PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Enns,* 2021 NSPC 45

Date: 20211022
Docket: 8440898, 8440899, 8440900, 8440901
8440902, 8440903, 8440904, 8440905, 8440906
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Enns and 3247317 Nova Scotia Ltd.

DECISION ON APPLICATION PURSUANT TO SS. 8 & 24(2) OF THE *CHARTER*

Judge:	The Honourable Judge Elizabeth A. Buckle
Heard:	in Halifax, Nova Scotia
Decision:	October 22, 2021
Charges:	10(2), 9(2), 13(1) of the ***Cannabis Act,*** 354(1)(a) x 2 of the ***Criminal Code***
Counsel:	Len MacKay for the Crown Christopher Enns for the Defence

By the Court:

Introduction

[1] Christopher Enns is charged with possession of cannabis for the purpose of selling it, possession of cannabis for the purpose of distributing it and possession, production, selling, distributing or importing anything with the intention that it be used to produce, sell or distribute illicit cannabis contrary to ss. 10(2), 9(2) and 13(1) of the *Cannabis Act*, S.C. 2018, c. 16. He and a numbered company, 3247317 Nova Scotia Ltd., are also charged with possession of property obtained by crime of a value exceeding $5000, contrary to s. 354(1)(a) of the *Criminal Code*.

[2] On August 1, 2019, two business premises were searched pursuant to warrants issued under s. 87 of the *Cannabis Act*. A single Information to Obtain (ITO) was filed in support of the two warrants. The Informant sought the warrants in the context of an investigation into alleged illegal cannabis dispensaries.

[3] Mr. Enns has applied under s. 24(2) of the *Charter* for exclusion of evidence seized from those two locations on the basis that it was obtained in violation of his right to be secure from unreasonable search under s. 8 of the *Charter*. He argues that both search warrants are invalid because the information in support is facially insufficient to establish reasonable grounds for their issuance. He further argues that the ITO contains inaccurate or misleading information that bolstered the grounds and omits relevant information which undermined the grounds such that even if the ITO survived facial review, it would not survive following appropriate excision and amplification. He argues that if I find the searches were breaches of s. 8, the admission of the evidence would, in the circumstances, bring the administration of justice into disrepute.

[4] The Crown concedes that Mr. Enns has a protected privacy interest in the areas searched so has standing to assert a s. 8 violation.

[5] The Crown argues the ITO, when viewed as a whole, contains sufficient credible and reliable information such that the justice could conclude that there were reasonable and probable grounds to believe that there was illegal cannabis and associated evidence at the two locations. More specifically, he argues that the two locations were storefronts that were openly selling cannabis products and

obviously not authorized under the *Cannabis Act*. In the alternative, the Crown argues that if a breach is found, the test for exclusion has not been met.

[6] A *Garofoli* hearing was held. Mr. Enns was granted leave to cross-examine the Informant on the ITO in limited areas. The evidentiary record for the application includes the search warrants, the ITO, the testimony of the Informant, Cst. Mathieu Godbout, and certain information that was provided on consent during written and oral submissions.

Law

[7] Section 8 of the *Charter* guarantees everyone the right to be secure against unreasonable search and seizure. A search is reasonable if it is authorized by law, if the law is reasonable and the search is carried out in a reasonable manner (*R. v. Collins*, [1987], 1 S.C.R. 265, at para. 23).

[8] The searches in this case were warranted searches. Mr. Enns does not take issue with the law authorizing the issuance of the search warrants or, in this application, the manner of the searches.

[9] Search warrants are presumed to be valid. The Applicant bears the burden of displacing that presumption on a balance of probabilities.

[10] My role as the reviewing judge is to review the revised record and determine whether there is a basis upon which an authorizing judge, acting judicially, could have granted the authorization. As was stated by Justice Sopinka in *Garofoli*, [1990] 2 S.C.R. 1421, at page 1452:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.

[11] As is clear from this passage and cases that come after, my role is not to determine whether I would have granted the authorization or whether the justice of the peace should have been satisfied but rather, whether she could have been satisfied on the evidence in the ITO that the standard for issuance had been met.

[12] Section 87 of the *Cannabis Act* permits a search warrant to issue where the justice is satisfied by information on oath that there are reasonable grounds to believe that any of the following is in a place:

- cannabis in respect of which this Act has been contravened;
- anything in which cannabis in respect of which this Act has been contravened is contained or concealed;
- offence-related property; or
- anything that will afford evidence in respect of an offence under this Act or an offence, in whole or in part, in relation to a contravention of this Act, under section 354 or 462.31 of the *Criminal Code*.

[13] The standard, reasonable grounds to believe, has been considered in other contexts.

[14] Reasonable grounds to believe is more than mere possibility or reasonable suspicion but less than proof beyond a reasonable doubt or a *prima facie* case (See: *R. v. Wallace*, 2016 NSCA 79; *R. v. Lofty*, 2017 BCCA 418; *Mugesera v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 40, at para. 114; *R. v. Jir*, 2010 BCCA 497, at para. 27; and *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166). It has been described as reasonable belief, reasonable probability (*Debot*, at p. 1166) and credibly-based probability (*Hunter v Southam*, [1984] 2 SCR 145 at p. 167).

