PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Clayton*, 2023 NSPC 51

Date: 20231117
Docket: 8645046-49
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Registry: Halifax

Between:

Martin Trey Clayton
Teanna Marie Hillison
Peter Walley Nguyen

Applicants

and

His Majesty the King

Respondent

DECISION REGARDING EXCLUSION OF EVIDENCE

Judge:	The Honourable Judge Del W Atwood
Heard:	August 24, 2023 in Halifax, Nova Scotia
Charge:	Sections 9, 10, 13 of the *Cannabis Act* Section 5 of the *Controlled Drugs and Substances Act* Sections 86, 91, 92, 95, 96, 117.01, 354, 462.31 of the *Criminal Code*
Counsel:	Carla Ball for the Nova Scotia Public Prosecution Service and for the Public Prosecution Service of Canada Patrick MacEwen for Peter Walley Nguyen Jennifer MacDonald for Teanna Marie Hillison Allan MacDonald for Martin Trey Clayton

By the Court:

Synopsis

[1] The Court is dealing with a pre-trial application for exclusion of evidence. Ms. Ball of the Nova Scotia Public Prosecution Service is appearing for the Public Prosecution Service of Canada as well. This is permissible pursuant to *R v. Sacobie and Paul*, [1983] 1 SCR 241. The material reviewed by the Court had been edited by the prosecution to redact privileged information. Accordingly, there are no restrictions on the publication of this decision.

[2] Martin Trey Clayton [Mr. Clayton], Teanna Marie Hillison [Ms. Hillison] and Peter Walley Nguyen [Mr. Nguyen] are charged with an array of offences under the *Cannabis Act*, the *Controlled Drugs and Substances Act* [*CDSA*], and the *Criminal Code* [*Code*].

[3] They elected trial in Provincial Court are to be tried jointly on 18 December 2023; I am the assigned trial judge.

[4] Mr. Clayton, Ms. Hillison and Mr. Nguyen have applied to the court for an exclusion-of-evidence remedy under the *Charter*.

[5] Police obtained a general warrant from a judge of the Provincial Court on 13 July 2022. The warrant allowed police to enter and search a home where Ms. Hillison was believed to reside. The information to obtain [ITO] on which the general warrant was based revealed that Ms. Hillson was the holder of a possession and acquisition licence that allowed her to acquire restricted firearms—specifically, handguns— and store them securely at her home. Police believed that Ms. Hillson was illegally transferring to Mr. Nguyen handguns which she had purchased from legal sources. The purpose of the general warrant was not to search for those handguns; rather, police expected to find that Ms. Hillson was no longer in possession of them, having trafficked them to Mr. Nguyen.

[6] When police searched Ms. Hillson's home, they located a safe; inside it, they found Ms. Hillson's handguns, some ammunition, and a Schedule I controlled substance; police found other controlled substances in other parts of Ms. Hillson's home. Armed with this information, the original general-warrant affiant obtained two more warrants (to search for (1) firearms under § 117.04 of the *Code*, and (2) controlled substances under § 11 of the *CDSA*); as a result, police seized more incriminating evidence from Ms. Hillson's home.

[7] Defence counsel challenge the constitutional validity of the general warrant, focussing primarily on alleged inadequacies in the ITO. Should the warrant be found invalid, defence counsel seek exclusion of evidence seized as a result of the execution of the general warrant, as well as the exclusion of evidence seized under subsequent search warrants which were issued after the general-warrant search.

[8] The prosecution argues that the general-warrant ITO was sufficient; in the alternative, the prosecution submits that, even if the general warrant is found to have been issued invalidly, the seized evidence should be admitted at trial.

[9] I find that there was no evidence before the issuing judge to support the granting of the general warrant dated 13 July 2022; applying the appropriate legal criteria, I find that the evidence seized by police was obtained in a manner that violated the constitutional rights of Mr. Clayton, Ms. Hillison and Mr. Nguyen to be secure against unreasonable search or seizure. The appropriate proportional remedy is the exclusion of the seized evidence.

[10] The following are the reasons of the Court.

Admissions by counsel

[11] At the commencement of the hearing, the prosecution admitted that Mr. Clayton, Ms. Hillison and Mr. Nguyen had standing to advance a § 8 *Charter*-grounds application.

