SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2014 NSSC 218

Date: 20140625
Docket: *Halifax*, No. 416973 and No. 417017
Registry: Halifax

Between:

Her Majesty the Queen

v.

Michael Victor MacDonald

DECISION

Judge: The Honourable Justice Joshua M. Arnold

Heard: January 29, 2014 and February 28, 2014, in Halifax, Nova Scotia

Decision: June 25, 2014

Counsel: Jeffrey S. Moors, for Her Majesty the Queen
Kevin A. Burke, Q.C. for Michael Victor MacDonald

By the Court:

[1] Michael Victor MacDonald stands charged:

> **THAT** on or about 29 day of January, 2009, at or near Dartmouth, Regional Municipality of Halifax, Province of Nova Scotia, he did unlawfully have in his possession for the purposes of trafficking, not in excess of three kilograms, Cannabis resin, 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;
>
> **AND FURTHERMORE DID** unlawfully have in his possession for the purposes 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
>
> **AND FURTHERMORE DID** unlawfully have in his possession for the purposes 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;

Overview

[2] On January 29, 2009, members of the Halifax Regional Police Department entered Mr. MacDonald's home located at 11 Trenholme St, Dartmouth, Nova Scotia, armed with a search warrant. The police conducted what is called a "hard entry", in that they broke open the exterior door of the home in order to enter. No one was in the house when this happened. Mr. MacDonald was arrested a short time after the search commenced while in his motor vehicle in the parking lot of a nearby pub.

[3] During the course of searching Mr. MacDonald's home the police found 82 bundles of cash ($94,870 in a bedroom; $19,200 in a cashbox); 38.3 grams of cocaine in various small bags; scales; score sheets; and 236 grams of dried marijuana.

Issues

[4] On January 29, 2009, Cst. Pam (Tortolla) Green (“Cst. Green”) authored an Information to Obtain ("ITO") in an effort to obtain a search warrant for Mr. MacDonald's home. The ITO alleges that the police will find cocaine for the

purposes of trafficking at that address. The ITO references information provided to the police in 2007 as well as other information provided to the police in 2009. As previously noted, a search warrant was authorized on the basis of the information contained in the ITO allowing the police to search 11 Trenholm St., Dartmouth, NS.

[5] The defence alleges the ITO is deficient and the search warrant should never have been granted. The defence further alleges the search was therefore conducted illegally and in violation of Mr. MacDonald's s.8 *Charter* rights. As a result the defence alleges that any seized evidence should be excluded in accordance with s. 24(2) of the *Charter*.

Framework for Analysis

[6] Section 8 of the *Canadian Charter of Rights and Freedoms* states: "*Everyone* has the right to be secure against unreasonable search or seizure."

[7] Fish J. summarized the principles that should be applied when conducting a review of search warrants at paras. 39-41 of **R. v. Morelli**, 2010 SCC 8:

> [39] Under the Charter, before a search can be conducted, the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search" (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 168). These distinct and cumulative requirements together form part of the "minimum standard, consistent with s. 8 of the *Charter*, for authorizing search and seizure" (p. 168).
>
> [40] In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65 (CanLII), 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.
>
> [41] The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the reviewing court may have reference to amplification" evidence - that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO - so long as this additional evidence corrects good faith errors of

> the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.

[8] The Supreme Court of Canada has provided very clear direction: a reviewing court must not quash a warrant simply because the reviewing court would not have issued the warrant. A reviewing court should only quash a warrant if there was no basis upon which the warrant could have been issued.

[9] In **R. v. Morris** (1998), 173 N.S.R. (2d) 1, [1998] N.S.J. No. 492 (CA), Cromwell J.A. (as he was then) stated at paras. 88-91:

> 88 The issue of amplification, at the level of principle, is concerned with the balance between the two requirements for a warrant: the reasonable grounds of belief requirement and the prior authorization requirement. As discussed earlier, the Supreme Court of Canada has held that the primary focus is on whether the reasonable grounds of belief requirement was met when the warrant issued. The Court's treatment of amplification is consistent with this. Allowing evidence after the fact showing that reasonable and probable cause existed at the time the warrant was obtained is an indication that the existence in fact of such grounds is an important consideration on review.
>
> 89 This is not to say that failure to provide complete and accurate information during the prior authorization process will be ignored; far from it. It is open to a court to invalidate the warrant where that process has been fundamentally subverted. In addition, the court is required to exclude from consideration material that was obtained in breach of the Charter. Also to be excluded is material that was deliberately and purposefully false or misleading in the sense that it was known to be false or materially misleading and was placed before the justice for the purpose of making the grounds appear more substantial than they were.
>
> 90 I conclude that in a s. 8 voir dire challenging a warrant issued pursuant to an Information to obtain which is valid and adequate on its face, evidence is admissible to explain non-deliberate errors or omissions on the review provided that the information was known to the police officers involved in obtaining the warrant at the time it was obtained and subject, of course, to the requirement that unconstitutionally obtained evidence cannot be considered. Although it is not, strictly speaking, necessary for me to do so for the purposes of this case, I am inclined to accept the Crown's position that deliberately false and misleading material placed before the authorizing justice is not subject to amplification.
>
> 91 It may be helpful to summarize the principles I have adopted to the review in a s. 8 voir dire at trial of a warrant supported by an Information to obtain which is valid on its face:

> 1. The trial judge is to determine whether the justice of the peace could have validly issued the warrant;
>
> 2. In conducting that review, the trial judge may hear and consider evidence relevant to the accuracy of and motivation for the material included in the Information to obtain a search warrant;
>
> 3. Fraudulent or deliberately misleading material in the Information does not automatically invalidate the warrant. However, it may have this effect if the reviewing judge concludes, having regard to the totality of the circumstances, that the police approach to the prior authorization process was so subversive of it that the warrant should be invalidated. In addition, fraudulent and deliberately misleading material should be excised from consideration;
>
> 4. In assessing the validity of the warrant, the trial judge, generally, is entitled to consider all evidence bearing on the existence in fact of reasonable and probable cause shown to be in the knowledge of the police at the time the warrant was sought. However, such evidence cannot be used if it was obtained by unconstitutional means or (I am inclined to think) to amplify fraudulent or intentionally misleading material in the Information to obtain.

[10] In **Morris,** *supra,* Cromwell J.A. referred to the decision of **R. v. Bisson,** [1994] 3 S.C.R. 1097 where the unanimous court found at para. 2:

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

Should the Search Warrant have been Issued?

[11] In **Hunter v. Southam,** [1984] 2 S.C.R. 145, 1984 CanLII 33 (SCC) the Supreme Court of Canada stated at para. 43:

> 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.

