constitute sufficiently reliable information to support the authorization of a search warrant by the issuing judge. He attacks the reliability of the information provided to Cst. Sanford by Sources A and B, and argues that the officer's own assertions were misleading. He also submits that he failed to disclose critical information to the issuing judge. All of these arguments were made at the *voir dire* and rejected by the reviewing judge. On the appeal of his decision, the appellant also asserts that the reviewing judge erred in his interpretation of the law with respect to the assessment of the sufficiency of information provided by informers.

Reasonable Grounds for a Search Warrant

[15] I turn now to a consideration of the law with regard to the grounds for belief contained in an Information to Obtain which are required for the authorization of a search warrant.

[16] The leading authority on this issue is *R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.) ["*Debot* (S.C.C.)"] . At p. 215, Wilson, J. stated the following concerning the sufficiency of grounds in an Information to Obtain a Search Warrant:

> 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? Secondly, 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. (Emphasis added)

[17] As emphasized by *Debot* (S.C.C.), no single factor will be decisive. Rather, it is always the totality of the circumstances which will determine whether the standard of reasonableness has been met.

[18] As stated earlier, in *R. v. Durling*, supra this court considered in what circumstances a warrant could be justified. At ¶ 17, MacDonald, C.J.N.S. described the test as an objective one, which requires credibly-based probability to replace suspicion. The decision continued:

> ¶19 This reference to the issuing judge having a "credibly-based probability" has been the subject of much judicial discussion over the years. In **R. v. Morris (W.R.)** [1998] N.S.J. No. 492 (C.A.); 173 N.S.R. (2d) 1; 527 A.P.R. 1 Cromwell, J.A., of this court provided the following guidance:
>
> > ¶ 30 Without attempting to be exhaustive, it might be helpful to summarize, briefly, the key elements of what must be shown to establish this "credibly based probability":
> >
> > (i) The Information to obtain the warrant must set out sworn evidence sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence and that the things in question will be found at a specified place: (**R. v. Sanchez** (1994), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.), at 365).
> >
> > (ii) The Information to obtain as a whole must be considered and peace officers, who generally will prepare these documents without legal assistance, should not be held to the "specificity and legal precision expected of pleadings at the trial stage." (**Sanchez**, supra at 364)
> >
> > (iii) The affiant's reasonable belief does not have to be based on personal knowledge, but the Information to obtain must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant's belief: **R. v. Yorke** (1992), 115 N.S.R. (2d) 426 (C.A.); aff'd [1993] 3 S.C.R. 647.
> >
> > (iv) Where the affiant relies on information obtained from a police informer, the reliability of the information must be apparent and is to be assessed in light of the totality of the circumstances.

> The relevant principles were stated by Sopinka, J. in **R. v. Garofoli**, [1990] 2 S.C.R. 1421, at pp. 1456-1457:
>
> > (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;
> > >
> > > (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, provided evidence of reliability of the information.
>
> ¶ 31 The fundamental point is that these specific propositions define the basic justification for the search: the existence of "credibly-based" probability that an offence has been committed and that there is evidence of it to be found in the place of search.

[19] As to whether information provided by an informer meets the reasonable grounds standard so as to justify a search warrant, and the extent to which

corroboration is required, the comments of Wilson, J. in *Debot* (S.C.C.) at p. 218 are instructive:

> . . . it should not be necessary for the police to confirm each detail in an informant's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. As I noted earlier, however, the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where few details are provided and the risk of innocent coincidence is greater.

[20] Also helpful is the test for assessing a confidential informer's information as articulated by Martin, J.A. in *R. v. DeBot* (1986), 30 C.C.C. 207 (Ont. C.A.) ["*DeBot* (Ont. C.A.)"] at p. 218-219, as follows:

> . . . I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search . . . Highly relevant . . . are whether the informer's "tip" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any *indicia* of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.

Lamer, J. referred with approval to that passage in *R. v. Greffe* (1990), 55 C.C.C. (3d) 161 (S.C.C.) at p. 189, which was considered in *Garofoli*, supra at p. 1456.

[21] Three decisions of the Supreme Court of Canada, namely *R. v. Wiley* (1993), 84 C.C.C. (3d) 161; *R. v. Plant*, [1993] 3 S.C.R. 281 and *R. v. Grant* (1993), 84 C.C.C. (3d) 173 illustrate the standard for reasonable and probable grounds for a search warrant where the affiant of an Information to Obtain has relied on information from a police informer. I will discuss these later in my decision.