[12] Counsel filed with the Court an agreed statement of facts [the "agreed statement"]:

- On 13 July 2022, the ITO affiant obtained from a judge of the Provincial Court a general warrant authorizing the search of Ms. Hillson's residence
- On 19 July 2022, police executed the warrant.
- Police observed Mr. Nguyen leaving in Ms. Hillson's vehicle and placed him under arrest.
- Police searched Ms. Hillson's residence, and found Ms. Hillson and Mr. Clayton inside.
- Police searched a firearms safe in the residence; they found Ms. Hillson's firearms and evidence of criminal activity.
- As a result of what police found during the general-warrant search, the same ITO affiant obtained two more warrants to search Ms. Hillson's residence—under § 11 of the *CDSA* and § 117.04 of the *Code*.

- Those searches led to the discovery and seizure of a significant quantity of controlled substances, firearms, ammunition and cash.

[13] The prosecutor admitted further that, if the Court were to find that the originating general warrant was unconstitutionally issued, and if the Court were to exclude evidence seized under the authority of that warrant, then reference to the results of the initial seizure ought to be excised from the ITOs used to obtain the two subsequent search warrants.

Standard of review

[14] Production orders, general warrants and search warrants may be challenged in trial courts under the procedure set out in *R v. Garofoli*, [1990] 2 SCR 1421 [*Garofoli*]. While that case dealt with the validity of an authorization to intercept private communication, it applies to any challenge of a judicial authorization, order or warrant that impacts the privacy interests of a person.

[15] In a *Garofoli* hearing, the controversy pertains most often to the ITO that was the basis for the judicial order under review.

[16] The standard of review and the procedure for review are aligned with these guiding principles:

- When exclusion of evidence is a primary objective of a *Charter*-grounds motion, the preferred venue is the trial court: *Garofoli* at 1450.

- A warrant that authorizes a form of search is subject to a higher level of constitutional scrutiny than warrantless conduct: *R .v Golub,* 1997 CarswellOnt 2448 at ¶ 18-19 (CA).

- A warrant or order under review is presumed valid: *R v. Pires; R v. Lising*, 2005 SCC 66 at ¶ 30; *R v. Knott*, 2021 NSSC 255 at ¶ 11; *R v. Sadikov*, 2014 ONCA 72 at ¶ 83.

- The onus is on the accused to prove that the ITO was insufficient: *R v. Campbell*, 2011 SCC 32 at ¶ 14.

- A review is not a *de novo* hearing: *R v. Araujo*, 2000 SCC 65 at ¶ 51 [*Araujo*]; *R v. Wint*, 2022 NSSC 367 at ¶ 8 [*Wint*].

- A reviewing judge should apply a deferential standard of review: *R v. Durling*, 2006 NSCA 124 at ¶ 14.

- Reviewing judges do not substitute their assessments of the ITO for those of the issuing judge: *R v. Vu*, 2013 SCC 60 at ¶ 16 [*Vu*]; *Wint*; *R v. Hobin*, 2023 NSPC 12 at ¶ 14-25 [*Hobin*].

- The overarching question to be resolved is whether there was some evidence upon which the issuing judge could have granted the order under review, not whether the reviewing judge would have granted it: *Vu*.

- The test is whether there was any reliable evidence that might reasonably be believed on the basis of which a warrant could issue: *R v. Morelli*, 2010 SCC 8 at ¶ 40 [*Morelli*]; *Araujo* at ¶ 51.

- The reviewing court should examine the totality of the challenged ITO, and should not engage in a paragraph-by-paragraph parsing of it: *R v. Saunders*, 2003 NLCA 63 at ¶ 11-15, aff'd 2004 SCC 70; *Hobin* at ¶ 15.

- An ITO need not be a model of legal writing: *R v. Downey*, 2017 NSSC 65 at ¶ 7; *R v. Nguyen*, 2011 ONCA 465 at ¶ 57 [*Nguyen 2011*].

- The reviewing judge should recognize that the issuing judge would have been permitted to draw reasonable inferences from evidence presented in ITOs: *Vu*; *R v. Shiers*, 2003 NSCA 138 at ¶ 14; *R v. Burgoyne*, 2018 NSPC 13 at ¶ 14; *R v. Allain*, [1998] NBJ No 436 at ¶ 11 (CA).

- An ITO need not offer evidence corroborating every detail of information offered by a confidential informant [CI]; nor is an ITO affiant required to confirm a tip to the extent of observing the commission of an offence: *R v. Bajich*, 2019 ONCA 586 at ¶ 16.

- Nevertheless, a reviewing court should be alert to poorly sourced or unsourced statements in an ITO. CI information should be compelling, corroborated and credible: *R v. Debot*, [1989] SCJ No 118 at ¶ 60.

