SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2015 NSSC 297

Date: 20151019
Docket: CRH No. 434905
Registry: Halifax

Between:

Her Majesty the Queen

v.

Ryan Duane MacDonald

Judge: The Honourable Justice Joshua M. Arnold

Heard: August 25, 2015, in Halifax, Nova Scotia

Counsel: Andrea E. Jamieson, for the Federal Crown

J. Patrick L. Atherton, for the Defendant

By the Court:

[1] Ryan Duane MacDonald stands charged:

> 1. THAT on or about the 12th day of July, 2013, at or near Dartmouth, Province of Nova Scotia, he did unlawfully have in his possession, for the purpose of trafficking, not in excess of three kilograms, Cannabis (marihuana), a substance included in Schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said Act;
>
> 2. AND THAT at the same time and place aforesaid, did have in his possession, for the purpose of trafficking, Cocaine, a substance included in Schedule I of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said Act;

Overview

[2] On July 12, 2013, the police arrested Ryan Duane MacDonald ("Mr. MacDonald") for possession of cocaine and marijuana for the purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. The police found 42.5 grams of cocaine and 125 grams of marijuana in Mr. MacDonald's vehicle. The Defence challenges the lawfulness of the arrest.

[3] The Crown argues that through source information and surveillance the police had both subjective and objective grounds to lawfully arrest Mr. MacDonald.

[4] The Defence allege that:

- the arrest of Mr. MacDonald in his vehicle was improper as the police did not have reasonable and probable grounds;
- Mr. MacDonald's s. 9 *Charter* right to be free from arbitrary detention was breached;
- any search of Mr. MacDonald was unreasonable and a violation of his s. 8 *Charter* rights;
- any evidence seized as a result of the alleged arbitrary detention and improper search should be excluded in accordance with s. 24(2) of the *Charter*.

Relevant *Charter* Sections and Legislation

[5] Section 8 of the C*harter* states:

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

[6] Section 9 of the *Charter* states:

> Everyone has the right not to be arbitrarily detained or imprisoned.

[7] Section 24(2) of the *Charter* states:

> Where, in proceedings under subsection (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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[8] Section 495 of the *Criminal Code of Canada* states:

> *Arrest without warrant by peace officer*
>
> 495. (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence; or
>
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.
>
> *Limitation*
>
> (2) A peace officer shall not arrest a person without warrant for
>
> (a) an indictable offence mentioned in section 553,
>
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
>
> (c) an offence punishable on summary conviction,
>
> in any case where
>
> (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
>
> (i) establish the identity of the person,
>
> (ii) secure or preserve evidence of or relating to the offence, or
>
> (iii) prevent the continuation or repetition of the offence or the commission of another offence,
>
> may be satisfied without so arresting the person, and

> (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.
>
> *Consequences of arrest without warrant*
>
> (3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of
>
> (a) any proceedings under this or any other Act of Parliament; and
>
> (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

Evidence

[9] Four witnesses were called on this *voir dire*.

Constable Josh Underwood

[10] Constable Underwood was the lead investigator in relation to this matter. Constable Underwood concluded that he had reasonable and probable grounds to arrest Mr. MacDonald based on a combination of source information and police surveillance.

[11] In relation to the source information Cst. Underwood testified that:

- he had known his source for six months prior to July 12, 2013;
- he began receiving information from the source about Mr. MacDonald in May 2013;

- as of July 12, 2013, he had contact with the source 115 times;
- contact with the source would either be by telephone or in person;
- some of that contact was small talk, setting up meets and/or relaying information;
- he had received information from the source about Mr. MacDonald approximately fifteen to twenty times;
- he had previously acted on information provided by the source;
- he had used information provided by the source to prepare an Information to Obtain in a drug search warrant;
- he had arrested individuals on non-drug search warrant related arrests based on the source's information;
- he had arrested individuals on *Criminal Code* matters based on the source's information;
- he had faith in the source;

- he would not answer all questions posed to him on cross-examination regarding the source as he testified that he felt answering such questions might serve to identify the source;

- on July 11, 2013, the source advised that Mr. MacDonald was going to Cynthia Duffy's residence to get cocaine;

- the source advised that Mr. MacDonald had been in possession of cocaine within the past 48 hours;

- a combination of source information and surveillance confirmed Cynthia Duffy's address.

[12] Constable Underwood testified that at approximately 9:00 a.m. on July 12, 2013, he held a briefing with other police officers. During that briefing Cst. Underwood advised the other officers that: source information indicated Mr. MacDonald was a cocaine trafficker; he had been in possession of cocaine within the previous 48 hours; Cynthia Duffy was a cocaine trafficker; Mr. MacDonald was going to pick up cocaine from Cynthia Duffy on July 12, 2013; and Cynthia Duffy lived at 25 Fernhill Drive.

[13] Constable Underwood's own surveillance of Mr. MacDonald was limited to seeing Mr. MacDonald's vehicle drive from Windmill Road onto Fernhill Drive and park.

Constable Dan Parent

[14] Constable Parent was a ten-year member of the Halifax Regional Police at the time of his testimony on this *voir dire*. Prior to that he had been in the military for thirteen years, seven of which he served as a military police officer. He was assigned to conduct surveillance of Mr. MacDonald on July 12, 2013. The purpose of that surveillance was an investigation into possession of cocaine for the purpose of trafficking.