[12] Prior to **Morelli**, *supra*, but consistent with the approach espoused by Fish J., 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 JA 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] 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), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.) at 365).
> >
> > (ii) The Information to obtain as a whole must be considered and peace officers, who generally will prepare these documents without legal assistance, should not be held to the "specificity and legal precision expected of pleadings at the trial stage." (Sanchez, supra, at 364)
> >
> > (iii) The affiant's reasonable belief does not have to be based on personal knowledge, but the Information to obtain must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant's belief: R. v. Yorke (1992), 115 N.S.R. (2d) 426 (C.A.); aff'd [1993] 3 S.C.R. 647.
> >
> > (iv) Where the affiant relies on information obtained from a police informer, the reliability of the information must be apparent and is to be assessed in light of the totality of the circumstances. The relevant principles were stated by Sopinka, J. in R. v. Garofoli, [1990] 2 S.C.R. 1421 at pp. 1456-1457:
> >
> > > (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
> > >
> > > (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no

> formulaic test as to what this entails. Rather, the court must look to a variety of factors including:
>
> (a) the degree of detail of the "tip";
>
> (b) the informer's source of knowledge;
>
> (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
>
> (iii) The results of the search cannot, ex post facto, provide evidence of reliability of the information.
>
> 31 The fundamental point is that these specific propositions define the basic justification for the search: the existence of "credibly-based" probability that an offence has been committed and that there is evidence of it to be found in the place of search.

[13] In **Morris,** *supra*, Cromwell J.A. provided direction to reviewing courts when reviewing police conduct at paras. 35-36:

> 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.

[14] LeBel J. gave further direction for such a review in **R. v. Araujo**, 2000 SCC 65, at para. 46:

> 46 Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an ex parte authorization is full and frank disclosure of material facts: cf. Dalglish v. Jarvie (1850), 2 Mac. & G. 231, 42 E.R. 89; R. v. Kensington Income Tax Commissioners, [1917] 1 K.B. 486 (C.A.); Re Church of Scientology and The Queen (No. 6) (1987), 31 C.C.C.

> (3d) 449 (Ont. C.A.), at p. 528; United States of America v. Friedland, [1996] O.J. No. 4399 (QL) (Gen. Div.), at paras. 26-29, per Sharpe J. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as À la recherche du temps perdu, as lively as the Kama Sutra, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.

The Information to Obtain

[15] The search warrant in this case is a presumptively valid court order. The defence application challenges the validity of the search warrant. In order determine the validity of the search warrant on this *Charter* application a careful review of each paragraph of the ITO must be undertaken. While no *viva voce* evidence was called on the *Charter voir dire* by either party, the ITO, the preliminary inquiry transcripts, Cst. David Lane's notes/Can Say, the Crown Brief Report, a Bail Report and a document referred to as the HRM POLICE GENERAL OCCURRENCE HARDCOPY ("GOH") were provided to the Court for amplification purposes. The GOH referred to throughout was prepared in relation to this investigation in 2007.

[16] Appendix "A" of the ITO contains the information relied on by Cst. Green in requesting the warrant. Paragraphs one and two of Appendix "A" simply outline Cst. Green's policing background and do not greatly impact any analysis of the sufficiency of the ITO. Those introductory paragraphs state:

> 1. Information received from crime stoppers, confidential sources, and investigations conducted to date have led investigators to believe that Michael Victor Macdonald is involved in the distribution of Crack Cocaine within the Province of Nova Scotia.
>
> 2. Back Ground:
>
> > i. I have been a member of the Halifax Regional Police since April 2000. I am currently attached to the Halifax Regional Police/RCMP Integrated Drug Section and have been assigned to this specialized investigative unit since October 2008. I have authored three warrants under the Criminal Code of Canada. As well as authored four warrants under the Controlled Drug and Substance Act.

> ii. I have participated in the execution of over twenty (20) warrants issued under the Controlled Drugs and Substances Act.

[17] Amplification reveals no crime stoppers information was actually relied on during this investigation contrary to what Cst. Green swore in the ITO. The reference to crime stoppers appears to have been boilerplate relied on by Cst. Green. It is inaccurate and sets the tone for a poorly drafted ITO.

[18] Paragraphs three and four detail the police databases Cst. Green swears she relied upon in preparing the ITO. Paragraph three is not controversial and provides the foundation for the inclusion of Mr. MacDonald's criminal record as detailed later in the ITO. Paragraph three states:

> 3. The Canadian Police Information Centre, (hereinafter referred to as CPIC) is a computerized data base repository maintained by the Royal Canadian Mounted Police in Ottawa, Ontario. It can be accessed through authorized and restricted terminals, by authorized personnel, and is accessible by police and law enforcement agencies throughout Canada. This repository records information such as missing and wanted persons, stolen property, criminal records of individuals, and accesses records of the motor vehicle branches in the various provinces cross Canada with regard to driver's license information, names, birth dates, descriptions, addresses, driving records, and motor vehicles registered to a particular named individual, through vehicle license numbers. Hereinafter, when reference is made to information obtained as a result of a **CPIC** inquiry, I believe that information to be accurate.

[19] More notably, under that same heading of "DATABASES RELIED UPON", the ITO states at paragraph four:

> 4. The computerized data base repository maintained by the Halifax Regional Police, Province of Nova Scotia called **Versaterm**, came into effect on December 3rd,2004 to replace RAPID. This repository records information that is collected through the normal course of investigation, including names, birth dates, personal descriptors, addresses, vehicles information, as well as an investigation synopsis. When reference is made to information obtained as a result of a **Versaterm** inquiry, I believe that information to be accurate.

[20] As will be detailed later on in this decision, the Versaterm entries referred to at paragraph four of Appendix "A" reflect all of the information contained in the GOH. Therefore, the contents of the GOH/Versaterm are important to review in some detail. The relevant portions of the GOH are:

Friday, 2007-Nov-09 13:18

At 1225 Cst LIVINGSTONE responded to a drug complaint at 579 Barnes Rd, Goffs. The original complaint was [redacted] HAD WITNESSED WHAT HE BELIEVES TO BE A DRUG DEAL TAKING PLACE AT APPROX 1215 AND APPROX 1030 HRS, STATES THAT ONE OF THE PERSON INVOLVED Additional Remarks:

Notes 07-11-09 12:26 Updated by CT06 MCIVER, KARL

COMP IS NOT SURE WHAT TO DO ABOUT THIS AND IS LOOKING TO SPEAK TO A POLICE OFFICER.

LIVINGSTONE called and talked to the original complainant [redacted]. [redacted] transferred LIVINGSTONE over to one of the witness [redacted].