- The court should examine the level of detail provided by a CI; when few details are provided, there will be a greater need for police to verify the tip: *Debot* at ¶ 50. And see M Biddulph, "The Privacy Paradox: *Marakah, Mills*, and the Diminished Protections of Section 8" (2020) 43:5 Man LJ 161 at 178.

- The ITO should make it clear whether the CI was present when the event or transaction described in the tip took place. If the CI is merely relaying information received from someone else, the reliability of the tip is placed in question. Is the information in the tip something the CI personally saw? *R c Beauregard*, [1999] JQ no 1109 at ¶ 17 (CA).

- When evaluating information in an ITO originating with CIs, the reviewing court should consider the totality of the circumstances, including: (a) the degree of detail of the tip; (b) the CI's source of knowledge; (c) indicia of the CI's reliability such as past performance or confirmation from other investigative sources: *R v. Demirovic*, 2022 NSCA 56 at ¶ 23-24 ; *R v. Morris*, [1998] NSJ No 492 at ¶ 30 (CA).

- A reviewing judge should verify that an ITO satisfies all governing statutory requirements for the issuance of an order, such that the ITO is found to contain adequate information that would have allowed the issuing judicial officer to be satisfied that the requirements were fulfilled: *R v. Nguyen*, 2023 ONCA 367 at ¶ 45-55 [*Nguyen 2023*]; *R v. Wallace*, 2017 ONSC 132 at ¶ 78.

- The reviewing judge should verify that the affiant provided full, frank and fair disclosure in the ITO: *Nguyen 2011* at ¶ 48-50.

- If a warrant or order is found invalid, any search authorized by it must be treated as a warrantless search, rendering it presumptively unreasonable and a violation of § 8 of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being

Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

Section 8 states:

> Everyone has the right to be secure against unreasonable search or seizure.

- As in any *Charter*-grounds application, the accused must satisfy the reviewing court on a balance of probabilities that there has been a *Charter* infringement, consequential enough that an exclusion-of-evidence remedy under section 24(2) of the *Charter* ought to be granted: *R v. Collins*, [1987] 1 SCR 265 at 277 [*Collins*].

The challenged order and the scope of the hearing

[17] The authority grant a general warrant is found in § 487.01 of the *Code*:

> 487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if
>
> > (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
> >
> > (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

> (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.
>
> (2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.
>
> (3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

[18] The challenged order in this case is, in fact, a general warrant; it was issued by a judge of the Provincial Court on 13 July 2022. The ITO and the warrant are subject to a sealing order under 487.3 of the *Code*; the Court is working with a prosecution-redacted copy of the ITO, released through an order under § 487.3(4). There were no defence objections to the redactions, so that there has been no need to go through a contested 6-step *Garofoli*-redaction-scrutiny procedure.

[19] Defence counsel are challenging the facial validity of the general warrant; there is no sub-facial-validity challenge. Defence counsel did not seek to cross-examine the ITO affiant or any sub-affiants. There was no amplification evidence called by the prosecution. The defence did not call evidence.

[20] Although it appeared initially that there might be a controversy regarding Mr. Clayton's part in this application, the prosecution has admitted that all

three accused persons have standing to advance a § 8 *Charter* challenge. This concession was efficient, as a contested hearing would likely have been resolved in Mr. Clayton's favour, given that a *Charter*-relief applicant may rely on the theory of the prosecution to make out a case for standing: *R v. Jones*, 2017 SCC 60 at ¶ 32.

[21] Defence counsel point to three putative deficiencies in the issuance of the general warrant:

- There were other techniques available to police, so that the criterion in ¶ 487.01(1)(c) of the *Code* was not met.
- The ITO affiant did not declare expressly that the warrant would be in the best interests of the administration of justice; thus, the criterion in ¶ 487.01(1)(b) was not met.
- The ITO did not establish that there were reasonable grounds to believe an offence had been committed; the criterion in ¶ 487.01(1)(a) was not met.

Other legal techniques

[22] Defence counsel argue that there were investigative techniques accessible to police other than a general warrant, so that the criterion in ¶ 487.01(1)(c) of the *Code* was not met.

[23] I would not give effect to this argument.

[24] In oral submissions, defence counsel argued that police could have applied for a search warrant under § 487 of the *Code*, instead of a general warrant. In fact, police had obtained a search warrant for Ms. Hillson's residence on 13 June 2022. That warrant authorized an affirmative search for things: namely, firearms believed to be possessed by Mr. Nguyen illegally. The warrant was not executed prior to its expiry date and went stale.