[15] Constable Parent started surveillance at 10:20 a.m. on July 12, 2013. He was in a police vehicle with Cst. Nick Joseph in the area of Nadia Drive and Fernhill Drive. Cst. Parent received a radio transmission that morning indicating Mr. MacDonald's vehicle, a red Pontiac G6 with a particular Nova Scotia license plate number, was coming up Fernhill Drive. When Cst. Parent drove past 25 Fernhill Drive the red Pontiac was empty. He watched Mr. MacDonald enter 25 Fernhill Drive. When Cst. Parent saw Mr. MacDonald go into 25 Fernhill Drive, he radioed Cst. Underwood to relay that information. Constable Parent did not know Mr.

MacDonald at the time, but after Mr. MacDonald was arrested he monitored the interview at the police station and confirmed Mr. MacDonald was the person he had seen entering 25 Fernhill Drive.

[16] Fernhill Drive is described by Cst. Parent as being located in a dense residential area. Because of this Cst. Parent could not find a suitably inconspicuous position to park. As a result he drove past 25 Fernhill Drive and continued on his way.

[17] Constable Parent did not see Mr. MacDonald leave 25 Fernhill Drive and thus could not say when he left.

Constable Jeff Seebold

[18] As of July 12, 2013, Cst. Seebold had been working for the Halifax Regional Police for approximately ten years. On that day, in the morning, he attended the briefing, wherein he learned that Mr. MacDonald would be travelling to an address in Dartmouth, possibly to purchase cocaine.

[19] At approximately 10:20 a.m. Cst. Seebold set up in a vehicle on Windmill Road directly across from Fernhill Drive near the old Shannon Park soccer field so that if the suspect vehicle went by him he would be in a position to pull it over and

arrest the occupants. He confirmed that his intention was to arrest Mr. MacDonald regardless of the surveillance results as long as he was told to arrest him. He confirmed that Mr. MacDonald was not otherwise known to the police.

[20] At about 1:55 p.m. Cst. Seebold received a radio transmission from Cst. Nick Joseph, advising that the target vehicle had left the target residence. Constable Seebold was told to stop the vehicle and arrest the occupant or occupants for possession for the purpose of trafficking.

[21] As the vehicle came down Fernhill Drive it turned right towards the MacKay Bridge. Constable Greg Stevens was driving the police vehicle in which Cst. Seebold was a passenger. Constable Stevens stopped the suspect vehicle on the service ramp leading to the MacKay Bridge by activating the police lights and sirens. The suspect vehicle stopped immediately. Constable Seebold exited the police vehicle and approached the passenger side of the suspect vehicle. Matthew Henry Comeau was seated in the passenger seat. Constable Seebold identified himself as a police officer, told both occupants of the vehicle that they were under arrest for trafficking cocaine, and instructed them to put their hands where he could see them. Constable Seebold described both individuals as being very compliant. Constable Stevens took control of Mr. MacDonald and Cst. Seebold took control

of Mr. Comeau. The prisoners were patted down, handcuffed and placed side-by-side on the curb to wait for a transport vehicle.

[22] At 2:00 p.m., once their prisoners were secure, the officers commenced a search of the red Pontiac G6. On the floor behind the driver's seat was a plastic shopping bag in which Cst. Seebold observed what appeared to be four rocks of cocaine and also some marijuana. He seized a five dollar bill from the centre console of the vehicle, $15 from one of the seats and a white iPhone from the front passenger seat.

Constable Greg Stevens

[23] Constable Stevens was working with Cst. Seebold on July 12, 2013. He had been at the briefing earlier that day after which, at approximately 10:20 a.m., he set up to conduct surveillance in the north end of Dartmouth. At the briefing he was advised that Mr. MacDonald and Ms. Duffy were involved in trafficking cocaine. Constable Seebold confirmed that he had no direct knowledge of any crimes committed by Mr. MacDonald. He testified that as a result of the briefing he believed that Mr. MacDonald had recently been in possession of cocaine for the purpose of trafficking.

[24] Constable Stevens said he and Cst. Seebold were set up in the Shannon Park soccer field area. Constable Stevens testified that he knew the car was at the residence but he did not know when or how he heard it had arrived there. He said he was eventually notified that the suspect vehicle was leaving the residence and coming in his direction. After the vehicle passed, Cst. Seebold followed it along Windmill Road until it turned left onto Princess Margaret Boulevard. They followed it under the bridge and when the vehicle turned right onto the ramp to get onto the bridge they pulled it over. The vehicle stop occurred at approximately 1:55 p.m.

[25] When he approached the vehicle, Cst. Stevens told the occupants to unlock the doors. He he found some cash, a wallet and cigarettes. He then assisted Cst. Seebold in taking Mr. Comeau into custody and searching him. Mr. MacDonald was taken into another police vehicle and then taken with Mr. Comeau to the police station.

[26] Constable Stevens confirmed that his grounds for arrest were simply the directions given by other officers. The direction was to effect an arrest with no reasons provided. He confirmed that he had no personal reason to believe that Mr. MacDonald had any cocaine in his vehicle at the time of the arrest and that at the

time of Mr. MacDonald's arrest there was nothing in or about the vehicle that aroused his suspicion.

Analysis

[27] In *R. v. Loewen*, 2011 SCC 21, McLachlin, C.J. determined that (para. 3):

> If the arrest was unlawful, the detention of Mr. Loewen violates s. 9 of the *Charter*. In that case, the search cannot have been incidental to arrest, and hence would violate s. 8 of the *Charter*. The first question is therefore whether the arrest was unlawful.

[28] Therefore, the starting point for analysis in this case is the lawfulness of Mr. MacDonald's arrest. With regard to the burden, when dealing with a warrantless search the Crown bears the burden of proving on a balance of probabilities that the search was authorized by law, that the law is reasonable and the search was conducted in a reasonable manner (*R. v. Collins*, [1987] 1 S.C.R. 265).