[redacted] stated that while he was observing Mike MACDONALD an IMP employee (cleaner) from approximately 1125 until approximately 1225 sitting in his vehicle in the parking lot. This was noticed because he should have been at work. While observing MACDONALD a black car (appeared to be a Honda Civic with red maple leafs around the license plate (plate not obtained) pulled up in front of MACDONALDS car. The passenger got out walked around to the drivers side of MACDONALDS car, and handed MACDONALD something. The male was then observed to be trying to hide a brown or white paper bag under his shirt as he walked back to the car. No description of the two males was available. The car then left. [redacted] explaint that this also happened last week but he did not clue in that it was happening at that time. [redacted] thinks that this happened on friday as well at lunch hour.

This information was passed onto Cst D Lane.

LIVINGSTONE advised [redacted] that as it ws not in progress there was nothing that could be done at this point. LIVINGSTONE also confirmed that nature of MACDONALDS employment which is as a cleaner/floor sweeper, he has no axcess to sensitive information.

Pass file to Drug Section for info only.

Conclude Here

52611 LIVINGSTONE

…

Friday, 2007-Nov-09 17:59

File reviewed and routed to DRUG section. (HDRUGS)

Attn: Cst Dave Lane

Bruce Webb, Sgt

OPS NCO Watch 3

…

Thursday, 2007-Nov-22 16:41

On November 22 2007 Cst Lane of the Halifax Integrated Drug Unit reviewed this file. The information that the complainant is providing is consistent with behaviour of someone trafficking drugs from a vehicle.

Investigator has checked with his Dartmouth contacts in drug section and they do not have any information or have heard of this suspect.

Cst Lane will contact the complainant next week and will request a diary date extension for same.

Cst Lane

Drugs

…

Tuesday, 2007-Dec-04 16:59

On December 4 2007, Cst Lane of the Integrated Drug Unit called the complainant in this file twice and left a message for him to call investigator back.

SUI

Cst Lane

Drugs

…

Friday, 2007-Dec-14 13:35

Cst Lane has spoken with the complainant [redacted] twice since being assigned this file. [redacted] advised Lane that he did not witness the suspected drug transactions himself as he called on behalf of one of his employees.

On December 14 2007, Cst Lane spoke with [redacted] who advised Lane that there have been no further reports of this activity in the parking lot.

Cst Lane will look into this further in the New Year.

Cst Lane

Integrated Drugs

…

Tuesday, 2008-Jan-15 11:34

The suspect has not been reported in any further drug activity in the Airport parking lot to date.

The following tasks have been completed:

> The suspect has been identified;
>
> The suspect's vehicle has been identified;
>
> Follow up with the complainant has been negative;
>
> The suspect's criminal record shows a lengthy history for drugs;
>
> There is no indication that the suspect continues to traffic at this place of work. That being said, investigator has briefed a Drug Investigator for Dartmouth (D/Cst Bennett) who is going to follow up on this suspect who lives at 11 Trenholm St, Dartmouth - for possible CDSA investigation.
>
> This file to close.
>
> Cst Lane
>
> Drugs
>
> …
>
> **Friday, 2008-Jan-18 17:51**
>
> This file has been reviewed and closed.

[21] The entry found in the GOH for December 14, 2007, clarifies that the complainant/informant did not personally witness anything. The complainant/informant was merely relaying hearsay information to the police on behalf of an unidentified individual. This becomes relevant when analysing paragraph six, subheading "b." of Appendix "A".

[22] I will skip the analysis of paragraph five (and eight) of Appendix "A" until the examination of the remaining paragraphs is complete. Paragraph five (and eight) relate to Source "A" and will be analyzed together subsequent to examining the rest of the ITO.

[23] Paragraph six references Source "B". Generally, the information detailed in the GOH is found in paragraph six of Appendix "A"; however, instead of identifying the information as hearsay passed along from an unidentified source, paragraph six incorrectly attributes the information directly to Source "B":

> 6. On January 22nd 2009, I spoke with Cst David Lane, he is a member of the RCMP Integrated Drug Section who I verily believe. He advised me that he spoke to a person who wishes to remain anonymous, herein after referred to as Source "B", whom Cst David Lane believes as this person is not involved in criminal activity and reported the following:
>
> a. Source "B" is aware that:
>
> i. Michael MacDonald works for IMP at the Halifax Aiport. [sic]

Source "B" observed what he / she believes to be:

ii. Drug transactions in the parking lot of the Halifax Airport in [redacted] on two (2) separate occasions by Mike Macdonald.

iii. Michael Macdonald, at the time was driving a Brown Dodge Intrepid.

[24] Reviewing the origin of this information is helpful. Cst. Lane drafted the GOH in 2007. Cst. Lane wrote in the GOH that the information attributed to Source "B" was hearsay. According to the Preliminary Inquiry transcript, Cst. Green had access to the GOH reports through Versaterm. Cst. Lane and Cst. Green apparently spoke about the information attributed to Source "B" prior to the ITO being drafted. Cst. Green referenced the Versaterm report in the ITO under the heading of "DATABASES RELIED UPON" and swore that the Versaterm information was "relied upon" by her in preparing the ITO. Yet, Cst. Green does not describe Source "B" in the ITO as providing hearsay information. It is curious that just exactly what Cst. Green actually read, heard, reviewed and relied on when preparing the ITO is so difficult to confirm. The Preliminary Inquiry evidence on this point is as follows:

CST. DAVID LANE, Cross-Examination by Mr. Burke:

A. I read this ITO, Your Honor. Obviously, it's, coming back to court, I wanted to review my notes. I read this paragraph 6 and I realized that some of the information that was in it was inaccurate, compared to my own notes, so I advised Mr. Moors that there was some inaccuracy in the paragraph. What it was was ... Your Honor, if you see paragraph 6(a), it says, "Source B is aware that Michael MacDonald works for IMP at the Halifax Airport." That was, that was correct. And then it says, "Source B observed what he or she believes to be ..." and then you see the drug transactions. It was actually ... Upon reviewing the file, Your Honor, Source B reported on behalf of someone else, another witness. Witnesses, actually.

Q. Okay. So we're, we're clear here, you're saying paragraph 6(a)(ii)...

A. Um-hmm.

Q. ... is wrong, is inaccurate?

A. Yes, sir.

Q. Okay. So that, indeed, Source B didn't observe drug transactions in the parking lot at the Halifax Airport on two separate occasions by my Mike MacDonald, is that right?

A. That's correct.

…

Q. Now it's clear that on January 22nd you must have had a meeting with Constable, Detective Constable Tortolla, did you?