[25] While it is true that a search warrant would have permitted police to do the very same thing as they did with the general warrant—*ie* enter Ms. Hillson's home and conduct a search—the general warrant authorized a technique that fit precisely the police operation that was proposed in the ITO: not a search to find and seize "a thing" (as comprehended in a § 487 search warrant); rather, a search expecting to find nothing. The theory of ITO affiant was that Ms. Hillson had transferred her handguns illegally to Mr. Nguyen, so that she no longer had them at her home. In my view, a § 487 search warrant would not

have covered this sort of technique; a general warrant was the only appropriate route. The "information concerning the offence" sought to be obtained by police was not the finding of some incriminating item of property, but the not-finding of it.

[26] Defence counsel identify the firearm-inspector power in § 105 of the *Firearms Act,* SC 1995, c 39 as being another provision in an Act of Parliament that would have allowed police to check whether Ms. Hillison had her firearms at home. In my view, this is not an appropriate technique when dealing with cases of illegal handgun transfers. I apply the principles in *R v. TELUS Communications Co*, 2013 SCC 16 at ¶ 77: the actual substance of the technique sought to be deployed in this case was not a perfunctory, regulatory-enforcement licencing check; rather, it was, at least potentially, a high-risk search in a case that was believed to involve illegal handgun transfers to criminal actors. A general warrant carried with it the coercive authority of the state to forcibly enter and search; it was the only appropriate technique in the circumstances.

[27] In deciding this point, the Court is not making an evaluation whether, in seeking the issuance of a general warrant, the police were proceeding in the most efficacious way in advancing their investigative objective. That sort of

analysis is erroneous: *Araujo* at ¶ 38. Rather, I find that this was the only legal investigative technique available to police in the circumstances.

Best interests of the administration of justice

[28] The ITO affiant did not specifically pledge his belief that the issuance of a general warrant would be in the best interests of the administration of justice. Defence counsel submit that this is fatal.

[29] I would not give effect to this argument.

[30] To be sure, a general warrant must satisfy the best-interests-of-the-administration-of- justice criterion set out in § 487.01(1)(b) of the *Code*. However, this is a legal determination to be made by the issuing judge. Paragraph 487.01(1)(b) makes it clear that it is the judge who must be satisfied on this point; it is not a matter to pleaded by an ITO affiant.

[31] This is because an ITO should set out facts.

[32] Whether the issuance of a warrant would meet the best-interests criterion is not a fact; rather, it is a legal conclusion, one to be decided by the issuing judge after reviewing the ITO. While there would be nothing wrong in an affiant pointing out evidence that addresses best-interests considerations—and so,

offering a reasoning path for the judge—the failure to expressly include in an ITO a best-interests pleading is neither necessary nor sufficient. If there is sufficient evidence in the ITO to allow the judge to make the required legal determination, then that is enough: *Nguyen 2023* at ¶ 45-55. If there is not enough evidence in the ITO to satisfy the judge, then a specific best-interests pledge by the ITO affiant will not repair the deficiency.

[33] By way of analogy, contrast ¶ 487.01(1)(b) with ¶ 487.01(a): ¶ (a) requires an "information on oath in writing that there are reasonable grounds to believe that an offence . . . has been committed." This, much as with § 487(1), requires a specific pledge by an ITO affiant of reasonable grounds; this requirement is repeated in Form 1. An ITO affiant must have those subjective grounds of belief in order to make a lawful application for a warrant. However, the "information on oath" language in ¶ 487.01(a) is not repeated in ¶ 487.01(b); this makes clear that it was not Parliament's intent that a general-warrant-ITO affiant include a specific best-interests pleading.

Reasonable and probable grounds to believe

[34] The reasonable-grounds-to-believe criterion for general warrants matches the standard required for search warrants. It is situated where credibly based

probability replaces mere suspicion: *Hunter v. Southam Inc*, [1984] 2 SCR 145 at 167; *R v. Wallace*, 2016 NSCA 79 at ¶ 29 [*Wallace*].

[35] An ITO subject to the reasonable-grounds standard need not establish a *prima facie* case of a criminal offence. But something more is required than suspicion, or the mere possibility that an offence was committed. Reasonable grounds can be said to exist only when suspicion is replaced by credibly based probability; a reasonable belief that there is a possibility of finding evidence is insufficient: *Debot* at ¶ 54; *Wallace* at ¶ 29.