[29] Cory J. made the following comments about reasonable and probable grounds for arrest in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-251:

> Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In

the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

> The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

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

[30] The police have the common-law power to search an individual incidental to arrest. However in order for a search to be lawful the police must have affected a lawful arrest on the basis of reasonable and probable grounds. There is no allegation in this case that the police were dealing with an investigative detention based on reasonable suspicion for officer safety.

[31] In determining whether the arrest was lawful and whether the police had reasonable and probable grounds a careful examination of the source information must be undertaken. In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, [1990] S.C.J. No. 115, Sopinka J. stated at paras. 64-68:

> In *R. v. Debot*, [1989] 2 S.C.R. 1140, police officers acting on the information of an informer stopped and detained the appellant's motor vehicle and conducted, without warrant, a search of the vehicle and the persons of the appellant and others. In assessing the weight to be given to the evidence relied on by the police officer, Wilson J. applied "the totality of the circumstances" standard which had been applied by Martin J.A. in the Court of Appeal. On this basis, Wilson J. found that there were reasonable and probable grounds to justify the search. This conclusion was concurred in by the other members of the Court.
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> In *R. v. Greffe*, [1990] 1 S.C.R. 755, the Crown conceded that in conducting a rectal search, there had been a violation of ss. 8 and 10 of the *Charter*. The parties differed, however, in characterizing the seriousness of the violation for the purpose of determining admissibility under s. 24(2). Lamer J. (as he then was) considered that "the core difference centres on whether the police had reasonable and probable grounds to believe that the appellant was in possession, and therefore trying to import into Canada, an illegal narcotic" (p. 788).
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> The only evidence on the record was testimony that on the basis of "confidential information received and background investigation" the officer had "grounds to believe . . . that he [Greffe] was going to be in possession of an unknown amount of heroin". Lamer J. held that the trial judge erred in concluding that the police had confidential and reliable information by reason of the eventual recovery of the heroin. He wrote, at p. 790:

> It was incumbent upon the Crown to establish at trial, if it could, the basis upon which the police claimed to have reasonable and probable grounds to believe that the appellant was in possession of the heroin. This would have been done through an inquiry into the source and reliability of the "confidential information" in the possession of the police.
>
> . . .
>
> What should have happened is that the police should have been asked at trial about the confidential information to determine if, in the totality of the circumstances, there existed reasonable and probable grounds to believe the accused was carrying the heroin. [Emphasis added.]

Lamer J. also referred with approval to the following passage from Martin J.A.'s judgment in *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), at pp. 218-19, as the test for assessing confidential informer's information:

> 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.

Although *Greffe* concerns admissibility under s. 24(2), in my opinion the discussion has a bearing on the sort of information that must be put before a judge issuing an authorization for electronic surveillance. I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable grounds to justify a warrantless search (the issue in the cases cited by Lamer J.) and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* and *Greffe*.

> (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:
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> (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*, provide evidence of reliability of the information.

[32] *Garofoli* involved examining informer information used as the basis to obtain judicial authorization for intrusion into someone's privacy. The *Garofoli* analysis was applied in the context of a warrantless search and arrest following a vehicle stop prompted by an informant's tip in *R. v. McCabe* (2008), C.C.C. (3d) 33, 2008 NLCA 62, where Barry J.A. said, for the court:

> 25 This Court in *R. v. Warford* (2001), 207 Nfld. & P.E.I.R. 263 (Nfld. C.A.), upheld the arrest of an individual on the basis of a tip. The informant had provided reliable information to the police six times in the previous eighteen months. Police also had more general advice from another informant. They stopped Warford's vehicle, identified him and found several packets of cocaine on his person when they "frisk-searched" him. Welsh J.A. for the Court referred to Garofoli in concluding a tip could provide reasonable grounds, subjectively and objectively, for an arrest and warrantless search, depending upon the totality of the circumstances.
>
> 26 In the present case, whether the police had reasonable grounds for arresting McCabe depends upon whether the tip received was sufficiently reliable. This Court must carefully scrutinize the facts surrounding the arrest to ensure that the police did not exceed or abuse their powers. Here the totality of the circumstances, including the fact that Constable Bill had previously received information from the informant, which was confirmed as reliable when it led to a drug seizure, combined with Constable Bill's knowledge of drug trade in the area and the information (although of unconfirmed reliability) about Baldwin's involvement in drug trafficking, is sufficient to meet the *Garofoli* test for establishing adequate reliability of a tip. The degree of detail of the tip, relating to non-criminal aspects of the activity, would not in itself have been sufficient corroboration here. Constable Bill's belief that the informer's source of knowledge was firsthand is worthy of some consideration, because of the officer's experience. But it is the indicia of the informer's reliability from past performance, combined with some slight confirmation from Constable Bill's other investigative sources, that provides the main basis for finding that, both subjectively and objectively, reasonable grounds for arrest existed. If the informer here had been anonymous the result may well have been different. This analysis is consistent with *Warford*, although the police had more indicia of the reliability of the informant in that case.