The Appellant's Submissions

[22] In his factum and oral argument, the appellant conducted a paragraph by paragraph review and criticism of the Information, arguing that the material was not sufficiently reliable to support the issuance of the search warrant. I will summarize his detailed submissions.

[23] As to the confidential informants described as Sources A and B, he says that where there is no indication that either of them know the appellant or his affairs, or had observed him, that their information lacked detail, and that it had not been corroborated by the police. Consequently, the appellant argued, the undisclosed basis of that information was important in determining its reliability; otherwise, it might have been based on mere rumour or gossip within the criminal community. He also points out that, while he did so for Source B, Cst. Sanford did not say that Source A was "past proven reliable." Source A had provided information that had been successfully used to obtain *C.D.S.A.* and other warrants, but the Information did not state that the information has ever been shown to be accurate on specific matters.

[24] As to Source B's assertion that the appellant was living beyond his means and had just purchased a new truck with cash, the appellant observes that Cst. Sanford testified at the *voir dire* that he was driving that same vehicle when arrested on October 31, 2002. Moreover, the officer knew from the Registry of Motor Vehicles that it had been registered in June 2002. Thus, argues the appellant, the Truck had not been "just purchased" when the Information was sworn on January 30, 2003. He also says that Cst. Sanford did not investigate before stating in the Information that he knew of no legitimate source of income for the appellant, and challenges his assertion that his only source of income was from illicit trafficking in narcotics.

[25] The appellant characterizes statements in the Information, wherein Cst. Sanford swore that "on several occasions" over the past "several months," he had conducted surveillance and had observed him "departing and arriving" at the Airport as erroneous, misleading, and unreliable. At the *voir dire*, Cst. Sanford could not provide surveillance dates, nor state when he saw the appellant coming to or going from the Airport, or the number of occasions. He testified that he had seen the appellant arriving by car once, driving off Airport property once, and in the arrivals lounge once. The appellant also argues that while the officer asserted that he saw him meeting with known drug traffickers, that information was

misleading in view of his having been seen once in the arrivals lounge and where there was no indication that he knew those persons.

[26] In his Information to Obtain, Cst. Sanford set out very specific information on air travel by the appellant over the previous year, as obtained from airline records pursuant to search warrants. He stated that the appellant had taken 31 trips (21 to Montreal, nine to Vancouver and one to Toronto) on Air Canada, that the majority were for three days or less, and that some were return on the same day. He also stated that the appellant had taken Canjet flights nine times between Halifax, Toronto and Montreal in a six month period.

[27] On June 3, 2005, pursuant to s. 489.1 of the *Code,* Cst. Sanford filed the Report to a Justice (the "Report") who issued a warrant, regarding his execution of the January 30, 2003 warrant to search the premises of Air Canada-Tango-Jazz. Attached to the Report were the past records in relation to the appellant that had been seized. That material relates to a three month rather than a one year period, and does not substantiate the nature or extent of the air travel set out in the Information to Obtain. The appellant submits that, had this information obtained on amplification been available to the issuing judge, it would have resulted in further inquiry without which the warrant would not have issued.

[28] The appellant also relied on material not included in the Information presented to the issuing judge, arguing that its omission amounts to material non-disclosure. According to evidence given on the *voir dire,* on October 31, 2002 Cst. Sanford received information from a confidential reliable informant who was neither Source A nor Source B. That person stated that the appellant, travelling with another individual, would be arriving at the Airport carrying a large quantity of marijuana. A police surveillance team quickly went to the Airport where they saw the appellant and another person loading luggage and other articles into the back of the appellant's Truck. The police followed the Truck to its destination, arrested the appellant and the other person, and searched the luggage and the contents of the Truck. No drugs were found.