A. We had a ... We had a conversation.

Q. You had a conversation.

A. Yes.

Q. Was it over the phone or was it in person?

A. It was in the office. I believe she sat over at cubicles and we just had a conversation back and forth, and the way I remember it is she was, she asked me about this file because she, obviously, had her own investigation. My investigation on Mike MacDonald was closed, and she read this file that we're talking about and she asked about it, and then I advised the person did have some information.

Q. Now how did she read the file? Did she read it on the ...

A. I don't know. You'd have to ask her. I would assume that she would have read it on Versadex.

Q. Pardon me?

A. I assume she would have read it on Versadex, but I can't say what she did. But that would be the logical thing.

Q. This is the computerized database?

A. Yes, sir.

Q. Maintained by the Halifax Regional Police, called Versaterm?

A. Yes, sir.

Q. And is that how you read it that day?

A. I don't know if I read it that day or not. She asked me if I had a file about him, I said yes, I told her about it. I don't have any notes to say that I looked it up, too, and read it, but I did have it. It was only, at that time, a year, fourteen months in between, so we had a conversation about what I had about this complainant.

Q. Did you read that file, your file, before you told ...

A. I don't recall.

Q. ... Detective Constable Tortolla about this?

A. There's no way I remember. There's no way I can recall that. I don't have notes on that.

…

Q. All right. Now you're saying that you had a conversation from one cubicle to the other cubicle with Constable Tortolla, that Tortolla had gone in on Versadex and accessed your file?

A. I assume she did. I mean, from being a drug investigator, I assume she was running checks on him and seeing, oh, Dave has a, had a file on this guy, and we discussed it. I do remember discussing it. There's... I do remember, specifically, like, she asked me about this file and I told her about it. And she would have access, she would have access to the unvetted version of this file.

Q. So just that I'm clear, what, in essence, you're saying is that the source that you are talking about is a person who made no personal observations, themselves?

A. About the drug deals.

Q. Is that correct, Constable?

A. Yes. He didn't re... He didn't observe the drug, the suspected transactions.

…

Q. Okay. My question is what, what did you tell her that day, on the 22nd of January 2009? Is what she states in that paragraph what you told her that day?

A. It's ... I can't remember exactly what I told her four, four and a half years ago. This is consistent with the investigation that I documented, everything here. I can't remember exactly if I said Source B observed it himself or Source B was reporting on someone else. I don't remember. I don't recall.

Q. Okay.

…

A. I can't sit ...

Q. Do you know whether you reviewed the file before you talked to her?

A. I don't re... I don't recall.

Q. Would it have been your normal practice to do that, given that it had been some considerable time before you ...

A. Possibly, yeah, I probably, I could have did a quick look, but I don't remember, sir. It's very rare to have, like, someone with source information, like, protection of **Leipert**, right on a Versadex file. It's kind of rare. Usually, you get your source debrief from a covert informant, you take that out, you look at it and give them the debrief and say what they can use and give them source qualification. This is rare in the fact that this is not a coded, confidential informant. Their name is published on a Versadex report. To me, that's ...

Q. Reading that paragraph, one gets the impression that you had been talking to a confidential informant.

A. To me, he has **Leipert** privilege, to me.

Q. Did you mention to Constable Green when you had spoken to this person?

A. She would have... She would have the Versadex file. Like I said, she would have access to that. It's ... If I gave you a copy of the file, the dates are there.

Q. When you talk about the Versadex file, you're talking about the file that you've been referring to?

A. Right here I have a Can-Say that, that was ...

Q. And the Versadex file ...

A. And the Versadex file is what she could see. She could see the unvetted version of that.

Q. Okay.

A. That's a file that was about a year and a half previous to her finding, investigating Mr. MacDonald.

Q. Okay. But other than the fact that she had access to that, you never mentioned to her that, as to when you had spoken to...

A. I don't ...

Q. And how old the file was?

A. I don't remember the exact conversation, sir.

[25] Cst. Lane's testimony must be compared to the testimony of Cst. Green on this same issue:

D/CST. PAMELA (TORTOLLA) GREEN, Cross-Examination by Mr. Burke:

Q. Okay. Now paragraph 6 speaks of a conversation that you had with Constable Lane on the 22nd of January, 2009?

A. Yes.

Q. You recall that conversation?

A. Yes.

Q. Where did it take place?

A. In our Drug office.

Q. Okay. And you stated that at that time he advised you that he spoke to a person who wished to remain anonymous.

A. Yes.

Q. Did he tell you that?

A. Yes.

Q. And that he believed that person?

A. Yes.

Q. And that that person is not involved in criminal activity?

A. Yes.

Q. Did you ask him how he knew that?

A. I don't recall if I asked him how he knew that.

Q. Did you ask him who the person was?

A. No.

Q. Now you state that Constable Lane believed that person. Did you question Constable Lane as to the basis for his belief?

A. No, I did not.

Q. Now you state, though, that Constable Lane told you that the source observed something, is that right?

A. That's how I took it, yes.

Q. How you took it.

A. When he explained it to me...

Q. What do you mean by that?

A. When he explained it to me that the person wished to remain anonymous and that this is the information they were giving, that's what I assumed he meant.

Q. Okay. But you're saying that Constable Lane told you that his source observed what he believed to be two separate drug transactions in the parking lot at the Halifax Airport?

A. Yes.

Q. He told you that?

A. Yes.

Q. Did you ask him anything about it?

A. I don't recall what I did ask him about it, no.

Q. Now I gather, in your Information to Obtain, you stated to the Justice of the Peace that you had relied on certain databases, is that right?

A. Yes.

Q. If you'd turn to paragraph 4, if you would. Now paragraph 4 refers to a computerized database repository maintained by the Halifax Regional Police called Versaterm.

A. Yes.

Q. You're familiar with that?

A. Yes, I am.

Q. Now on that particular day, did you access the file with respect to Michael MacDonald?

A. Yes.

Q. And ...

A. I don't know if it was that day, but I did ... I have it here that on the 28th, or, sorry, the 29th, I conducted a check on Versadex.

Q. But I gather you and Constable Lane were in the office together.

A. Yes, we were.

Q. And did ... Were you the one that brought up a discussion or initiated a discussion with Constable Lane about his prior involvement?

A. Yes, I did.

Q. So I gather you would have accessed the Versadex and punched in Mr. MacDonald's name?

A. Yes, yes, I would have, yes.

Q. And the information came up, is that right?

A. Yes, it did.

Q. Okay. And was it as a result of reading the file that you then spoke to Constable Lane about what he did or did not observe?