[33] The *Garofoli* analysis was also relied on by Derrick Prov. J. in *R. v. Dunbar,* 2008 NSPC 39:

> 17 The grounds for an arrest must be both subjectively and objectively reasonable. (*R. v. Storrey*, [1990] S.C.J. No. 12) I do not think an argument can be sustained in this case that the Crown, which has the burden of showing on a balance of probabilities that a warrantless search was reasonable, has failed to establish a subjective basis for Mr. Dunbar's arrest. Cst. Hussey testified that he believed Mr. Dunbar was "arrestable" based on the information he had received from Cst. Barna, information he regarded as reliable. He knew the information had come from another police officer and had his own knowledge of Mr. Dunbar's involvement in drugs. Believing that Mr. Dunbar could be arrested for drug possession, Cst. Hussey directed Cst. Walsh to effect the arrest. I am satisfied that Cst. Hussey personally believed that there were reasonable and probable grounds to arrest Mr. Dunbar and that Cst. Walsh was entitled to rely on Cst. Hussey's belief in making the arrest. (*R. v. Lal*, [1998] B.C.J. No. 2446 at paragraph 24 (B.C.C.A.))
>
> 18 The issue in this case is whether Mr. Dunbar's arrest was justified from an objective point of view. Would a reasonable person, standing in Cst. Hussey's shoes, have believed that reasonable and probable grounds existed to make the arrest? (*R. v. Storrey, supra*, at paragraph 16)
>
> 19 The totality of the circumstances must be assessed in determining whether the police officer (in this case, Cst. Hussey) had an objectively reasonable belief that Mr. Dunbar was in possession of cocaine. (*R. v. Warford,* [2001] N.J. No. 330 (Nfld. C.A.) at paragraph 15, referring to Wilson, J.'s judgment in *R. v. Debot*, [1989] S.C.J. No. 118) There is no dispute that there was nothing about the parked truck or Mr. Dunbar's behaviour that gave police reasonable and probable grounds to arrest him. That leaves the tip received by Cst. Willett and then transmitted through Cst. Barna to Cst. Hussey. Assessed objectively, was the tipster information enough to justify Mr. Dunbar's arrest?
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> 20 The Supreme Court of Canada in *R. v. Garofoli,* [1990] 2 S.C.R. 1421, held that a tip could provide the requisite grounds for a search if its reliability could be satisfactorily established. A variety of factors are to be examined in making the reliability determination:
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> * The degree of detail of the tip;
>
> * The informer's source of knowledge;
>
> * Indicators of the informer's reliability such as past performance or confirmation from other investigative sources.

21 It is well-established that the results of the search cannot be relied upon, *ex post facto*, to establish the reliability of the tipster information. Rigorous scrutiny of the source information and the reliability of the source is essential to ensure that the requirements for lawful arrest are met for all citizens, including those with a reputation for illicit drug activity.

***Garofoli* Analysis**

[34] A *Garofoli* analysis therefore involves examining:

1. The degree of detail of the tip;
2. The informer's source of knowledge;
3. Indicators of the informer's reliability such as past performance or confirmation from other investigative sources.

The Degree of Detail of the "tip"

[35] The details of the "tip" Cst. Underwood relied on in arresting Mr. MacDonald consist of:

1. That sometime within the previous 48 hours, Mr. MacDonald had been in possession of cocaine;
2. That Mr. MacDonald was going to Cynthia Duffy's to get cocaine?
3. A combination of source information and surveillance confirm Cynthia Duffy's address.

1. That sometime within the previous 48 hours Mr. MacDonald had been in possession of cocaine.

[36] What did the source actually see? How did the source know the item was cocaine? How much cocaine did the source see? In what circumstances?

Constable Underwood testified that he did not wish to answer all questions posed to him relating to the source as he was concerned that answering such questions could identify the source. Of course information that might identify a source is protected by privilege. Nonetheless, the Crown still needs to show reasonable grounds for the arrest. There has to be some degree of detail about the tip. A mere conclusory statement is not enough.

2. That Mr. MacDonald was going to Cynthia Duffy's to get cocaine.

[37] Again, there is absolutely no information or detail to support this allegation/conclusion.

3. A combination of source information and surveillance confirm Cynthia Duffy's address.

[38] What does this mean? What did the source tell the police versus what did surveillance show? Did the source know Cynthia Duffy? Did the source know Cynthia Duffy's address? Most importantly, why did the source believe Cynthia Duffy had cocaine at her residence? Again, no detail whatsoever was provided to the court in support of this statement.

The informer's source of knowledge

[39] The only details Cst. Underwood provided to this Court to consider were regarding the informer's source of knowledge:

1. *That somewhere within the previous 48 hours Mr. MacDonald had been in possession of cocaine.*

[40] There was no information provided to the court as to the informer's source of knowledge. Was it firsthand information or hearsay multiple times removed? Did the source personally observe anything? Did the source guess at this information?

2. *That Mr. MacDonald was going to Cynthia Duffy's to get cocaine*.

[41] There was no information provided as to where, when or how the source obtained this information. Was it firsthand information or hearsay multiple times removed? Did the source guess at this information? Why did the source believe Cynthia Duffy had cocaine at her residence?

3. A combination of source information and surveillance confirm Cynthia Duffy's address.

[42] There was no further information provided as to where, when or how the source obtained this information. Did the source know Cynthia Duffy? Did the

source know Cynthia Duffy's address? Was this firsthand information or hearsay multiple times removed? Did the source already know this? Did the source guess at this information?

Indicia of the informer's reliability such as past performance or confirmation from other investigative sources

[43] Constable Underwood claimed the source was reliable in that he had used the source previously to provide grounds for an ITO and to arrest other individuals. No details were provided to the court about the results of those arrests and searches. Just because a location was searched or an accused arrested based in part on source information does not mean the source information was accurate in those circumstances. The search may have been fruitless or the arrest unlawful. Merely because Cst. Underwood met or spoke with the source frequently and based some other arrests on the source's information does not mean those other arrests were proper or confirmatory of the information provided by the source. No information was provided to the court regarding the source's past proven reliability other than mere conclusory statements on the part of Cst. Underwood.

Did the police have reasonable and probable grounds?

[44] In *Hunter v. Southam*, [1984] 2 S.C.R. 145, the Supreme Court of Canada stated at p. 167:

> The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion.