[36] Defence counsel have presented a persuasive and compelling argument that the ITO failed to meet the reasonable-grounds standard.

[37] A general-warrant ITO must satisfy a judge that there are reasonable grounds to believe that an offence has been committed. Although an offence must necessarily have been committed by someone, the ITO need not identify a specific criminal actor as a likely offender; it is often the case that an ITO will describe criminal acts by persons whose identities are unknown.

[38] However, in this case, the general-warrant ITO offered up that additional specificity. The theory of the ITO affiant was that Ms. Hillison was illegally transferring legally acquired firearms to Mr. Nguyen, and, as a result of the

illegal transfers, was not keeping her handguns at home, placing her in violation of the terms of her possession-and-acquisition licence.

No direct evidence

[39] The term “direct evidence” means evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption: *R v. Greenwood*, 2022 NSCA 53 at ¶ 163; *Black's Law Dictionary*, 11th ed, *sub verbo* "evidence". Direct evidence is witness testimony as to “the precise fact which is the subject of the issue on trial”: Sidney N. Lederman, Michelle K. Fuerst, Hamish C. Stewart, *The Law of Evidence in Canada*, 6th ed (Markham: Lexis Nexis Canada, 2022) at ¶ 2.94-2.102. See also *R v. Arcuri*, 2001 SCC 54 at ¶ 29.

[40] I do not believe that there is any controversy that there was no direct evidence in the general-warrant ITO implicating Ms. Hillison in any criminal offence. In saying so, I remain alert to the fact that an ITO is not required to set out irrefutable evidence of guilt; an ITO need not even make out a *prima facie* case. Circumstantial evidence may be sufficient.

[41] The evidence presented in the ITO sought to make out a circumstantial case that there were reasonable grounds to believe that Ms. Hillson was transferring firearms illegally. In my view, that evidence was profoundly weak.

Ambiguity regarding confidential-informer information—how did they know what they claimed to know?

[42] The ITO affiant relied primarily on two CIs: Source A and Source B. [In referring to parts of the general-warrant ITO, ¶n=paragraph number]

[43] In oral argument, prosecution and defence counsel agreed that, on the face of the ITO, Source B had fewer indicia of reliability than Source A: Source B had been a CI for a shorter period of time (one year, compared to Source A's seven); had provided fewer tips leading to charges (five, compared to A's twenty-eight) or positive searches (five, compared to twenty); and had a criminal record but with no information in the ITO excluding credibility offences: ¶ 16, 17.

[44] The ITO contained the following recital describing how Source A obtained information:

> Source A freely associates with persons involved in criminal activity and has personal, first-hand knowledge of the information obtained herein based on conversations and observations of persons involved.

[45] The same thing is pledged about Source B: ¶ 16c, 17c.

[46] Courts have reviewed similar wording in *R v. MacDonald*, 2014 NSSC 218 at ¶ 38 [*MacDonald*]; *R v. Knott*, 2021 NSSC 255 at ¶ 3; *Hobin* at ¶ 34; *R v. Sparks*, 2015 NSSC 233 at ¶ 47 [*Sparks*]; *R v. Patterson*, 2014 NSPC 101 at ¶ 20-26

[47] This recital evinces a common misunderstanding harboured by ITO affiants about the meaning of the term "personal, first-hand knowledge."

[48] First-hand knowledge or personal knowledge is information or experience gained or learned directly, rather than from other people or secondary sources. It is acquired by seeing or hearing the event happen: *Araujo* at ¶ 48; *R v. Bissky*, 2018 SKCA 102 ¶ 35-37; *R v. Charles*, 2023 SKPC 6 at ¶ 30-31. It is original knowledge. And, so, if guns are being trafficked, a person witnessing the transaction has firsthand knowledge. If the subject-matter of an offence is, say, a conspiracy or a threat, a person overhearing a conversation between conspirators or hearing the threat being uttered would have firsthand knowledge.

[49] However, information "based on conversations" is not firsthand knowledge; rather, it is hearsay.

[50] To be sure, hearsay is admissible in an ITO: *Garofoli* at ¶ 68.

[51] But if a CI offers up to a handler a tip provided by someone else, it is that original source—the CI's source—that must be shown to be reliable.

[52] Consequently, it would be important to know in reviewing this ITO whether Source A and Source B were providing information based on what they had seen, or based on what they had been told by others. That sort of clarity is not mere granularity; rather, it is information necessary to evaluate the reliability of the CIs' tips.