[29] Cst. Sanford made no mention of this negative search in his Information to Obtain sworn on January 30, 2003. At the *voir dire* before the reviewing judge, the Crown asked why there was no reference to it. He responded:

> A. At the time that I was compiling or drafting the Informations to Obtain before the Courts today, there had been some time period that had lapsed since then, and I hadn't even put my mind to the previous incident that had taken place. I was more concentrating on the sources that I was using and making sure that I had indicated or done all the different things that I could to corroborate the information that they were providing to me at the time that I was applying for these search warrants.
>
> Q. Did it occur to you to put that October 31st incident in?
>
> A. No, I hadn't even thought about it, with the timing gone by, and just - it never even, it never even entered my mind.
>
> . . .
>
> Q. Do you now believe that the October 31st information would have relevance?
>
> A. Yes.
>
> Q. And why is that?
>
> A. Because it was similar circumstances, and if I had've - you know, I definitely would've put it in there. It just never entered my mind.

[30] Under cross-examination, the officer acknowledged that he had seen a complaint letter dated December 16, 2002 from counsel for the appellant to the Chief of Police regarding that negative search. That letter asked for explanations for the warrantless search, for the police refusal to identify themselves to the appellant, and in regard to missing items, and sought compensation for those items.

[31] The appellant strenuously argued that Cst. Sanford's explanation for failing to include information regarding this negative search on October 31, 2002 was unreasonable. He stressed that the appellant had been a person of interest to the officer for some months before he swore the Information on January 30, 2003 for a warrant for the luggage search, the relatively short period between the date of that negative search and the Information, and the officer's intervening knowledge of the December 16, 2002 complaint letter.

The Legal Tests and Their Application

[32] Before considering the detailed arguments of the appellant, which he had made before the reviewing judge; it would be helpful to set out suggestions the Supreme Court of Canada has given for affidavits in wiretap applications. In *R. v. Araujo*, [2000] 2 S.C.R. 992, [2000] S.C.J. No. 65, LeBel, J. writing for the Court stated:

> ¶ 45 This being said, it is clear that the affidavit was not perfect, even on its face. . . . it may be useful to discuss some practical suggestions about the form of affidavits on an application for a wiretap authorization in order to reduce needless litigation on similar matters and in better serving the interests of all parties.
>
> ¶ 46 Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an *ex parte* authorization is full and frank disclosure of material facts: cf. *Dalglish v. Jarvie* (1850), 2 Mac. & G. 231, 42 E.R. 89; *R. v. Kensington Income Tax Commissioners*, [1917] 1 K.B. 486 (C.A.); *Re Church of Scientology and The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), at p. 528; *United States of America v. Friedland*, [1996] O.J. No. 4399 (QL) (Gen. Div.), at paras. 26-29, per Sharpe J. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.
>
> ¶ 47 A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong – and much right – with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions.

> ¶ 48 Finally, while there is no legal requirement for it, those gathering affidavit material should give consideration to obtaining affidavits directly from those with the best firsthand knowledge of the facts set out therein, like the police officers carrying on the criminal investigation or handling the informers. This would strengthen the material by making it more reliable. . . .

[33] In his decision, the reviewing judge addressed each of the appellant's arguments regarding the reliability of the material in the Information and the non-disclosure of the negative search to the issuing judge. In considering the arguments respecting the statements from informers, he quoted the passage from Martin, J.A.'s decision in *DeBot*, supra. He also correctly referred to *Garofoli*, supra and instructed himself that the reviewing court should not set aside and quash a warrant unless it is satisfied on the whole of the material presented that there was no basis for that authorization. His decision continued:

> The test appears to be an examination of the totality of the circumstances and the posing of the question after examining all of the circumstances and discounting the weaknesses or deficiencies in the material advanced to the issuing authority; **could the issuing authority, not withstanding such, conclude reasonable and probable grounds exist?**
>
> In order to appreciate fully the arguments advanced by Mr. Creelman's solicitor, I have reviewed most of them and commented specifically. Acknowledging in some areas there are weaknesses and a preference for a somewhat higher standard, nevertheless, even discounting to the full extent commented on, it is clear that there is more than ample before the issuing authority, Judge Digby, upon which he could conclude reasonable and probable grounds exist and therefore the application to quash the warrants is dismissed.

[34] It is clear that the reviewing judge was familiar with the appropriate legal tests. In particular, he appreciated that it was the totality of the circumstances that was to be considered, after taking into account weaknesses and deficiencies that had been identified.