[45] There are many cases on the topic of sufficiency of search warrants that are also helpful in crafting a method of determining whether the police had reasonable and probable grounds to arrest and search Mr. MacDonald without a warrant on July 12, 2013, based on the single source relied on by Cst. Underwood.

[46] Prior to *R. v. Morelli*, 2010 SCC 8**,** but consistent with the approach espoused by Fish, J. in that decision, the Nova Scotia Court of Appeal addressed the role of a reviewing court when dealing with an application to quash a search warrant in *R. v. Durling***,** 2006 NSCA 124, where Oland, J.A. stated, at para. 19:

> [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*, 1998 CanLII 1344 (NS CA), [1998] N.S.J. No. 492 (C.A.), 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), 1994 CanLII 5271 (ON SC), 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), 1992 CanLII 2521 (NS CA), 115 N.S.R. (2d) 426 (C.A.); aff'd 1993 CanLII 83 (SCC), [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 CanLII 52 (SCC), [1990] 2 S.C.R. 1421 at pp. 1456-1457…
>
> …
>
> [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.

[47] In *Morris, supra*, Cromwell, J.A. (as he then was) provided direction to courts reviewing police conduct in the context of search warrants:

> 35 In reviewing police conduct during the prior authorization process, the court's attention cannot focus solely on the particular search under consideration. It is tempting to do so, especially where, as here, police suspicions proved to be well founded. However, the purpose of the prior authorization requirement must be kept in mind. As noted, that purpose is to prevent unreasonable searches, not to condemn them after the fact. If the prior authorization process is not vigorously upheld by the courts, it will lose its meaning and effectiveness. That process is in place to protect everyone from unreasonable intrusions by the state. In considering this, or any other s. 8 case, the court must not only protect the rights of this individual, but also protect the prior authorization process which helps assure that the rights of all individuals are respected before, not after, the fact.
>
> 36 In summary, the requirement of reasonable grounds to believe sets the balance between individual privacy and effective law enforcement. The requirement of prior authorization prevents searches where it is not demonstrated to an independent judicial officer that such grounds exist.

[48] In the instant case, Cst. Underwood was relying on a single source. While each case must be determined on its own facts, a review of search warrant cases where a single source was relied upon in an Information to Obtain ("ITO") is helpful in determining whether there is credibly-based probability in this case. In *R. v. Hosie* (1996), 107 C.C.C. (3d) 385, [1996] O.J. No. 2175 (Ont. C.A.), Rosenberg J.A., speaking for the Court, stated:

> 14 Thus, what remains of paragraph 5 is information from an unproven source. Mr. O'Connell asked us to place substantial weight on the detail supplied in paragraph 5, namely, that the appellant had recently moved to Everts Avenue and that he had established a "very hightech hydroponic Marihuana growing operation". In my view, the information supplied is far from detailed and could not be described as compelling, in the sense referred to by Wilson J. in *Debot*. There is no indication as to the informer's source of knowledge or how current the information is. There is no way to know whether the informer has obtained this information through personal observation as opposed to rumour or second or third hand information. The use of the phrase "very hightech" does not advance the case in any real sense. Had the informer provided information as to the type of equipment and similar details then the justice might have been able to infer that the informer had obtained the information first hand. That kind of detail, however, is lacking.
>
> 15 As Wilson J. said in *Debot, supra* at page 218, "the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater". Since in this case the credibility of the informants cannot be assessed and few details were supplied, a relatively higher level of verification was required. The validity of the warrant thus depends upon the sufficiency of the police investigation to corroborate the informer's tip as set out in paragraph 3. For ease of reference I will repeat that crucial paragraph:
>
> > A check with Windsor Utilities Commission on September 8, 1993 confirms that George Hosie resides at 1498 Everts St. and that he along with Mary Smith have been paying the hydro bill since March 1993. Hosie's hydro bills appear to be significantly larger than normal.

> The fact that the appellant and Ms. Smith had been paying the bills since March 1993 confirms Campbell's information that the appellant "recently" moved to Everts Ave. Otherwise, the somewhat tentative opinion is not sufficiently detailed nor is its source sufficiently identified to be an opinion that supports the allegation that marihuana was being grown in the house. The justice of the peace could not have properly inferred from this paragraph the basis of the opinion, or that the opinion as to the size of the hydro bills was that of an informed person at the Commission.

[49] The degree of detail provided by the single source in *Hosie, supra,* was described by the Ontario Court of Appeal as "far from detailed and could not be described as compelling…" (para. 14). Similarly, the information provided by Cst. Underwood's source in Mr. MacDonald's case is far from detailed, has no indicia of proven reliability and is not compelling.

[50] In contrast to Cst. Underwood's source, about whom we have been provided no record of past proven reliability, in *Morris, supra*, the source relied on in the ITO had been used by the police for six years, and that source's information had led to successful searches under the *Narcotic Control Act* and the *Criminal Code* leading to the arrest of at least 25 people. Cromwell, J.A. found that a single source with such a history of past proven reliability could provide sufficient basis to allow for a finding of credibly-based probability.

[51] The mere assertion by an informer that a certain person is engaged in criminal activity or that drugs would be found at a certain place does not

necessarily provide a sufficient basis for the granting of a warrant (or affecting an arrest), which depends on such factors as the degree of, or lack of, detail provided in the tip; the existence of, or lack of, supporting police investigation and/or other reliable information; and the existence of, or lack of, past proven reliability of the source: see *R. v. Debot*, (1986), 30 C.C.C. (3d) 207 (Ont. C.A.). As Martin, J.A. stated in *Debot, supra*, at p. 218:

> ... The underlying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged. I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds ...

[52] The Supreme Court of Canada affirmed the Ontario Court of Appeal decision in *Debot, supra*. Wilson, J. stated in *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1168:

> 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.