[15] The Informant's subjective belief is necessary but not sufficient. That belief also has to be objectively reasonable and grounded in credible and reliable information (*R v Araujo*, 2000 SCC 65, at para. 51; *R. v. Bisson*, [1994] 3 S.C.R. 1097, at p. 1098).

[16] The Informant's belief does not have to be based on personal knowledge. Hearsay is permitted but it must be sufficiently sourced to allow the issuing justice of the peace to carry out her constitutionally mandated role - to independently assess whether the Informant's belief is reasonable and grounded in credible and reliable information.

[17] In determining whether the standard has been met, the ITO must be assessed as a whole with each piece of information viewed in the context of the whole. The evidence explicitly included must be considered along with any reasonable inferences available from that evidence.

[18] Consideration must also be given to the fact that peace officers who prepare ITOs generally do so without legal assistance. As such, their drafting should not be held to the "specificity and legal precision expected of pleadings at the trial stage." (*R. v. Durling*, 2006 NSCA 124, at para. 19; and, *R. v. Sanchez*, 20 O.R. (3d) 468 (Ont. Ct. (Gen. Div.)).

[19] The applicant here alleges errors in the ITO and that relevant information which would have detracted from the grounds was not included.

[20] Errors, even fraudulent errors, in an ITO do not automatically invalidate a warrant (*R. v. Morris*, (1998), 134 C.C.C. (3d) 539, at p. 553, cited with approval in *Araujo*, at para. 54). The amplification process can be used to correct minor, inadvertent or technical errors made in good faith but cannot be used to retroactively authorize a search that was not supported by reasonable grounds on the face of the ITO. If not, the erroneous information must be excised.

[21] A search warrant application is made *ex parte*. As a result, there is a duty on the Informant to make full and frank disclosure. As was stated by Fish, J, writing for the majority of the Supreme Court of Canada in *R. v. Morelli*, 2010 SCC 8, at para. 58, a person seeking a warrant,

> … must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present *all material facts, favourable or not*. Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.

[22] Where material facts are omitted, they must be considered when reviewing the sufficiency of the information presented in the ITO (*Morelli*, at para. 60).

Analysis

[23] Search warrants were issued to search a business, “The Farm Assists” situated at two locations: 5106 Hwy 7, Porters Lake, NS; and, 2320 Gottingen Street, Halifax, NS on August 1, 2019. The ITO was sworn July 31st, 2019.

[24] The Informant included information obtained from: checks he completed on Versadex (a police reporting system); internet searches and open-source websites

he reviewed; a "criminal analyst" (presumably employed by a police department) who ran "checks" relating to the two properties; two other police officers who conducted surveillance; the Informant's own observations at one of the locations; and, some unsourced information.

[25] Based on my facial review of the ITO, I have concluded that without the information obtained from open-source internet searches, the ITO does not contain sufficient information to provide grounds to believe that offences contrary to the *Cannabis Act* were being committed or that illegal cannabis or related items would be found at the premises to be searched. As such the reliability and credibility of that information will be central to my decision on the sufficiency of the ITO.

[26] Before I address that issue, following are my reasons for concluding that the information included from other sources is not sufficient.

[27] The ITO includes certain conclusory statements which essentially must be viewed as nothing more than the Informant's opinion or statement of belief. For example:

- Para. 6., "this affidavit pertains to "an illegal cannabis dispensaries situated at …" . . . "The dispensaries are not a licenced cannabis producer and is not authorized to sell or distribute cannabis in the Province of Nova Scotia"
- Para. 9, "I was tasked with investigating an illegal cannabis dispensary located at …"
- Para. 16, officers conducting surveillance "observed 5 customers entering 2320 Gottingen Street".

[28] The Informant's statements that a premise is a dispensary, is illegal, or is selling cannabis are not facts upon which the issuing justice of the peace could find reasonable grounds. In each instance, the ITO must be examined to determine whether those conclusions are supported by credible and reliable facts.

[29] Similarly, describing people entering 2320 Gottingen Street as "customers" is a conclusion. Unless the underlying facts and evidence support that conclusion, it is not entitled to any weight. Nothing specifically observed by the surveillance officers supports the conclusion that the people who entered 2320 Gottingen Street were "customers". There is no evidence of how long they remained in the building, that they were seen leaving with anything in their hands or that they

entered the Farm Assists Cannabis Resource Centre. There is credible information that this business lists 2320 Gottingen Street as its address, but other businesses also use that address, including a restaurant, a convenience store and a food mart. Therefore, even if the issuing justice of the peace could draw an inference that the people who entered the address were "customers", in the absence of evidence to support an inference that they entered The Farm Assists, this information added virtually nothing to the Informant's grounds.

[30] The ITO also includes prejudicial information that had no apparent probative value.