[35] The reviewing judge described the appellant's argument regarding Cst. Sanford's failure to disclose the negative search of October 31, 2002 as an invitation for the court to conclude that it was "a deliberate misleading of the issuing authority." After carefully considering the evidence presented at the *voir dire*, he rejected that invitation, stating:

> I have had the benefit of observing Constable Sanford in the giving of his fairly lengthy testimony. He acknowledged in cross-examination that the existence of the previous search and negative result was relevant and that the failure to include it in the application for subsequent warrant was simply that he did not think of it. I found the evidence throughout of Constable Sanford to be given in a fair, honest and credible manner and this finding applies to the further arguments advanced by Mr. Creelman's solicitor in attacking the warrants. I note also that the basis of the initial search was an informant and that informant was not relied upon in the subsequent application for the warrant on the 30th of January 2003. It would have been of concern to the court if the warrant of the 30th of January 2003 had been issued on the basis of reliance upon the previous informant but such was not the case. I do not consider that the failure to mention the October 31st, 2002 search fatal by itself, however, it must be weighed in the totality of circumstances and I do so later in this decision.

[36] It may well be that, in certain circumstances, the "egregiously improper conduct of an informant" may require the quashing of a warrant, but such cases are rare: see *Re Church of Scientology and the Queen (No. 4)* (1985), 17 C.C.C. (3d) 499 (Ont. H.C.J.) at p. 510. In *R. v. Bisson*, (1994), 94 C.C.C. (3d) 94 (S.C.C.), the trial judge who found that the officer had deliberately misled the authorizing judge by failing to disclose in his affidavit, vitiated the wiretap authorization. The Supreme Court of Canada stated at p. 95 that in doing so, he fell into error and set out how the trial judge should have proceeded:

> As stated in *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, [1990] 2 S.C.R. 1421, 80 C.R. (3d) 317, errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the wire-tap authorization as was done by the trial judge. The trial judge should have examined the information in the affidavit which was independent of the evidence concerning Eric Lortie, in order to determine whether, in light of his finding, there was sufficient reliable information to support an authorization. Proulx J.A., writing for the Quebec Court of Appeal, 87 C.C.C. (3d) 440, [1994] R.J.Q. 308, 60 Q.A.C. 173, carefully reviewed and analyzed the affidavit after excluding the paragraphs directly affected by the retraction. On the basis of this analysis, we are satisfied that there was sufficient independently verifiable information which was not affected by the trial judge's finding and upon which an authorization could reasonably be based.

[37] Here, however, the reviewing judge did not find any bad faith, fraud, or attempt to deceive or mislead by way of strategic omission of any reference of the negative search from the Information. Inferentially, he accepted Cst. Sanford as a

truthful witness. I cannot say that the judge's acceptance of the officer's testimony, after hearing him on the stand and in view of the fact that the informant involved with the negative search was a person other than Source A or B, the confidential informants for the warrant whose issuance is under appeal, was unreasonable. He was satisfied that the omission was not fatal.

[38] I turn then to the argument that the material in the Information regarding the frequency and extent of air travel by the appellant was misleading, particularly in view of the material attached to the Report filed some four months after the authorization of the warrant. The reviewing judge dealt with this argument and drew an inference that the particulars in the Information came from Ms. Schetange of Air Canada-Jazz-Tango. In the absence of any cross-examination on the apparent inconsistency, this was a reasonable conclusion.

[39] In my view, the Information could have been drafted with more precision. The fact that it was not permits a piecemeal attack on various aspects. However, as indicated in *Durling*, supra relying on *Sanchez*, supra, it is the Information as a whole which is to be considered, and police officers who draft Informations without legal assistance should not be expected to provide the specificity and legal precision expected in trial proceedings.

[40] An examination of the Information and evidence presented at the *voir dire* discloses sufficient information and sufficiently reliable information to authorize a search warrant pertaining to the appellate's luggage at the Airport.

[41] As indicated earlier, the Supreme Court of Canada decisions in *Wiley*, supra, *Grant*, supra and *Plant*, supra provide helpful information regarding reasonable and probable grounds for the search warrant where the Information relies on information provided by an informer. In *Wiley*, supra and *Grant*, supra, the police knew the informer involved to be previously reliable. In addition, the informer in *Wiley* gave detailed descriptions and had personal knowledge of facts strongly supportive of the commission of an offence. The independent pieces of information in *Grant*, supra in combination led to the same conclusion. I agree with the appellant that in each of those cases, the totality of the circumstances was more persuasive than those in the case on appeal.