A. Yes. Yes, it was.

Q. I want you to refer to page 9 of the file. Do you have it in front of you?

A. No.

Q. The, the Versaterm document. I believe the pages are numbered down at the bottom.

A. Yes, page 9.

Q. Okay. And you can see in that particular document ... Would you just read it to the Court.

A. Constable Lane has spoken with the complainant twice since being assigned this file. Advised Lane that he did not witness the suspected drug transactions, himself, as he called on behalf of one of his employees. On

December 14th, 2007, Constable Lane spoke with ... who advised Lane that there had been no further reports of this activity in the parking lot. Constable Lane will look into this further in the new year.

And it's signed by Lane.

Q. Okay. So I gather you were aware, then, at the time you, before you spoke to Lane that his contact had not observed anything?

A. At the time, how I understood the report was that Constable Lane had spoken to an anonymous source who wished to remain anonymous and that they observed it, is how I initially read it, in the front page, the beginning of the report...

Q. Is it fair ...

A. I'd have to look through it to see which page it's on, but that was, initially, how I read it and understood it.

Q. But you don't, you don't have any difficulty understanding what was set out on page 9, that, indeed, the complainant that Lane had spoken to did not witness the suspected drug transactions themselves?

A. No, now I don't, no, now, when I look at it now, but at the time, when I read the initial report, the first pages of it, that's how I understood it, was that he spoke to the anonymous source, they wished to remain anonymous and that they witnessed it, is how I read it.

Q. That's how you read page 9, is it?

A. No. The... It would be in the beginning of that report. I don't know which page it's on. I'm not sure exactly where, which page it's on.

MR. MOORS: Your Honor, I'll hand up my copy. It's ...

THE COURT: Sure.

MR. BURKE: Are you referring to page 5?

A. Yes.

Q. So you made an assumption from reading page 5 that, indeed, there was a personal observation made?

A. Yes, from reading that and from when speaking to Constable Lane. He said, yes, they wished to remain anonymous. I understood that they wished to remain anonymous and that they witnessed it, is what I, how I understood it.

Q. Did ... Obviously, you read the whole file, did you?

A. At ... You know what, at the time, I don't know if I read the whole file. I know I read this part and I spoke to Constable Lane, and then I... that's what I came up with, was they wished to remain anonymous, they witnessed it, and from

talking to Constable Lane, that's how I understood it, and that's why I wrote what I did write.

Q. So are you telling us that Constable Lane, in fact, told you that his source had witnessed two suspected drug transactions?

A. That's how I understood it, yes.

Q. That's how you understood it.

A. Yes.

Q. But do you have a personal recollection of Constable Lane actually telling you that?

A. I don't remember the exact words, no.

…

Q. Did you ask Constable Lane whether or not there were any source debriefing notes?

A. I don't recall if I asked him at the time, no.

Q. As an affiant preparing an Information to Obtain that you would have to swear to ...

A. Um-hmm.

Q. ... would you, normally, ask Constable Lane or any other Constable to examine the source debriefing notes?

A. Yes, I would.

Q. In this particular case...

A. I guess, from reading the report, they wished to remain anonymous, so I ... And it wasn't Constable Lane's initial report; it was Constable Livingstone's.

Q. But who did this person supposedly say that they wished to remain anonymous, was that made to Constable Livingstone, who made the initial report, or was it made to Constable Lane, or do you know?

A. I'd have to read through this again. It wasn't made to Constable Lane at the time, because he wasn't the initial officer on it. It was Constable Livingstone. It says, "Constable Livingstone responded to a drug complaint. The original complainant... blah, blah, blah ... had witnessed..."

Q. Detective Constable, did you speak to Constable Livingstone?

A. No.

Q. Any reason why you didn't?

A. No. I... Just I spoke with Constable Lane and he ... No, I did not speak to Livingstone.

[26] The Versaterm/GOH entry stating that Source "B" did not personally observe anything was available to Cst. Green at the time she drafted the ITO. Was she also told by Cst. Lane that Source "B" had not personally observed anything? That is difficult to determine. Whatever Cst. Green was told by Cst. Lane, the fact remains: it would not have taken a great deal of effort for Cst. Green to have actually read the Versaterm report. Contained within the Versaterm report is a brief, but clear, entry at "**Friday, 2007-Dec.-14 13:35**" clarifies the origin of the information. If Cst. Green had read the information available to her she would have quickly been made aware that Source "B" was reporting hearsay information and had not directly witnessed anything. Cst. Green alleges that Cst. Lane may not have been clear when speaking her to about Source "B". Either way, the police were negligent in the preparation of this ITO.

[27] The Crown advises that certain parts of paragraph six should be excised for the purpose of this analysis to allow paragraph six to read simply:

> 6. On January 22nd, 2009 I spoke with Cst David Lane, he is a member of the RCMP Integrated Drug Section who I verily believe. He advised me that he spoke to a person who wishes to remain anonymous, herein after referred to as Source "B", whom Cst David Lane believes as this person is not involved in criminal activity and reported the following:
>
> a. Source "B" is aware that:
>
> i. Michael MacDonald works for IMP at the Halifax Aiport [sic].

[28] In **Morris**, *supra*, Cromwell J.A. confirmed that inaccurate information can be excised from the ITO during amplification. I agree that the Crown has discretion to excise the inaccurate portions of paragraph six for the purpose of a sufficiency inquiry. Without the excised portions, paragraph six is of little value when determining the sufficiency of this ITO.

[29] Having excised the information attributed to Source "B" about alleged drug trafficking the sufficiency examination can be narrowed to an analysis of the information provided by Source "A" and any corroborating information gathered by the police. That analysis will take place following an examination of the remainder of Appendix "A" of the ITO.

[30] Paragraphs seven and nine of Appendix "A" outline the police investigation undertaken in an effort to corroborate the claims made Source "A". Paragraph seven states:

> 7. On January 21st 2009 at approximately 11:00 am (Daylight, sunny), I conducted physical surveillance in the area of 11 Trenholme St, Dartmouth and observed the following:
>
> a. 11 Trenholme St is a small blue/grey home.
>
> b. 11 Trenholme St appears to be a one or one and a half story single dwelling home.
>
> c. There is a shed in the backyard of 11 Trenholme St.
>
> d. There is a truck that appears to be abandon in front of 11 Trenholme St.

[31] Paragraph seven is described by the defence as a "drive by" on the part of the police. Paragraph seven simply tells us that 11 Trenholme St. is a small blue/grey single to single and a half story residence with a shed and a truck in the yard. This is general information that could be observed by any person traveling past that address.

[32] As noted earlier, I will skip the review of paragraph eight for now since paragraph eight, like paragraph five, relates to Source "A". I will return to examine those paragraphs once my analysis of the other paragraphs is complete.