[31] The Informant included information obtained from the Versadex police reporting system for each of the two target locations. Specifically, that there were "70 events" related to the 5106 Hwy 7 location and "242 events" related to the 2320 Gottingen Street location. No explanation was provided of what an "event" is other than the general description of Versadex at the beginning of the ITO. That description says it is a database maintained by police which records information collected "through the normal course of investigations and by the processing of persons charged with offences against Federal and Provincial Statutes.". The description goes on to say that it "includes information not limited to: names, addresses, vehicles, birth dates, property, the nature of an investigation, local criminal convictions and locations of incidents" (para. 5). The relevance of this information to the requirements for issuance of the warrants is not readily apparent and not set out in the ITO. In my view, it is suggestive of criminal activity associated with the target entities and is prejudicial.

[32] In addition, the Informant included the following paragraph:

> While on the face of it marihuana dispensaries appear to be a relatively harmless enterprise, there have been many incidents as of late where dispensaries have been targeted for violent robberies, their owners have been the victims of home invasions, and most recently a marihuana dispensary on Dutch Village Road in Halifax was firebombed. Dispensaries are targeted by rival groups or criminals because the benefit of robbing a dispensary is that two valuable commodities can be obtained for the price of one robbery. Dispensaries place the communities they are in at risk due to incidents of that nature. (para. 19)

[33] This information is prejudicial and inflammatory and, again, I can not see how it was in any way relevant to the issuance of the search warrant. It does not contribute to a belief that the entity under investigation is committing an offence

under the *Cannabis Act* or that anything of value to that investigation would be located at the premises to be searched.

[34] Further, there is a concerning lack of clarity about the source of this information. The Informant does not specifically say how he acquired the information included in this paragraph. In his introduction, he states "I am a peace officer and as such have personal knowledge of the matters herein". Given that general statement, in the absence of specific attribution to another source, I would assume this information is based on the Informant's personal knowledge – that he was personally involved in the investigation of these incidents as opposed to hearing about them from speaking with other police officers, reading police reports or news reports. However, the way the information is described in this paragraph suggests something less than personal knowledge.

[35] A summary of the relevant information which was obtained from sources other than open-source internet searches is as follows:

- 5106 Hwy 7 housed 6 businesses, including "The Farm Assists Cannabis Resource Centre" and other businesses that, based on their name, had some connection to Cannabis (Versadex – para. 10);
- The Farm Assists Cannabis Resource Centre had a business address of 2320 Gottingen Street which address also listed five other business names (Versadex – para. 11);
- 5106 Hwy 7 is owned by Diana Crimp who owns another property, the address of which is listed as Christopher Enns' residence on the Registry of Joint stocks (information provided by a criminal analyst as a result of "checks", it is unclear whether all information came from the Registry of Joint Stocks or if there were other sources checked – para. 15);
- Christopher Enns is listed as Director/President/Recognized Agent of six businesses, including: The Farm Assists Cannabis Resource Centre at 2320 Gottingen Street; The Grow Op Shop Indoor Gardening & Hydroponic Supplies; The Halifax Compassionate Club; Nova Scotia Medicinal Association of Cannabis Dispensaries; and two numbered companies (information provided by a "criminal analyst" as a result of "checks" – para. 15)

- on July 29, 2019, two officers conducted surveillance and observed "5 customers entering 2320 Gottingen St. within a 7 minute period" (para. 16);
- on July 30, 2019, the Informant drove by 5106 Highway 7. He observed a sign near the driveway saying "The Farm Assists medical cannabis resource centre", a two storey residence with a sign saying "lounge" with an arrow pointing toward the back, three vehicles in the driveway. He parked and saw a vehicle pull in and park. He did not observe anyone enter the residence but when he drove by later, the vehicle was still there and was unoccupied (para. 17); and,
- In the Informant's experience, illegal marihuana dispensaries usually display marihuana in separate containers for customers to purchase and stock large amounts of various cannabis infused products and edibles. He also lists the types of paraphernalia that is commonly associated with the illegal sale of drugs and which he would expect to be present where drugs are being illegally sold.

[36] This information is capable of supporting a reasonable belief that the target business is physically located at the two target addresses, that the name of the business suggests it is in some way connected with Cannabis, that Christopher Enns is the director/president of the business, and that one of the target addresses is owned by someone who also owns the property where Mr. Enns resides. Without the information obtained from the open-source internet inquiries, this information is not, in my view, capable of supporting a reasonable belief that the target business was involved in the illegal sale of Cannabis or that illegal cannabis or related evidence would be found at the target addresses.

[37] That leads me to the central issue, the credibility and reliability of the information obtained from the open-source internet searches. That included information from: a website located at "www.weedmaps.com; listings which appeared online upon searching for "The Farm Assists" and "The Farm Assists Porters Lake", including a website located at "www.farmassists.com", Facebook and Instagram; and, online news articles that referenced Christopher Enns.

[38] The Informant describes the Weedmaps site as a "yellow pages" style website that caters to cannabis dispensaries and cannabis delivery services. He says a person can search for a dispensary or delivery service based on their

geographic location (para. 12). The Informant does not include the source of this knowledge, so, from context, I infer that he is describing what he believes the site to be based on what he has observed on the site.

[39] In many respects, the internet information relied on in this case is similar to that obtained from an anonymous tipster. Like with anonymous tipsters, the identities of those who sponsor the sites or those who contribute information to the sites is entirely unknown and the Informant is not in a position to vouch for the credibility or reliability of the information.