[53] Wilson J. went on to state, at p. 1172:

> … the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater.

[54] Therefore, an ITO leading to a search warrant or an arrest without warrant that relies on a single source may or may not meet the standard of sufficiency, depending on the past-proven reliability of the source, the degree of detail in the tip and corroborating information provided by the police (see *R. v. Lane*, 2007 NSSC 15; *R. v. Fougere*, 2010 NSSC 169; *R. v. Woodworth*, 2006 NSSC 22, and *R. v. Sutherland* (2000), 52 O.R. (3d) 27, [2000] O.J. No. 4704).

[55] In *R. v. Philpott*, [2002] O.T.C. 990, [2002] O.J. No. 4872, the Ontario Superior Court of Justice stated:

> [159] On behalf of the accused it is argued that the efforts of the police amounted to insufficient corroboration of what the tipster had advised the sergeant. I agree. Corroboration is particularly important where, as here, the reliability of the tipster is unknown.
>
> [160] It is not necessary for the police to corroborate each detail of a tipster's information — so long as the corroboration is sufficient to lend reality to the tip and, for example, to remove the possibility of innocent coincidence.
>
> [161] As I have held on other occasions, in determining what level of investigation to expect of the police, the law must vigorously maintain the distinction between acting on a tip from a reliable source and acting on a tip from an unproven source.
>
> [162] Where there are scanty particulars provided by a tipster and his or her reliability is unknown, a relatively thorough investigation is essential so as to provide that critically important ingredient — corroboration.

Conclusion Regarding *Charter* Breaches

[56] The police did not have reasonable and probable grounds to arrest Mr. MacDonald on July 12, 2013. The arrest was not lawful. The search incident to arrest was not lawful. Mr. MacDonald was arbitrarily detained contrary to s. 9 of the *Charter* and was unreasonably searched contrary to s. 8 of the *Charter*.

S**ection 24(2) *Charter* Argument**

[57] To determine whether the evidence should be excluded in accordance with s.24(2) of the *Charter*, I will undertake the analysis outlined by the majority in *R. v. Grant*, 2009 SCC 32, at para. 71:

> [U]nder s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2)application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

[58] The authorities suggest that I consider each of the three factors noted in *Grant, supra*.

Stage One

[59] First, the *Charter*-infringing state conduct in this case was the arrest of Mr. MacDonald, the subsequent search of his vehicle and the seizure of drugs from that vehicle. The police did not have reasonable and probable grounds to arrest Mr. MacDonald. There was little or no detail provided by Cst. Underwood's source in relation to the tip that would lend an air of reliability to the allegations. The source merely made conclusory statements. The Court was not made aware of anything

that would confirm that Cst. Underwood's source had a clear past proven record of reliability. There was no corroboration of significance of any of the information provided by the source.

[60] In *R. v. Harrison*, 2009 SCC 34, the Supreme Court of Canada ruled on the admissibility into evidence of 35 kilograms of cocaine. In conducting a s. 24(2) analysis, McLachlin C.J. stated for the majority at paras. 24-27:

> 24 Here, it is clear that the trial judge considered the *Charter* breaches to be at the serious end of the spectrum. On the facts found by him, this conclusion was a reasonable one. The officer's determination to turn up incriminating evidence blinded him to constitutional requirements of reasonable grounds. While the violations may not have been "deliberate", in the sense of setting out to breach the *Charter*, they were reckless and showed an insufficient regard for *Charter* rights. Exacerbating the situation, the departure from *Charter* standards was major in degree, since reasonable grounds for the initial stop were entirely non-existent.
>
> 25 As pointed out by the majority of the Court of Appeal, there was no evidence of systemic or institutional abuse. However, while evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor.
>
> 26 I note that the trial judge found the officer's in-court testimony to be misleading. While not part of the *Charter* breach itself, this is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour. As Cronk J.A. observed, "the integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the *Charter*. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority" (para. 160).
>
> 27 In sum, the conduct of the police that led to the *Charter* breaches in this case represented a blatant disregard for *Charter* rights. This disregard for *Charter* rights was aggravated by the officer's misleading testimony at trial. The police conduct was serious, and not lightly to be condoned.

[61] In *Morelli, supra*, during the course of a *Grant* analysis the Supreme Court of Canada stated at para. 99:

> First, the *Charter*-infringing state conduct in this case was the search of the accused's home and the seizure of his personal computer, his wife's laptop computer, several videotapes, and other items. The search and seizure were unwarranted, but not warrantless: they were conducted pursuant to a search warrant by officers who believed they were acting under lawful authority. The executing officers did not wilfully or even negligently breach the *Charter*. These considerations favour admission of the evidence. To that extent, the search and seizure cannot be characterized as particularly egregious.

[62] The Crown argues that this case does not involve random state action or any action that could be classified as abusive. The Crown says that as a result of confidential information the police were in the vicinity of Cynthia Duffy's house to conduct surveillance on Mr. MacDonald. During their surveillance they witnessed what they believed to be a drug transaction involving the target and the identified address of the person supplying the cocaine. After witnessing what they reasonably believed to be a drug pickup they initiated a traffic stop of the suspect and arrested him for drug possession. They conducted non-intrusive searches of the suspect and his vehicle and located cocaine and marijuana in the rear of the car. The Crown says that given the police background information, their assigned duties, and their observations, the police did what would be expected of them in the circumstances.