[33] Paragraph nine, like paragraph seven, relates to the police investigation and states:

> 9. On January 29th 2009, I conducted a check on Versadex and learned the following:
>
> a. Michael Victor Macdonald has a recorded address of 11 Trenholme St, Dartmouth, Nova Scotia
>
> b. Michael Victor Macdonald owns a 2001 Brown Honda Accord with Nova Scotia license plate DBL546.

[34] The police investigation as described in paragraph nine confirms Michael MacDonald's address (the same address provided by Source "A") and the colour of his vehicle. Again, this is general information that could easily be determined by anyone.

[35] Paragraph 10 details the results of a CPIC check inquiry concerning Mr. MacDonald's criminal record and reveals a relevant and related, although somewhat dated, criminal record for Michael MacDonald:

> 10. On January 29th 2009, I conducted a CPIC check regarding Michael Victor Macdonald with a date of birth of 1962 April 18th and learned the following:
>
> He has a criminal record for:
>
> a. Possession of Narcotics (Nov 1987).
>
> b. Possession of Narcotics (June 1989).
>
> c. Possession of Narcotics (Nov 1989)
>
> d. Possession of Narcotics (Feb 1990)
>
> e. Possession for the Purpose of Trafficking (Aug 1990)
>
> f. Possession of Narcotics (Jan 1991)
>
> g. Possession of Narcotics (May 1991)
>
> h. Possession for the Purpose of Trafficking (Feb 2003)
>
> i. Possession for the Purpose of Trafficking (June 2003)

[36] The Crown argues that this criminal record is among the most compelling information in the ITO. The criminal record for drug related offences is significant. However, sufficiency requires more than just a related criminal record.

[37] Paragraphs 11 and 12 are simply Cst. Green's conclusions:

> 11. It is my belief, which is based upon the information documented above, that Cocaine is being possessed for the purpose of trafficking, inside the residence situated at the civic address 11 Trenholme St, Halifax Regional Municipality in the Province of Nova Scotia.
>
> 12. All the details listed in the Information to Obtain a Search Warrant and viewing it in its totality would support one to believe that Michael Victor Macdonald is in possession of crack/cocaine for the purpose of trafficking and that a Warrant issued under the Controlled Drugs and Substances Act to search the residence and out buildings situated at 11 Trenholme St, Dartmouth, Halifax Regional Municipality in the Province of Nova Scotia, will result in the seizure of the said Controlled Substances and items related to the said offence.

[38] Paragraphs five and eight deal with Source "A" and, with the majority of the information attributed to Source "B" having been excised and without much else by way of confirming police investigation or surveillance, are the critical paragraphs in this case. Paragraph five states:

> 5. On January 21st 2009, I spoke to a confidential informant (Source "A") who has supplied information in the past.

a. I have known Source "A" [redacted]. The information provided by Source "A" has been corroborated through investigation, physical surveillance, and information provided by other sources. Source "A" associates freely with persons involved in criminal activity and has personal knowledge of the information obtained herein based on conversations and observations of persons involved unless otherwise stated. Source "A" has been paid for information supplied in the past. Source "A" has not provided information in the past that has led to the execution of CDSA warrants, charges, and convictions under the Controlled Drugs and Substances Act and the Criminal Code of Canada. I have been in contact with Source "A" on a regular basis.

b. Source "A" observed the following:

i. Mike Macdonald is trafficking cocaine from his home.

ii. Mike Macdonald is also trafficking marihuana from his home.

c. Source "A" is aware of the following:

iii. Mike Macdonald works at the Halifax International Airport.

iv. Mike Macdonald lives at 11 Trenholme St in Dartmouth.

v. Mike Macdonald drives a brown or gold colored vehicle.

d. The informant believes the information supplied by Source "A" to be reliable

[39] In subheading "a." the length of time Cst. Green has known Source "A" has been vetted and no additional information was provided on amplification.

[40] Additionally, in subheading "a.", Cst. Green claims "the information provided by Source "A" has been corroborated through investigation, physical surveillance, and information provided by other sources." In light of the fact that later on in this paragraph Cst. Green states that Source "A" has no past proven reliability, it appears that this sentence merely refers to the information referenced within the ITO under scrutiny. As already detailed above, with proper excision, Source "B" does not corroborate anything of substance. Since there was little else undertaken by way of police investigation and physical surveillance this comment by Cst. Green is somewhat misleading.

[41] Cst. Green goes on to swear in subheading "a." that "Source "A" associates freely with persons involved in criminal activity and has personal knowledge of the information obtained herein based on conversations and observations of persons involved unless otherwise stated. Source "A" has been paid for information supplied in the past." The fact that Source "A" freely associated with criminals does not add much to the sufficiency of this ITO. Source "A" may have been paid

by the police for information in the past, however Source "A" has no past proven record of reliability so having been paid for information in the past by the police (for information that did not lead to successful searches or arrests) does not add to the reliability of Source "A" at all.

[42] Most importantly, Source "A" has no past proven reliability as is noted in subheading "a.":

> … Source "A" has not provided information in the past that has led to the execution of CDSA warrants, charges, and convictions under the Controlled Drugs and Substances Act and the Criminal Code of Canada. I have been in contact with Source "A" on a regular basis.

[43] The lack of past proven reliability of Source "A" noted in subheading "a." makes Cst. Green's statement at subheading "d." curious: What foundation is there for Cst. Green's belief that Source "A" is providing reliable information? Nothing was provided on amplification to explain this conclusion on the part of Cst. Green.

[44] In paragraph five, subheading "b.", Cst. Green states simply that Source "A" saw Mr. MacDonald trafficking in cocaine and marijuana from his home. There is nothing in paragraph five to indicate when Source "A" may have made this observation. There is nothing in paragraph five to indicate how Source "A" arrived at this conclusion. Why does Source "A" believe such events to have occurred and what measure of reliability is attached to this claim? Subheading "b." is devoid of the type of detail that would lend an air of reliability to the allegation.

[45] Paragraph five, subheading "c.", detailing Mr. MacDonald's place of employment, home address and vehicle, is general information that could be known, or easily discovered, by anyone.

[46] A sufficiency analysis should focus exclusively on what is actually contained in the ITO and not what might be missing from the ITO. Therefore, merely as an aside, it is also quite curious that there is no date, time or specific information contained in subheading "b." Did this occur over the past number of hours, days, weeks, months or years? How stale is the information? What weights/amounts of various drugs is Source "A" alleging is involved? Whatever might be "missing" from paragraph five, the comments in subheading "b." are without proper foundation and conclusory in nature. The allegations outlined in

paragraph five are attributed to a source with no past proven record of reliability, they are devoid of detail and they are not corroborated by police investigation in any significant way.