[40] The framework for assessing whether reasonable grounds exist when an ITO relies on confidential information comes from the Supreme Court of Canada cases of *R. v. Debot*, [1989] 2 S.C.R. 1140 and *Garofoli*. That test can be applied imperfectly to this situation.

[41] In *Debot* and subsequently in *Garofoli*, the SCC identified factors which are relevant to the issue of whether information from a confidential source would provide reasonable grounds:

- Is the information compelling having regard to things such as the level of detail or specificity and the informer's source of knowledge?; and,
- Is the source credible/reliable by reference to such things as past performance and/or independent confirmation or corroboration from other investigative sources?

[42] Over time these have been distilled into three factors:

(1) Is the tip (information) compelling?

(2) Is the source credible?

(3) Has there been independent confirmation of the tip?

[43] These factors do not form separate tests but, rather, must be assessed together to determine whether on the totality of the circumstances, there are reasonable grounds.

(1) <u>Is the information Compelling?</u>

[44] This factor requires consideration of the level of detail and specificity in the information and the source of knowledge of the person who provides the information. The information from "www.weedmaps.com, www.farmassists.com, and Facebook is detailed and specific:

- Information on www.farmassists.com states "We strive to offer a wide range of dried cannabis, concentrates, and edible products at reasonable prices to best serve each member's needs and treatment requirements. Our members can expect a strong quality standard is applied to all our products". The address on the site is 2320 Gottingen Street.
- Information for The Farm Assists on www.weedmaps.com provided the address of 2320 Gottingen street, with hours of operation (9 am to 9 pm daily) and a menu tab listed a variety of cannabis groups, some with pictures, including: indica, sativa, hybrid, concentrate, edible and drink.
- Information attributed to Facebook (it is unclear whether the Informant went to a Facebook page or simply looked at what was available in the search results), included the Porters Lake Address, an email address, business hours and "medical cannabis resource centre. Medical vapor lounge".

[45] However, there is no indication of when any of it was posted so there is no ability to determine whether it is current and no indication of the source of the poster's information so no ability to determine whether it is firsthand, second hand or simply based on rumour.

[46] The remaining internet information, including "multiple websites and news article online qualify Christopher Enns as cannabis advocate and activist", Instagram and a CBC news article adds little to the grounds other than confirming he has an interest in cannabis that he owns The Farm Assists.

(2) Is the Source Credible/Reliable?

[47] It is widely known and not disputed in this case that information on the Internet, in general, is not regulated for quality or accuracy. The reliability and credibility of this type of information depends on the reputation of the site it is taken from and/or the reader's ability to ascertain the source of the information

contained on the site and make their own assessment. For example, information from websites for government or other established/reputable institutions might have inherent reliability because of an expectation that the site is secure, monitored, and contains information that has been properly sourced and vetted. Other sites might not have inherent reliability but provide sufficient information for the reader to make their own assessment. These sites might include the name of the person or organization that sponsors or is responsible for the site, some indication of whether anyone is responsible for regulating who can add information or its accuracy, or the names of the authors or other source of factual information.

[48] The primary sources relied on by the Informant (www.weedmaps.com and www.farmassists.com) are not readily identifiable as reputable, there is no information in the ITO that would indicate who created, sponsored or controlled the sites, whether anyone regulates access or checks accuracy, whether the sites have policies or rules to verify or regulate information, who contributed the specific information relied on by the officer, when it was last updated, or whether there was feedback on the site indicating accuracy or inaccuracy. Similarly, the information from Facebook is only as reliable as the person who created the specific account where the information was found, and no information is provided about that.

[49] For www.weedmaps.com, the Informant states that it is used to find dispensaries. Assuming that is the purpose of the website, there is no evidence that it is a reliable or current source of that information.

[50] The www.farmassists.com website suggests, because of its name, that it is associated with that business. Evidence of that might add to the reliability of the information it contains. However, there is no evidence that The Farm Assists business owned that domain name or created, sponsored, supported or approved of the site.

[51] Other courts have also expressed concerns over the reliability of this kind of evidence. In *R. v. Ashley Brown*, et al (an unreported decision of Judge R. MacKinnon, NSPC, dated April 26, 2019, Judge MacKinnon reviewed sufficiency of grounds to support a warrant to search an alleged cannabis dispensary. The ITO in that case included information from www.weedmaps.com. In concluding the grounds were insufficient, Judge MacKinnon found a number of problems and deficiencies, including that he could not rely on the information from that site.

[52] In *R. v. Hanse*, 2018 ONSC 6691, the court concluded, as I have, that there are reliable sources available on the internet and courts regularly rely on some of these sources of "indisputable" accuracy. However, the Court concluded that weedmaps.com was not one of them. Similarly, in *R. v. Graff*, 2015 ABQB 415, the court found that information from an online source, Spypig, was unreliable and excised it from an ITO.

[53] In my view, in some respects, some of the information available on the internet is even less reliable than information provided to police by anonymous tipsters. With information provided to police by a tipster, there is at least a sense that the person knows they are providing information in circumstances where it might be relied upon with serious or significant consequences.