[63] Constable Underwood relied on a single source who provided information that Mr. MacDonald had been in possession of cocaine within the past 48 hours and that he was going to Cynthia Duffy's residence to get cocaine. The police then saw Mr. MacDonald enter Cynthia Duffy's home. Sometime later they arrested Mr. MacDonald driving away from Ms. Duffy's home. The *ex post facto* discovery of drugs is irrelevant. If the police wish to rely on a single source in order to arrest and search an individual, the single source should be proven to be reliable either through past conduct or through confirmatory police investigation. Here we have neither. The police did not provide sufficient details regarding the source's reliability. The confirmatory police investigation was limited to (possibly) determining Ms. Duffy's address, observing Mr. MacDonald enter Ms. Duffy's home and then observing Mr. MacDonald drive away from Ms. Duffy's home some time later. The police did not see Mr. MacDonald leave Ms. Duffy's home with anything in his possession. Contrary to what is inferred by the Crown in their arguments, the police did not observe any activity on the part of Mr. MacDonald in or around Ms. Duffy's home that appeared suspicious. Nevertheless, they stopped Mr. MacDonald, arrested him and searched his vehicle.

[64] In *Harrison, supra,* McLachlin C.J. stated at para. 20:

> The *Charter* breaches in this case are clear. It is common ground that the appellant's rights under ss. 8 and 9 of the *Charter* were violated by the detention and search, as found by the trial judge. Given that the officer recognized prior to the detention that the appellant's S.U.V. did not require a front licence plate, he should not have made the initial stop. A vague concern for the "integrity" of the police, even if genuine, was clearly an inadequate reason to follow through with the detention. The subsequent search of the S.U.V. was not incidental to the appellant's arrest for driving under a suspension and was likewise in breach of the *Charter*. While an officer's "hunch" is a valuable investigative tool -- indeed, here it proved highly accurate -- it is no substitute for proper *Charter* standards when interfering with a suspect's liberty.

[65] In conducting the first stage of the analysis in *Harrison, supra,* McLachlin C.J. stated (at paras. 22-27):

> 22. At this stage the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern.
>
> 23. The trial judge found that the police officer's conduct in this case was "brazen", "flagrant" and "very serious". The metaphor of a spectrum used in *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), *per* Doherty J.A., may assist in characterizing police conduct for purposes of this s. 24(2) factor:
>
> > Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights... . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct. [Citation omitted; para. 41.]
>
> 24. Here, it is clear that the trial judge considered the *Charter* breaches to be at the serious end of the spectrum. On the facts found by him, this conclusion was a reasonable one. The officer's determination to turn up incriminating evidence blinded him to constitutional requirements of reasonable grounds. While the

> violations may not have been "deliberate", in the sense of setting out to breach the *Charter*, they were reckless and showed an insufficient regard for *Charter* rights. Exacerbating the situation, the departure from *Charter* standards was major in degree, since reasonable grounds for the initial stop were entirely non-existent.
>
> 25. As pointed out by the majority of the Court of Appeal, there was no evidence of systemic or institutional abuse. However, while evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor.
>
> 26. I note that the trial judge found the officer's in-court testimony to be misleading. While not part of the *Charter* breach itself, this is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour. As Cronk J.A. observed, "the integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the *Charter*. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority" (para. 160).
>
> 27. In sum, the conduct of the police that led to the *Charter* breaches in this case represented a blatant disregard for *Charter* rights. This disregard for *Charter* rights was aggravated by the officer's misleading testimony at trial. The police conduct was serious, and not lightly to be condoned.

[66] The police did have source information implicating Mr. MacDonald in cocaine trafficking. However the single informant did not have a past record of proven reliability, provided little or no degree of detail within the tip and the police did not provide confirmation of the source's knowledge. The conduct of the police in acting on the source information in this case, considering the long-standing comments of Sopinka J. in *Garofoli, supra,* equates to conduct on the part of the police that shows a blatant disregard for Mr. MacDonald's *Charter* rights. Such serious police conduct likely favours exclusion of the evidence in relation to the first factor set out in *Grant, supra*.

Stage Two

[67] Turning to the second factor set out in *Grant, supra,* the impact of the breach on the *Charter*-protected interests of Mr. MacDonald, in *Harrison, supra*, McLachlin C.J. said:

> 28 This factor looks at the seriousness of the infringement from the perspective of the accused. Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact? These are among the questions that fall for consideration in this inquiry.
>
> 29 In this case, the detention and the search had an impact on the appellant's liberty and privacy interests. The question is how that impact should be characterized.
>
> 30 The majority of the Court of Appeal emphasized the relatively brief duration of the detention and the appellant's low expectation of privacy in the S.U.V., and concluded that the effect of the breach on the appellant was relatively minor. It is true that motorists have a lower expectation of privacy in their vehicles than they do in their homes. As participants in a highly regulated activity, they know that they may be stopped for reasons pertaining to highway safety - as in a drinking-and-driving roadblock, for instance. Had it not turned up incriminating evidence, the detention would have been brief. In these respects, the intrusion on liberty and privacy represented by the detention is less severe than it would be in the case of a pedestrian. Further, nothing in the encounter was demeaning to the dignity of the appellant.
>
> 31 This said, being stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial. As Iacobucci J. observed in *Mann*, the relatively non-intrusive nature of the detention and search "must be weighed against the absence of <u>any</u> reasonable basis for justification" (para. 56 (emphasis in original)). A person in the appellant's position has every expectation of being left alone - subject, as already noted, to valid highway traffic stops.
>
> 32 I conclude that the deprivation of liberty and privacy represented by the unconstitutional detention and search was therefore a significant, although not egregious, intrusion on the appellant's *Charter*-protected interests.