[47] That leaves us with the most important paragraph in the ITO: paragraph eight. Does paragraph eight help take us past mere suspicion all the way to credibly-based belief? Paragraph eight states:

> 8. On January 28th 2009, I spoke to a confidential informant "Source "A", who observed the following
>
> a. Cocaine packaged for resale inside the residence of 11 Trenholme St in Dartmouth with in the last 48 hours.
>
> b. The informant believes the information supplied by "Source A" to be reliable.

[48] Subheading "b." in paragraph eight is another conclusory statement about the reliability of Source "A". No foundation is provided for Cst. Green's opinion that Source "A" has provided reliable information.

[49] Subheading "a." in paragraph eight alleges very serious crimes, recently committed (suggesting a greater likelihood that evidence will be found if the search is conducted right away) and provides a specific address to search. The Crown argues sufficiency on the basis of this being direct information (observed by Source "A") stating the type of drug (cocaine), the location (inside the residence of 11 Trenholme St., Dartmouth), the manner of packaging (for resale) and that it was recent (observed within the last 48 hours).

[50] As stated by Cromwell J.A. in **Morris**, *supra*, the reviewing court must examine the totality of the circumstances and should not rely on a formulaic test when determining sufficiency. Cromwell J.A. suggests that there will be a variety of factors to examine when determining sufficiency, including the degree of detail of the information provided, the informant's source of knowledge, and the indicia of the informant's reliability, such as past performance or confirmation from other investigative sources.

[51] Working through Cromwell J.A.'s suggested framework for analysis:

(a) **Degree of detail provided:** Mentioning cocaine narrows down the type of drug expected to be found during the search. The location of 11 Trenholme St. is Mr. MacDonald's residence. Source "A" provides

no specific detail regarding the location within the residence where the drugs were observed and/or where they were being stored. Stating that cocaine is packaged for resale suggests possession for the purposes of trafficking but does not provide a detailed description. Observing something within the past 48 hours is specific. Again, the focus must be on what is actually contained in the ITO, however it is interesting that Appendix "A" does not provide any specifics whatsoever about the claim made by Source "A" in paragraph eight other than stating that Source "A" "observed" "*cocaine packaged for resale inside the residence of 11 Trenholme St. in Dartmouth with in [sic] the last 48 hours*." Was Source "A" in the residence, outside the residence or elsewhere when they "observed" this? What details were provided to support the allegations/what specifically did Source "A" "observe"? How does Source "A" know this was cocaine? How was the cocaine "packaged for resale"? What weights or amounts of cocaine did Source "A" observe? There are of course many questions that could be asked about the allegations made by Source "A". Again, the focus is on what is actually contained in the ITO, not what might be missing. There is certainly some detail provided by Source "A" but is it enough to lend an air of reliability to the assertions contained in paragraph eight?

(b) **Informant's source of knowledge:** Cst. Green obtained information from Source "A", Source "B", police databases and an apparent "drive by" of 11 Trenholme St.

(c) **Indicia of the informant's reliability based on past performance or confirmation from other investigative sources**: The only information that Cst. Green directly obtained corroborating the information provided by Source "A" and Source "B" was her database search of Michael MacDonald's address, place of employment and vehicle. Paragraph six, subheading "b" having been excised, Mr. MacDonald's place of employment and vehicle have no relevance to this case. His address could be known to anyone. There is no information in the ITO from other investigative sources that confirms the substantive claims of Source "A" in any significant way, nor is there any investigative information that supports the reliability of Source "A" aside from containing Mr. MacDonald's address.

(d) **Reliability:** Objectively, it is impossible to agree with Cst. Green's bald assertion of reliability. The ITO states clearly that Source "A" has no record of past proven reliability.

[52] Therefore, the search warrant was issued based on some specific but sparse information from a single source with no record of past proven reliability. In the totality of the circumstances is the information provided by a single source sufficient?

Single Source

[53] While each case must be determined on its own facts, a review of other cases where a single source was relied upon in an ITO is helpful in determining whether there is credibly-based probability. In **R. v. Hosie** (1996), 107 CCC (3d) 385, [1996] O.J. No. 2175 (Ont. CA) Rosenberg J.A., speaking for the Court, stated at paras. 14-15:

> 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.

[54] 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 Source "A" in Mr. MacDonald's case is far from detailed and is not compelling.

[55] In contrast to Source "A" who has 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, that source's information led to successful searches under the *Narcotic Control Act* and the *Criminal Code* and also led 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 be sufficient to allow for a finding of credibly-based probability.

[56] 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 form a sufficient basis for the granting of a warrant depending on: 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 CanLII 113, (1986), 30 C.C.C. (3d) 207 (Ont. C.A.). As Martin J.A. stated **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 ...

[57] The Supreme Court of Canada affirmed the Ontario Court of Appeal decision in **Debot, *supra***. As 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.

[58] Wilson J. went on to state, at 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.

[59] Therefore, an ITO 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, **R. v. Sutherland** (2000), 52 O.R. (3d) 27, [2000] O.J. No. 4704.

[60] In **R. v. Philpott**, [2002] O.T.C. 990, 2002 CanLII 25164, 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 re: Sufficiency

[61] In my opinion, following amplification and excision, the ITO was simply not sufficient to allow credibly-based probability to replace suspicion. The particulars provided by Source "A" were scant. Source "A"'s reliability was unknown and unproven. There was no significant corroboration through investigation. There was not sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place. The search warrant should not have been issued. Because the warrant should not have been issued, the subsequent search violated s. 8 of the *Charter*.

Hard Entry

[62] The defence complains that the police used a "hard entry" when conducting their search of Mr. MacDonald's residence; that is, they knocked his door down. The defence base their argument on the principles espoused in **R. v. DeWolfe**, 2007 NSCA 79. In that case our Court of Appeal overturned the trial judge who excluded seized evidence on the basis of a "hard entry" policy but reviewed the law as it relates to hard entries.

[63] In this case, no evidence was called on the motion to exclude. However, during oral argument counsel confirmed that no one was home at Mr. MacDonald's house when the police arrived to conduct their search. The police were armed with search warrant. How else could they gain entry into the home to conduct their search if no one was home to answer the door?

[64] I do not find that there is any merit to this aspect of the defence arguments.

Search of Mr. MacDonald's Motor Vehicle

[65] The defence complain that upon Mr. MacDonald's arrest, which appears to have taken place while he was driving his car, the vehicle was searched. All of the evidence relating to this s.8 *Charter* argument was seized from Mr. MacDonald's home, not his car. I do not need to conduct a detailed analysis with respect to this aspect of the defence argument and find that it adds nothing to the *Charter* motion before this Court.

Strip Search

[66] The defence also complain that Mr. MacDonald was strip searched subsequent to his arrest while in police custody. Again, I do not need to conduct a detailed analysis with respect to this aspect of the defence argument and find that it adds nothing to the *Charter* motion before this Court in the specific circumstances of this case.