[42] Unlike *Wiley*, supra and *Grant*, supra, the informant in the third Supreme Court of Canada decision was not a previously reliable confidential informer.

Rather, the source in *Plant*, supra was unknown to the police. Moreover, the information provided lacked precision and was not extensive.

[43] In *Plant*, supra the facts which led to the search, and ultimately the appellant's conviction for unlawful cultivation of marijuana, were summarized at p. 285 as follows:

> . . . On March 9, 1990, the Calgary Police Service received an anonymous Crime Stoppers tip which indicated that marihuana was being grown in the basement of a "cute house" beside a house with a lot of windows on 26th Street between two consecutive cross avenues in Calgary. Acting on this tip, Constable Fair, a member of the Calgary Police Service drug unit, conducted a reconnaissance which included travelling to the reported street, searching out the house described and ascertaining the exact street address of the house which appeared to match the premises identified by the informant: 2618-26th Street S.W., Calgary. Constable Fair, being satisfied that this was the house described, noted the full address.
>
> After determining the correct address, on March 9, 1990 Constable Fair used a terminal in the Calgary Police Service Detective Division which was linked to the city of Calgary utility main frame and was designed to allow the police to check electrical consumption at a specified address after entering a password. Constable Fair, upon comparison of the electrical consumption at 2618-26th Street S.W. over the prior six-month period with two other comparably sized residences in the city of Calgary, determined that consumption at that address was four times the average of the other two over the same period.
>
> Later on March 9, 1990, Constable Fair and another member of the Calgary Police Service, Constable Hettler, entered the property at 2618-26th Street S.W. and knocked on one door, received no answer and went around to the back door. The two officers observed that two basement windows were covered in something opaque and they sniffed at what appeared to be the outside vent for the dryer. As they smelled nothing, they looked inside the vent and discovered that it was plugged with a plastic bag. The two officers were chased from the premises by a resident who returned home.

[44] The information which resulted in the authorization of a search warrant in *Plant*, supra consisted of the anonymous tip, the results of the electricity comparison, and police observations made during the perimeter search. Sopinka, J. for the majority determined that the police check of electricity consumption records did not breach s. 8 of the *Charter* and thus those records were available to the police to support the application for a search warrant. Although the perimeter search was a violation of s. 8, the court determined after a consideration of the

factors in *R. v. Collins*, [1987] 1 S.C.R. 265, that the evidence should not be excluded under s. 24(2) of the *Charter*.

[45] In *Plant*, supra, responding to the appellant's argument that the anonymous tip was not sufficiently reliable to have constituted a reasonable ground for believing that an offence had been committed in his residence, after citing *Debot*, supra Sopinka, J. stated at p. 297:

> While that case related to the decision of the police to conduct a warrantless search pursuant to the tip of a known informant, the factors enunciated demonstrate principled concerns with the use of informants in general and are equally applicable to the anonymous tip in the case at bar. The information given by the anonymous informant was compelling in that it identified the location of the cultivation operation and located the appellant's house in a fairly specific geographic region, albeit without specifying an exact street address. It is impossible to determine whether the source was credible except by reference to the fact that the information was subsequently corroborated by a police reconnaissance which resulted in identification of the exact address of the residence described by the informant. The tip itself, therefore, was compelling enough in its specification of the place in which the offence was occurring for the police to readily locate the exact address of the appellant's residence and corroborate the report of the informant. I conclude that the anonymous tip, although made by an unknown informant, was sufficiently reliable to have formed part of the reasonable grounds asserted in the information to obtain the warrant. Therefore, I would not excise that piece of evidence from the warrant.

[46] In the case under appeal, the two confidential sources were not anonymous nor were they unknown to the police. According to the Information, Source A has been an informer for two years. While not described as "past proven reliable source," this informer specified that the appellant travels by air to transport or arrange for the transport of narcotics. Such a statement is considerably more compelling than a general allegation that the appellant is a drug trafficker. Moreover, Source A is described as a person who freely associates with users and sellers of narcotics. The appellant conceded that the Information to Obtain indicates that information Source A has provided has been "corroborated by other sources and investigative techniques," which serves as some evidence of past reliability.