[54] Given the absence of information about the sites relied on by the Informant or the source of the information contained within, there is no ability to assess the reliability or credibility of the information. It could have been placed on the internet at any time, by any one and for any reason.

(3) Has there been Corroboration of the Information?

[55] Corroboration can significantly bolster the credibility/reliability of information or sources of information.

[56] Here, there is some cross-corroboration of information found on the various sites in the sense that they contain similar information. However, corroboration between anonymous sources is of little value given the possibility that the author/source of the information could be the same person or that information from one source is simply adopted by another.

[57] The surveillance corroborates that there were physical structures located at the two addresses and, for 5106 Hwy 7, that Farm Assists was located there, had a sign which allows for an inference that it wanted its presence there known to the public and had a "lounge" which is also referred to in the Facebook listing as a "vapourlounge".

[58] The surveillance from 2320 Gottingen Street adds virtually nothing beyond the presence of a physical structure.

[59] The checks done by the criminal analyst, assuming they were of reputable sources like the Registry of Joint Stocks, corroborated that The Farm Assists business was located at 2320 Gottingen Street. However, it does not confirm the Porters Lake address.

[60] There is no indication that the officer attempted to investigate the internet sources he relied on. For example, he apparently did not call any of the phone numbers listed on the various sites, did not attempt to obtain information about the policies of the site, did not try to identify who contributed information to the site, didn't investigate the URL / domain name of the farmassists.com site to determine who was associated with it, did not independently test the information from weedmaps, didn't speak with anyone who had used weedmaps, and didn't try to ascertain when the various sites were updated.

[61] Other than the surveillance already referred to and the checks done by the criminal analyst, there is no indication that the Informant attempted any other investigation to attempt to corroborate the information obtained from the internet. For example, police officers in plain clothes could have entered or tried to enter the premises to see whether cannabis was present.

[62] In assessing the sufficiency of the ITO I have considered it in light of the decision of the Supreme Court of Canada in *R. v. Plant*,[1993] 3 SCR 281, which provides a useful guidepost for determining whether information is sufficient to meet the reasonable grounds standard, especially in the context of an anonymous source. The grounds which remained in that case after results of the unlawful perimeter search were excised were as follows:

> (i) An anonymous "Crime Stoppers" tip which indicated that marihuana was being grown in the basement of a "cute house" beside a house with a lot of windows on 26th Street between 2 consecutive cross avenues in Calgary;
>
> (ii) Police confirmed the exact address of the house described in the "Crime Stoppers" tip; and
>
> (iii) Upon comparing the electrical consumption at this address with that of (2) other comparable sized residences in Calgary over a (6) month period, Police determined that the consumption at that address was 4 times the average of the other (2) residences over the same period.

[63] There are two key differences between the circumstances in *Plant* and that before me. The first, and most significant, is that in *Plant* there was corroboration of the aspect of the tip that related to criminal activity – the tipster reported a grow operation and electrical consumption records for the address were shown to be 4 times the average. In the case before me, there is no external corroboration of the potential illegal activity reported on the internet. The second, and much less significant, difference is that in *Plant*, the information had come in through crimestoppers. With a crimestoppers tip there is some small added reliability because the person is presumed to know that if the information is not reliable, there will be no financial reward.

[64] In these circumstances, the open-source information in this case was of entirely unknown credibility and reliability. It supported a suspicion and should have been the starting point for an investigation. It should not have been essentially the entire investigation. The ITO, viewed as a whole, does not contain sufficient credible and reliable information to support reasonable grounds and could not have been issued.

[65] Therefore, the search warrants were not valid, the searches were warrantless and violated s. 8 of the *Charter*.

[66] Despite my conclusion on the facial validity, I will go on to address some of the Applicant's claims on sub-facial validity, since they impact my s. 24(2) analysis.

[67] The Crown acknowledged that the following inaccurate information was included in the ITO:

- the Informant stated that "medical cannabis in the Province of Nova Scotia is still obtained the same way as pre-legalization, sent by a licenced producer through the mail to patients" (para. 8). In fact, at the time the ITO was sworn, those with a medical licence were permitted to grow their own cannabis or designate someone to grow cannabis for them and could pay for that service and product and obtain it either by meeting the designated grower or having it delivered to them.

[68] The Crown also does not dispute the accuracy of certain other information that was not included in the ITO:

- at the time the ITO was sworn, none of the businesses referenced or their owners, including Mr. Enns, had any prior criminal convictions; and,
- in June of 2019, there had been an inspection under the NS *Cannabis Control Act* at 5106 Hwy #7 and nothing was seized.

[69] The Crown also acknowledges that the ITO should not have included a reference to charges having been dropped against Mr. Enns. The Informant referenced an online news article that listed Mr. Enns as the owner of "The Farm Assists Cannabis Resource Centre". The URL for that article, dated November 17, 2017, was included and said "… Canada/Nova Scotia/Christopher-enns-cannabis-activist-some-charges-dropped…" (para. 14).