Section 24(2) *Charter* Argument

[67] To determine whether the evidence should be excluded in accordance with s.24(2) of the *Charter*, I will have to undertake the analysis outlined by the majority in **R. v. Grant** 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.

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

Stage One

[68] First, the *Charter*-infringing state conduct in this case was the search of Mr. MacDonald's home and the seizure of money and drugs. The ITO was insufficient and misleading. Source "A" had no past proven record of reliability yet Cst. Green swore he or she was reliable. There was no corroboration of significance of the information provided by Source "A". Source "A" did not provide details such to lend and air of reliability to the allegations. Source "B" did not observe anything directly, yet Cst. Green swore that he or she did. To put it gently, between the testimony of Cst. Lane and Cst. Green while under oath at the preliminary inquiry, we were not left with a very clear explanation as to how the eventual contents of paragraph 6, subheading "b", came to be drafted.

[69] In **R. v. Harrison,** [2009] S.C.J. No. 34 the Supreme Court of Canada ruled on the admissibility of 35 kilos of cocaine. In conducting a s. 24(2) analysis, McLaughlin 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.

[70] As noted in **Morelli**, *supra*, at para. 99, during the course of a *Grant* analysis:

> 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.

[71] As has been indicated repeatedly, if the police wish to rely on a single source in order to obtain judicial authorization to enter someone's home, the single source

should be proven to be reliable either through past conduct or through confirmatory police investigation. We have neither of those here, aside from confirmation of Mr. MacDonald's address, place of employment and vehicle.

[72] In Mr. MacDonald's case, the ITO was negligently drafted. However, the police who executed the search believed that they were acting under lawful authority. They had a search warrant authorized by a Justice of the Peace. This likely favours admission of the evidence in relation to the first factor set out in **Grant,** *supra*.

Stage Two

[73] Turning to the second factor set out in **Grant,** *supra:* the impact of the breach on the *Charter*-protected interests of Mr. MacDonald. The officer who prepared the ITO was far from diligent in this case. At a minimum, Cst. Green did not read the entire Versaterm/GOH and missed the critical facts regarding Source "B", leading her to refer to Source "B" as having had first-hand knowledge as opposed to second-hand hearsay information. That portion of the ITO was excised for the purpose of the sufficiency review. Nonetheless, the ITO as it read originally was misleading.

[74] Additionally, Source "A" had no past proven reliability. Yet, Cst. Green referred to the information provided by Source "A" as being reliable. The information provided by Source "A" was generic and devoid of detail. Finally, there was no investigation of any significance by the police to corroborate the conclusory statements provided by Source "A".

[75] As noted in **Morelli**, *supra* at para.102:

> The repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct. Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in ex parte proceedings. In discharging those duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. They must refrain from concealing or omitting relevant facts. And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant.

[76] In **Harrison,** *supra,* at paras. 28-32, McLaughlin C.J. found:

> 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.

[77] Cst. Green did not testify on this motion and as a result I was not given the opportunity to assess her credibility. As previously detailed, I do have the preliminary inquiry transcripts to consider. I accept for the purpose of this application that the error relating to Source “B” was the result of negligence on the part of the police.

[78] The repute of the administration of justice would be significantly eroded, particularly in the long term, if information devoid of the necessary detail, that comes from a source not proven to be reliable and is not confirmed through police investigation, is permitted to form the basis for so intrusive an invasion of privacy

as the search of our homes. If the police are going to enter our homes, they must be diligent and careful.

[79] For centuries it has been recognized that "a man's home is his castle." In discussing the significance of a search of a residence, Cory J. stated for the majority of the Supreme Court of Canada in **R. v. Silveira**, [1995] 2 S.C.R. 297, at para. 148:

> The police, without warrant or authority, entered a dwelling-house. This was not a simple perimeter search as in Kokesch, but an entry into the dwelling itself. It is hard to imagine a more serious infringement of an individual's right to privacy. The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society. To condone it without reservation would be to conjure up visions of the midnight entry into homes by agents of the state to arrest the occupants on nothing but the vaguest suspicion that they may be enemies of the state. This is why for centuries it has been recognized that a man's home is his castle. It is for this reason that the Narcotic Control Act prohibits entry into a private dwelling-house without a warrant and it is for this reason that a search warrant must be obtained from a judicial officer on the basis of reasonable and proper grounds. …

[80] In **Sutherland**, *supra*, the Ontario Court of Appeal stated:

> [15] A search of a dwelling house must be approached with the degree of responsibility appropriate to an invasion of a place where the highest degree of privacy is expected...

[81] The Nova Scotia Court of Appeal expressed a similar sentiment in **Morris**, *supra*, where Cromwell J.A. stated at para. 34:

> The nature of the process demands candour on the part of the police. They are seeking to justify a significant intrusion into an individual's privacy. This is especially so when it is proposed to search a dwelling house which has long been recognized as the individual's most private place. The requirement of candour is not difficult to understand; there is nothing technical about it. The person providing the information to the justice must simply ask him or herself the following questions: "Have I got this right? Have I correctly set out what I've done, what I've seen, what I've been told, in a manner that does not give a false impression?": see R. v. Dellapenna (1995), 62 B.C.A.C. 32 (B.C.C.A.) per Southin J.A. at para 37.

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

Stage Three

[83] 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. In this case the exclusion of the 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).

[84] This is consistent with the position of McLaughlin C.J. for the majority in **Harrison,** *supra*, where she stated at paras. 33-34:

> 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.

Balancing

[85] As noted by Fish J. in **Morelli**, *supra*, at paras. 108-112:

> 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.
>
> 109 In my view, the repute of the administration of justice will be significantly undermined if criminal trials are permitted to proceed on the strength of evidence obtained from the most private "place" in the home on the basis of misleading, inaccurate, and incomplete Informations upon which a search warrant was issued.

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.

[86] McLaughlin C.J. states in **Harrison,** *supra* at paras. 35-42:

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 *Charter* breach 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.

[87] I reiterate the comments of Justice Fish in **Morelli,** *supra*. The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. The failure to do so in this case resulted in an unconstitutional search of a private residence.

[88] The police must draft ITOs requesting authorization to search private homes such that the authorizing body has accurate, complete and sufficient information to move from suspicion to credibly-based probability. The police can and must do better than they did in this case. *Ex post facto* discovery of drugs and money does not eradicate the deficiencies and inaccuracies plaguing this ITO. To admit the illegally and unconstitutionally obtained evidence in this case and similar cases in the future would undermine the public's confidence in the long term.

[89] The evidence in question should be excluded.

Arnold, J.