[47] The second informant, Source B, is a past proven reliable source who has been an informer for three years. The police have acted on his information some

ten times. Source B also freely associates with users and sellers of narcotics and his information has also been corroborated by other sources and investigative techniques. Like Source A, he stated that the appellant uses air travel nationally and internationally to conduct drug transactions. Thus two informers gave those same particulars and their statements in this regard are corroborative of each other. Cst. Sanford also spoke to Ron Nault of Canada Customs who confirmed that the appellant travels internationally, and his CPIC check disclosed the appellant's conviction for possession of proceeds of crime, which arose from an R.C.M.P. investigation in relation to a major marijuana operation. These investigations support the information regarding air travel and drug transport provided by the two informants.

[48] According to past proven reliable Source B, the appellant has the best price on B.C. bud around and appears to have an unlimited supply. Again, this information is detailed. The information the police obtained from the airlines that the appellant travels frequently to British Columbia would serve to bolster that assertion by this informant.

[49] Source B also stated that the appellant is living beyond his means. His statement that the appellant used cash to purchase a new truck is fairly specific – it referred to a particular type of vehicle, namely a truck, and a particular and unusual method of payment for an expensive asset. Cst. Sanford had seen the appellant driving that same type of vehicle. His checks of the records at the Registry of Motor Vehicles linked the Truck to the appellant and indicated its registration to him in late June 2002. Whether Source B would describe the Truck as "just purchased" in an Information sworn six months later is impossible to know. One could surmise either way.

[50] According to Cst. Sanford's evidence, his statement that the appellant did not appear to have a legitimate source of income was based on conversations with associates of the appellant. That could be viewed as some corroboration for Source B's information that the appellant was "living beyond his means."

[51] According to the information, Cst. Sanford observed the appellant coming from and going to the Airport on several occasions, but gave few details in his testimony. He obtained warrants for air travel records from January 2002 to January 2003. He swore that he received very specific information of numerous flights over that period, most of which were trips of three days or less, and some of

which were return trips in the same day. The airline security officer, with whom he spoke, stated that the majority of the appellant's flights were booked and paid for at the ticket counter just prior to flight departure, a procedure which makes it difficult to track a person. Cst. Sanford's investigations serve to corroborate the assertions by Sources A and B that the appellant travels by air for the purpose of transporting narcotics.

[52] I am satisfied that the reviewing judge applied the appropriate standard of review to the issuing judge's determination that the Information was sufficient for the issuance of a search warrant. The grounds for the search warrant authorizing the search at the Airport of the appellant's luggage as set out in the Information and subsequently amplified at the *voir dire,* when reviewed in light of the case law including *Debot* (S.C.C.); *DeBot* (Ont. C.A.); *Garofoli*, supra; *Araujo*, supra and *Plant*, supra were ample for that purpose.

[53] The additional submission presented on the appeal alleged error of law in the reviewing judge's interpretation of the law with respect to the sufficiency of the information provided by informers. The appellant points to comments by the reviewing judge made during the *voir dire*. That passage reads:

> The Court: Well, there is also - the tip can be - the tip is just - if the tip is from a source proven to be reliable, I don't think you have to go into the degree of detail of the tip.
>
> Mr. Zimmer: If Your Lordship is saying that . . .
>
> The Court: You can say Source A, on ten different occasions, provided confidential information about trafficking in drugs by individuals, and in all ten cases proved accurate and convictions were then - surely that's a pretty reliable source. I don't think you have to then go in to the source of knowledge - well, you've got to see the indices of the informer's reliability in the past, for example. You already have them. I - my reading of that case, Garafoli, [sic] was that the reference to Martin dealt with the fact that the police were just starting to get into the practice of saying a mere conclusory statement, that I'm informed by an informer that he's doing it, and that that was the basis upon which you could issue a warrant. And that's simply not so.

[54] I reject the appellant's submission that this exchange during argument calls for appellate intervention. Nowhere in his decision does the reviewing judge suggest that the fact that an informer was previously reliable means that his

information is free of scrutiny. He cited *DeBot* (Ont. C.A.) and quoted at ¶ 9 of his decision the passage set out in ¶ 20 above which describes as highly relevant the detail contained in an informer's information as highly relevant. He also considered the sources of that information and the reliability of Sources A and B, in accordance with the case law.

Section 24 of the *Charter*

[55] In view of my conclusion that there was no breach of s. 8, I need not address the s. 24(2) issue.

Disposition

[56] I would dismiss the appeal.

Oland, J.A.

Concurred in:

Cromwell, J.A.

Bateman, J.A.