[53] The ITO claimed that the CIs "freely associate with persons involved in criminal activity . . . ." Did that include contact with Mr. Nguyen or any of the named persons linked to him? Did the CIs associate with Ms. Hillson? Or with Mr. Clayton? Were the CIs parties to any of the alleged criminal activities described in the ITO?

[54] Unfortunately, the ITO does not provide any necessary clarity regarding the sources of the CIs' knowledge. The paragraphs that set out the tips provided by the CIs—¶23, 29, 30, and 31—offer up bald, conclusory statements (as that term was used in *Hobin* at ¶ 18, citing *Debot* at ¶ 62) that do not describe sources of knowledge.

[55] *Sparks* offers a useful contrast. The "is-it-firsthand/is-it-hearsay?" ambiguity in that ITO was able to get cleared up, once the reviewing judge got beyond the introductory ITO boilerplate and examined the information actually witnessed by the CIs who were the affiant's sources in that case. There was rich detail about what the CIs had seen themselves, where they were when they were making their observations, and who was present; the CIs offered direct evidence implicating the targets. The ITO in *Sparks* furnished that necessary level of detail that lifted the case above the mere possibility of an offence having been committed, up to a level of credibly based probability.

[56] Not so here.

[57] The CI information cited by the affiant offers nothing much more than generic accusations of criminal conduct: a particular person is in possession of guns, or sells white, or sells weed. There is not even the barest detail describing whether the CIs actually observed the events, where the events happened, or who was there. One might infer recency, given the use of the present tense; however, there remains the uncertainty whether the tips are actual first-hand information.

No direct evidence and weak circumstantial evidence implicating Ms. Hillson in criminal activity

[58] Pertinent details in the ITO connecting Ms. Hillison to any sort of criminal activity are, at best, scant. In fact, they are non-existent.

[59] For instance, only once does either CI make reference to anyone having an actual handgun—¶ 23; everywhere else in the ITO, the CIs refer to "firearms" or "a gun": ¶ 29-31. This is important, as the ITO describes Ms. Hillison as having acquired handguns only; no other type of firearm is mentioned: ¶ 20. One would assume that reliable CIs who associate freely with persons involved in criminal activity would be able to distinguish, on sight, a handgun from other types of firearms. Further, neither CI provided even generic manufacture details about any handgun, gun, or firearm mentioned in their tips that would have matched any of the handguns known to have been acquired by Ms. Hillson—of various manufacture, yes, but all of them 9mm which ought to have been readily identifiable, at least generally. The lack of specificity suggests strongly that the CI information was not first-hand knowledge. Indeed, one key tip provided by Source A—that Peter Nguyen is *most likely* getting guns for Rakeem and Tereeko (two alleged criminal associates of Mr. Nguyen's) [emphasis added]—is worded in a way strongly indicative of something other than first-hand knowledge: ¶ 29h.

[60] Further, if the CIs were present when they saw guns, firearms, handguns, or drugs, they would have been able to say where they were when they saw those things. Were they actually involved in the drug-and-gun trafficking? Or merely bystanders? Even that bare level of detail is absent from the ITO.

[61] Significantly, the CIs provide no information linking Ms. Hillson's address to any sort of criminal activity.

Tenuous evidence connecting Ms. Hillson to Mr. Nguyen

[62] As to Ms. Hillson's connection to Mr. Nguyen, other than one instance on 10 June 2022 (when they were observed by police surveillance sitting together on the front steps of Ms. Hillson's residence), there is no other linking evidence presented in the ITO: ¶ 28. The CPIC information which the affiant collected on Mr. Nguyen does not reveal a home address: ¶ 26. Were Ms. Hillison and Mr. Nguyen living together? Were they in an intimate relationship? Did they have a business connection? The ITO is bereft of any meaningful detail that would link Ms. Hillison sufficiently to Mr. Nguyen to admit of an inference that she would be making straw buys of handguns for him. The fact that the prosecution now concedes Mr. Nguyen's standing as an occupant of Ms. Hillson's residence—and so able to advance a § 8 *Charter*-grounds application—does not immunize the ITO from a sufficiency-of-evidence

review. Absent amplification evidence, the Court may consider only what is contained in the ITO, as it was that information—and that information only—that was considered by the judge who issued the general warrant.