[70] In making those concessions the Crown did not concede the relevance of that information or that it would have impacted the grounds.

[71] In my view, in the context of this ITO, this information was potentially relevant.

[72] First, the inaccurate statement of the law. As I have discussed, the basis for the officer's belief that the premises were illegal cannabis dispensaries came primarily from internet searches. The information included from those sources is capable of more than one interpretation. Had the issuing J.P. been advised that medical cannabis could be obtained legally by someone with a medical licence from a designated grower, the information from those sites may have been interpreted differently.

[73] The fact that none of the businesses or individuals had criminal convictions would not normally be relevant since in the absence of evidence of criminal convictions, the issuing J.P. should assume there was none. However, in this case the failure to include this information exacerbated the impact of the inclusion of information about the number of Versadex "events" associated with the target entities. The inclusion of these "events", without stating that none of the entities or individuals had criminal convictions, may have given an impression that the businesses were engaged in criminal activity beyond what was under investigation. As such, it was potentially misleading

[74] The fact that there had been an inspection at 5106 Hwy 7 in June and nothing was seized is also relevant. The NS *Cannabis Control Act* permits

inspection without warrant and seizure of anything, including cannabis, if the inspector has reasonable grounds to believe that the thing will afford evidence of an offence under that act or is being used in connection with an offence. The fact that there was an inspection and nothing was seized allows for the inference that nothing of that nature was present. This information could have undermined the Informant's grounds to believe that illegal cannabis or other evidence would be present on August 1, 2019, within two months after the previous inspection.

S. 24(2)

[75] I have found that the searches of the two locations breached s. 8 of the *Charter*. The Applicant seeks exclusion of the evidence seized.

[76] The items seized from the two sites combined included the following (Crown Brief but agreed by Mr. Enns):

- 50 lbs of cannabis marihuana
- 589 g of cannabis resin (hash)
- 1361 packages of cannabis resin (shatter)
- 1695 cannabis edibles
- 881 various cannabis resin products
- 194 cannabis oil vape refills
- 156 syringes of cannabis oil
- 51 jars of CBD isolate
- $43,788 cash

[77] Section 24(2) requires that evidence be excluded if it was "obtained in a manner" that infringed the *Charter* and its admission "would bring the administration of justice into disrepute" (the evaluative determination.

[78] The Crown does not dispute, given my ruling on s. 8, that the evidence was obtained in a manner that infringed the *Charter*.

[79] The Applicant bears the burden to establish, on a balance of probabilities, that the admission of the evidence would bring the administration of justice into disrepute.

[80] In 2009, in *R. v. Grant*, 2009 SCC 32, and *R v. Harrison*, 2009 SCC 34, the Supreme Court of Canada revised the analysis for exclusion of evidence under

section 24(2) of the *Charter*. In doing so, it provided an overview of the general purpose and principles of s. 24(2) as well as clarifying the criteria for exclusion of evidence under that section.

[81] A number of general principles can be taken from *Grant* (paras. 65 – 70):

- The purpose of s. 24(2) is to maintain the good repute of the administration of justice;
- "Administration of justice" includes the rule of law and upholding *Charter* rights in the system as a whole;
- Admission or exclusion must be considered with a view to the long-term, prospective, and societal consequences on the integrity of, and public confidence in, the justice system;
- The distinction between conscriptive and non-conscriptive evidence is much less relevant; and,
- Trial fairness is to be viewed as an "overarching systemic goal" rather than as a distinct stage of the 24(2) analysis.

[82] Against the backdrop of these general principles, the Court set out the three factors that should be considered in determining whether the admission of evidence would bring the administration of justice into disrepute (*Grant,* at para. 71):

- the seriousness of the *Charter*-infringing state conduct;
- the impact of the breach on the *Charter*-protected interests of the accused; and,
- society's interest in the adjudication of the case on its merits.

[83] The Court in *Grant* and subsequent courts have provided guidance as to how these factors should be applied.

[84] When considering this first factor, courts should consider whether admitting the evidence would send the message that the Court condones the state misconduct by allowing it to benefit from the fruit of the misconduct. The concern in this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a positive consequence. The main concern is to preserve public confidence in the rule of law and its processes (*Grant*, para. 73).

The Court recognized a spectrum of misconduct including inadvertent or minor violations at one end and willful or reckless disregard on the other. The more deliberate or serious the conduct, the greater the risk that the public's confidence would be undermined and the greater need for the Court to dissociate itself from that conduct. The Court also noted that extenuating circumstances or good faith could attenuate the seriousness of the misconduct or reduce the need for the Court to dissociate itself (*Grant*, paras. 74 and 75).

[85] Analysis of the second factor, the impact of the breach on the accused, requires the Court to evaluate the interests engaged by the infringed right and the degree to which that right has been violated within a spectrum of intrusiveness (*Grant*, at para. 77).

[86] Under the third factor, society's interest in adjudication, the Supreme Court said that society's interests include determining the truth, bringing offenders to justice, and maintaining the long-term integrity of the justice system. The issue to be determined under this factor is "whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence, or by its exclusion." (*Grant*, at para. 79). Factors such as the reliability of the evidence at issue, the importance of the evidence to the prosecution's case and the seriousness of the offence are all relevant under this factor.