[68] Being stopped and subjected to a search by the police without justification impacted on Mr. MacDonald's rightful expectation of liberty and privacy in a way that is much more than trivial. The relatively nonintrusive nature of the detention and search must be weighed against the absence of any reasonable basis or justification. A person in Mr. MacDonald's position has every expectation of being left alone in his vehicle, subject to lawful highway traffic stops. In such circumstances the authorities indicate that the deprivation of liberty and privacy represented by such an unconstitutional detention and search is a significant, although not egregious, intrusion on Mr. MacDonald's *Charter* protected interests.

[69] The s. 8 breach had a significant impact on the *Charter*-protected privacy interests of Mr. MacDonald in this case.

Stage Three

[70] The third factor to be weighed under s. 24(2) of the *Charter* according to *Grant, supra*, is society's interest in adjudication of the case on its merits. As McLachlin C.J. noted in *Harrison, supra*:

> 33 At this stage, the court considers factors such as the reliability of the evidence and its importance to the Crown's case.
>
> 34 The evidence of the drugs obtained as a consequence of the *Charter* breaches was highly reliable. It was critical evidence, virtually conclusive of guilt on the offence charged. The evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial. While the charged

> offence is serious, this factor must not take on disproportionate significance. As noted in *Grant*, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high. With that caveat in mind, the third line of inquiry under the s. 24(2) analysis favours the admission of the evidence as to do so would promote the public's interest in having the case adjudicated on its merits.

[71] The cocaine and marijuana seized from Mr. MacDonald are highly reliable evidence. The exclusion of that evidence seized during the search would leave the Crown essentially with no case against Mr. MacDonald. Exclusion of the evidence would therefore seriously undermine the truth-seeking function of the trial. This factor then weighs against exclusion of the evidence (see *Grant*, *supra***,** at paras. 79-83). This is consistent with the position of McLachlin, C.J. for the majority in *Harrison*, *supra*.

Balancing

[72] McLachlin, C.J. noted in *Harrison*, *supra*:

> [35] I begin by summarizing my findings on the three factors in *Grant*. The police conduct in stopping and searching the appellant's vehicle without any semblance of reasonable grounds was reprehensible, and was aggravated by the officer's misleading testimony in court. The *Charter* infringements had a significant, although not egregious, impact on the *Charter*-protected interests of the appellant. These factors favour exclusion, the former more strongly than the latter. On the other hand, the drugs seized constitute highly reliable evidence tendered on a very serious charge, albeit not one of the most serious known to our criminal law. This factor weighs in favour of admission.
>
> [36] The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each

line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[37] In my view, when examined through the lens of the s. 24(2) analysis set out in *Grant*, the trial judge's reasoning in this case placed undue emphasis on the third line of inquiry while neglecting the importance of the other inquiries, particularly the need to dissociate the justice system from flagrant breaches of *Charter* rights. Effectively, he transformed the s. 24(2) analysis into a simple contest between the degree of the police misconduct and the seriousness of the offence.

[38] The trial judge placed great reliance on the Ontario Court of Appeal's decision in *Puskas*. However, the impact of the breach on the accused's interests and the seriousness of the police conduct were not at issue in *Puskas*; Moldaver J.A. opined that *if* there was a breach of s. 8, it was "considerably less serious than the trial judge perceived it to be", the police having fallen "minimally" short of the constitutional mark (para. 16). In those circumstances, the public interest in truth-seeking rightly became determinative.

[39] This case is very different. The police misconduct was serious; indeed, the trial judge found that it represented a "brazen and flagrant" disregard of the *Charter*. To appear to condone wilful and flagrant *Charter* breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.

[40] As Cronk J.A. put it, allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law 'the ends justify the means'" (para. 150). *Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences. In relying on *Puskas* in these circumstances, the trial judge seemed to imply that where the evidence is reliable and the charge is serious, admission will always be the result. As *Grant* makes clear, this is not the law.

[41] Additionally, the trial judge's observation that the Charter breaches "pale in comparison to the criminality involved" in drug trafficking risked the appearance of turning the s. 24(2) inquiry into a contest between the misdeeds of the police and those of the accused. The fact that a Charterbreach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2). We expect police to adhere to higher standards than alleged criminals.

> [42] In summary, the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards. That being the case, the admission of the cocaine into evidence would bring the administration of justice into disrepute. It should have been excluded.

[73] In Morelli, *supra*, Fish J. commented:

> 108 In balancing these considerations, we are required by Grant to bear in mind the long-term and prospective repute of the administration of justice, focussing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused.
>
> …
>
> 110 Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants. But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices.
>
> 111 The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. To admit the evidence in this case and similar cases in the future would undermine that confidence in the long term.
>
> 112 I am persuaded for all of these reasons that admitting the illegally obtained evidence in this case would bring the administration of justice into disrepute.

[74] The police conduct in stopping and searching Mr. MacDonald's vehicle without reasonable and probable grounds was wrong. The *Charter* infringements had a significant, although not egregious, impact on the *Charter* protected interests of Mr. MacDonald. These factors favour exclusion. However, the drugs seized constitute highly reliable evidence in relation to a very serious charge, although, as pointed out by McLachlin, C.J., not one of the most serious known to our criminal law. This factor weighs in favor of admission.

[75] The public must have confidence that invasions of privacy are justified by a genuine showing of reasonable grounds. The failure to do so in this case resulted in the unconstitutional search of Mr. MacDonald and his vehicle. The police conduct was serious.

Conclusion

[76] The police must adhere to the appropriate legislative and constitutional standards. To admit the unconstitutionally obtained evidence in this case and similar cases in the future would undermine the public's confidence in the criminal justice system over the long term. In other words, the price to be paid for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards. The admission of the cocaine and marijuana into evidence would bring the administration of justice into disrepute. Such evidence must be excluded.

Arnold, J.