[63] Source A provided a tip that Mr. Nguyen was driving a vehicle with a Nova Scotia marker; a CPIC check showed that the vehicle was registered to Ms. Hillison: ¶ 23-24. Police surveillance placed it at Ms. Hillison's residence on 3 June 2022; it is not remarkable that a vehicle owner will park it at home. However, apart from the tip from the CI, there is nothing in the ITO connecting Mr. Nguyen to Ms. Hillison's vehicle.

[64] The CIs provide sparsely detailed information about Mr. Nguyen's criminal associations; the affiant collected additional historical information from the guns-and-gang unit: ¶ 29, 40. However, Ms. Hillison is not linked to any of Mr. Nguyen's associates.

Ms. Hillson and a parolee—what relevance?

[65] The ITO includes information on a parolee who had been living at Ms. Hillison's address until his parole was revoked. This person had some connection to a guns-in-vehicle incident that occurred on 31 July 2021, which was the subject of a police investigation: ¶ 39. It is not possible to link that

event to the allegation of Ms. Hillison making straw buys, as it occurred prior to her first handgun purchase: ¶ 20b.

No evidence to support the issuance of the general warrant—leading to evidence "obtained in a manner that infringed"

[66] Applying the proper deferential standard, I conclude that the ITO did not provide the issuing judge with any reliable evidence that would have permitted the issuance of the general warrant. No single frailty is predominant; rather, I have considered the totality of the ITO.

[67] Accordingly, I find the general warrant to have been issued invalidly. Excising from the subsequent search-warrant ITOs the evidence gathered through the general warrant, I find the warrants under § 117.04 of the *Code* and § 11 of the *CDSA* to have been invalidly issued. Automatic excision was conceded by the prosecution. This concession was efficient, and legal, as the law on excision in the context of ITO reviews is not controversial: *R v. Zacharias*, 2023 SCC 30 at ¶ 32-34, 40-59 [*Zacharias*]; *R v. Spencer*, 2014 SCC 43 at ¶ 74 [*Spencer*]. Any uncertainty regarding the state of the law on excision arising from *R v. Love*, 2022 ABCA 269 was resolved in *Zacharias*: *Love* was overruled.

[68] As a result, the searches of Ms. Hillson's residence were warrantless, rendering them presumptively unreasonable; this leads inevitably to a finding that the evidence seized by police under the three warrants was obtained in a manner that infringed the rights of Ms. Hillison, Mr. Nguyen and Mr. Clayton under § 8 of the *Charter*.

[69] This violation engages § 24(2) of the *Charter*:

> Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[70] The degree of proof borne by a *Charter*-relief claimant appears substantial, given the phraseology "*would* bring the administration of justice into disrepute". [Emphasis added]. However, the equally authoritative French-language version of the statute reads: "est *susceptible* de déconsidérer l'administration de la justice." [Emphasis added] This is translated as "*could* bring the administration of justice into disrepute", indicative of a lower threshold. It is an interpretation that has been judicially approved: *Collins* at 288.

[71] If, as with the 13 June 2022 search warrant, the general warrant had been allowed to go stale, there would have been no impact. It was the execution of the constitutionally invalid general warrant that led to the direct impacts of search and seizure. The impacts were linked—contextually, causally and contemporaneously—to the § 8 *Charter* breach. The nexus is clear: *R v. Strachan*, [1988] 2 SCR 980 at 1002.

Reputation of the administration of justice

[72] The Court must determine whether the admission of the seized evidence could bring the administration of justice into disrepute. The question to be decided is whether a reasonable person, informed of the circumstances and of the values underlying the *Charter,* would conclude that the admission of the evidence could bring the administration of justice into disrepute: *R v. Grant*, 2009 SCC 32 at ¶ 68 [*Grant*].

[73] The fact that there has been a *Charter* breach means that damage has already been done to the administration of justice; the Court must ensure that evidence obtained through that breach not do further damage: *Grant* at ¶ 69. In fulfilling that responsibility, a reviewing court must consider:

- the seriousness of the offending conduct;

- the impact of the offending conduct on the Charter-protected interests of the relief claimants; and
- the interests of society in an adjudication of the case on the merits.

[74] Having considered these factors, a reviewing court must then determine whether, on balance, the admission of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute: *Grant* at ¶ 86.

Stage I—Seriousness of the Charter-infringing conduct

[75] Police acted on the authority of a general warrant and two search warrants. In the result, the searches were unwarranted, but were not warrantless: *Morelli* at ¶ 99. Police believed they were acting under lawful authority. Furthermore, no argument has been made that the ITOs were fraudulent or that they failed to disclose pertinent information. Police acted in good faith.