[87] Finally, the Supreme Court instructs lower courts to balance these factors to arrive at an answer to the ultimate question suggested in *Grant* and *Harrison:* what is the broad impact of the admission of the evidence on the long-term repute of the justice system? (*Grant*, at para 70 and *Harrison*, at para. 36). As was stated in *Harrison* (at para. 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.

Application to Circumstances

Factor 1 - Seriousness of the Breach

[88] The Crown argues that the seriousness of the breach is at the low end of the spectrum.

[89] There is no dispute that the police sought and obtained a search warrant which was presumptively valid and then acted on it in good faith.

[90] In *R. v. Rocha*, [2012] ONCA 707, Justice Rosenberg specifically addressed how to assess the seriousness of *Charter*-infringing conduct when a search warrant had been obtained. He said:

> **28** Applying for and obtaining a search warrant from an independent judicial officer is the antithesis of wilful disregard of *Charter* rights. The search warrant process is an important means of preventing unjustified searches before they happen. Unless, the applicant for exclusion of evidence can show that the warrant was obtained through use of false or deliberately misleading information, or the drafting of the ITO in some way subverted the warrant process, the obtaining of the warrant generally, as I explain below, tells in favour of admitting the evidence. In this case, the police submitted the fruits of their investigation to a justice of the peace who granted the warrants. I have held that the warrant was properly granted in relation to the restaurant. The warrant should not have been granted in relation to the house, but it must be remembered that an independent judicial officer did authorize the search.

[91] Justice Rosenberg went on to say that it is not automatic that having a search warrant will favour admission of the evidence under the first criterion. Rather, he suggested that reviewing courts examine the ITO and consider first whether it is misleading in any way and, if so, consider "where it lies on the continuum from the intentional use of false and misleading information at one end to mere inadvertence at the other end" (para. 29).

[92] In *Rocha,* Justice Rosenberg found that for one of the ITOs under review, the quality of the document put the police conduct towards the serious end of the continuum (para. 37). He agreed that relevant information had not been disclosed, misleading information had been included and the Informant had failed, through carelessness, to swear that drugs would be found in the location to be searched (paras. 33, 34, 35 & 36). He concluded that there was no "impropriety or bad faith" but there "was at least negligence in the obtaining of the search warrant" and "inattention to constitutional standards" (para. 43).

[93] This aspect of *Rocha* was recently considered by the Ontario Court in *R. v. Muddei*, 2021 ONCA 200. In that case, there was a finding that most of the

affidavit in support of a wiretap was straightforward and accurate and there was no intention to mislead the issuing judge (para. 90). However, the reviewing court had concluded that "the affiant, through carelessness or inadvertence, misled the issuing judge on an important component of the affidavit" and concluded that the state misconduct should be placed toward the more serious end of the continuum. This conclusion was upheld on Appeal. The Crown on appeal relied on *Rocha* to argue that the act of seeking and obtaining judicial authorization showed good faith and significantly diminished the blameworthiness of the state conduct.

[94] In addressing that argument, Doherty, J.A., writing for the Court said,

> [89] The inadequacies in the affidavit must be considered having regard to the *ex parte* nature of the authorization for the application. The potential to mislead by careless drafting, or ambiguous silences, is very real. It falls to the affiant, and the Crown agent, to be especially careful to minimize the risk that the issuing judge will be unintentionally misled by the language in the affidavit.
>
> . . .
>
> [92] The Crown submission is a fair one, but it goes only so far in assessing the blameworthiness of the state conduct. Even when the police follow the proper procedures and seek a judicial authorization, serious inadequacies in the material placed before the issuing judge can justify a finding the police acted negligently or unreasonably, thereby exacerbating the blameworthiness of the state conduct leading to the *Charter* breach: *Rocha*, at paras. 32-38. Justice Corthorn properly used her finding that the affidavit was materially, albeit unintentionally, misleading to place the state conduct at the more serious end of the fault spectrum.
>
> [93] Crown counsel also argue that the seriousness of the state conduct is mitigated because the grounds set out in the affidavit, if they were inadequate, fell just short of the grounds needed for an authorization. This was a near miss, say Crown counsel.
>
> [94] Justice Corthorn did not accept this submission. Nor do I. I have difficulty with the proposition that an affidavit that [page24] does not provide a basis upon which an issuing judge could (not should or would) be satisfied the criteria in s. 186(1) have been met can be accurately described as a near miss. The standard of review to be applied by the reviewing judge sets a relatively low bar. I would think that most affidavits which cannot clear that low bar will be seriously deficient in setting out the grounds required to justify the issuance of an authorization.

[95] In the case before me, I would not say that the Informant knowingly relied on false information, deliberately misled the Justice of the Peace or intentionally

subverted the warrant process. However, to use the language from these cases, I would say that information in the ITO was misleading, the drafting was careless, there was negligence and an unacceptable inattention to the constitutional standard for obtaining a warrant.