[76] This favours the admission of the evidence.

[77] However, I say so with these caveats: a search carried out under the authority of an apparently valid warrant may—and in this case, certainly did—lead to a far more invasive breach of privacy than, say, a search without a warrant, such as one done with plain-view or incident-to-arrest-or-detention

authority; furthermore, the fact that a judicial authorization was granted on inadequate grounds is something that, by itself, constitutes serious *Charter*-infringing conduct.

[78] While admission is favoured on this criterion, it is a close call.

[79] This leads to an analysis of the next *Grant* criterion.

Stage II—Impact on the Charter-protected interests of the accused

[80] Privacy interests in places where people live enjoy a high level of legal protection from the coercive power of the state; prior judicial authorization, subject to clear statutory standards that are constitutionally compliant, is the norm, with very few exigent-circumstance exceptions: see, *eg*, *R v. Tessling*, 2004 SCC 67 at ¶ 13. In *R v. Dyment*, [1988] 2 SCR 417, at 427-28 the Court noted that "[t]he restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state."

[81] The issuance of the general warrant led to an unconstitutional search of Ms. Hillson's home, which had significant ripple effects: Police obtained two more warrants that led to more widespread searches of Ms. Hillson's personal space. Police seized a significant inventory of incriminating evidence listed in ¶ 6 of the agreed statement. None of this would have been discoverable but for the

issuance of the general warrant. While discoverability is of lesser moment since *Grant*, even *Grant* held that it remains a useful metric in assessing impact: ¶ 122. Just so, here.

[82] An unconstitutional invasion of that privacy weighs strongly against the admission of the evidence seized under the warrants.

[83] In making this finding, the focus of the Court is on the direct impact of the general-warrant search: the seizure of real evidence and the gathering of information that led to the two later warrants. Certainly, there were indirect impacts: Mr. Nguyen and Ms. Hillison were arrested and held until they appeared in court and were placed on release orders. However, indirect impacts are not factored in this analysis; direct impacts are the focus: *Grant* at ¶ 8, 134-138; *Spencer* at ¶ 87.

Stage III—Society's interest in an adjudication on the merits—the truth-seeking purpose of a trial

[84] At this stage, the Court must consider the truth-seeking function of a trial, and the collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to law: *Grant* at ¶ 29; *R v. Askov*, [1990] 2 SCR 1199 at 1219-20.

[85] The evidence against the accused sought to be excluded is real and reliable, which militates in favour of inclusion: *Grant* at ¶ 81; *R v. Atkinson*, 2012 ONCA 380 at ¶ 93-95. However, there is no such thing as blanket admissibility of reliable evidence: *Grant* at ¶ 80. Reliability cannot be utilized as a rubber stamp leading to automatic admissibility: *R v. Le*, 2019 SCC 34 at ¶ 142.

[86] The charges against the accused—Schedule I *CDSA* trafficking and illegal possession and transfer of dangerous firearms—are serious.

[87] While society has a significant interest in seeing serious offences prosecuted, it has an equal interest in ensuring that the judicial process is beyond reproach, particularly when the stakes for accused persons are high: *R v. Côté*, 2011 SCC 46 at ¶ 53.

[88] In my view, the third *Grant* criterion results in an equal balance of exclusion and admission.

Balancing

[89] In applying the three-stage inquiry to the facts of this case, a balancing favours the exclusion of the evidence seized under the general warrant and the two later search warrants. The general-warrant ITO presented CI information that was not compelling, corroborated or credible. In this, it shared the frailty

of many ITOs, as in *Hobin*, *Patterson* and *MacDonald*. The issuance of the general warrant led to a significant breach of privacy in a dwelling.

[90] Admitting the evidence notwithstanding the § 8 breach would be nothing more than a declaratory judgment, and would not be proportional to the constitutional violation.

[91] I agree with the conclusion reached by my colleague in *Hobin* at ¶ 62:

> The public's confidence in the administration of justice is its backbone; in my view, it is not understating it to say this contributes to freedom and democracy. The proper administration of justice requires it. When weighed in the balance, the public's confidence in our justice system must not be undercut by unconstitutionally-obtained evidence that results in a significant curtailing of individual rights; the seriousness of the allegations and society's interest in adjudication do not outweigh the factors favouring exclusion.

[92] The defence application is granted and the seized evidence is ordered excluded from admission at trial.

[93] I am grateful to counsel for their excellent written and oral advocacy which was of substantial assistance to the Court.

Atwood, JPC