[96] The Informant misstated the law concerning medical access to cannabis and, in this situation, he is expected to know what the law was. I appreciate that knowing the true state of the law would have required the officer to look beyond the *Cannabis Act* to its Regulations. I also appreciate that the law in this area has been evolving. However, this officer was in a specialized unit, a drug section, and specifically tasked with investigating cannabis dispensaries. Further, the law in question was statutory so this is not a situation where an officer was called upon to "engage in judicial reflection on conflicting precedents (*Grant*, para. 133). Finally, having made the decision to include a statement of the law in his ITO, he should be expected to ensure that statement was accurate. This was not necessarily a harmless error. Had the issuing Justice of the Peace known that there were legal means by which a medical user could obtain cannabis in-person, she may have viewed the remaining information through a different lens.

[97] The Informant failed to include relevant information that could have been obtained through reasonably diligent investigation or inquiry. The Informant was apparently unaware of the fact that one of the premises had been inspected within two months previous by provincial authorities and nothing had been seized. This information had the potential to undermine his belief that there would be illegal items present.

[98] The Informant included potentially prejudicial information that was irrelevant. He included information that previous charges against Christopher Enns had been dropped (para. 17), information about the amount of crime associated with dispensaries and how their presence puts communities at risk (para. 19) and information relating to the number of "events" on Versadex for these entities (paras. 10 & 11). The inclusion of this information in the absence of any apparent relevance is concerning. The reference to charges being dropped is included in an internet address which the Informant purports to include because the article is a source of information that Christopher Enns owns The Farm Assists Cannabis Resource Center. That information is unnecessary given that the same information was obtained through the checks done by the criminal analyst (para. 15). Further, in the same paragraph, the Informant referred to "multiple websites"

and online "news articles" that qualify Christopher Enns as a cannabis advocate and activist without sourcing it to any internet addresses. As I said previously, the information about how dispensaries put communities at risk is irrelevant and highly prejudicial. The affidavit was short, only 27 paragraphs contained in six pages of grounds. In that context, this irrelevant paragraph occupied a significant amount of geography. Finally, the prejudicial impact of including the information about the number of Versadex events associated with the entities was exacerbated because the Informant failed to include information that none of the businesses or individuals had any criminal convictions, thus allowing for an inference that the target entities had previously been involved in crime.

[99] The Informant also relied on open-source internet information without doing any research to determine the source of the information or whether it was current and with virtually no investigation to corroborate it. That or similar information had been found to be unreliable in other cases, including one in the province of Nova Scotia, albeit an unreported decision.

[100] Finally, the ITO suffers from a lack of proper sourcing which would not in and of itself have been fatal, but demonstrates carelessness.

[101] In summary, the Informant included internet information that he should have known was of unknown reliability, misstated the law, included irrelevant prejudicial information, failed to include relevant information that might have impacted the assessment of his grounds, and relied on information with unknown or questionable reliability without conducting basic investigation to ascertain its reliability or corroborate it.

[102] As such, I view the *Charter* offending conduct here to be serious, high on the spectrum, and reduced only slightly by the fact that a warrant was obtained. Admitting the evidence would send a message that the court condones this kind of carelessness and perfunctory attention to the warrant requirement. This factor strongly favours exclusion.

Factor 2 - Impact on the *Charter*-protected Interests of the Accused

[103] The premises searched were business premises. There is a lower expectation of privacy in a business as compared to a residence. However, in this case there was an actual entry and search of premises as opposed to a production order, sniffer dog search etc. The evidentiary record is not complete, I have inferred that

the search went beyond the public parts of the business and included a search for records. I say that because the warrant authorized the search for "documentation".

[104] I am advised that the search was executed during business hours so there may have been customers present. However, in the ITO, the the Informant advised that he intended to execute the warrant as early as possible in the day to minimize the number of employees and customers. This would have lessened the potential for impact on the privacy or dignity of third parties.

[105] In *Brown*, Judge MacKinnon found a high expectation of privacy in the commercial premise, in part because of evidence in the ITO that there might be people in attendance who had prescriptions. Judge MacKinnon found there was potential for information to be present that had a high expectation of privacy and potential for intrusion on privacy of others and impact on their dignity

[106] I do not have that kind of information here. The only information that would suggest the premises were connected to health care comes from the sources I have concluded are of unknown reliability: the website with the name "farmassist" refers to serving "each members needs and treatment requirements"; Christopher Enns is listed as being an officer of companies that have "compassionate" and "medicinal" in their names; and there is repeated reference to the premises being dispensaries.

[107] Further, I have no evidence that any records were seized and if so, whether they related to clients of the business or contained private health care information and no evidence that the breach otherwise impacted anyone's personal dignity.

[108] In these circumstances, the second factor does not "pull as strongly towards exclusion" as would be in the case of premises with a higher expectation of privacy (*R. v. Paterson*, 2017 SCC 15, at para 49). Therefore, this factor marginally favours exclusion.

<u>Factor 3 - Society's Interest in Adjudication of the Case on Its Merits</u>

[109] The evidence seized is real evidence with inherent reliability and is crucial to the Crown's case. Exclusion would mean that the case could not be decided on its merits. As was stated in *Grant* (para.81), "exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and

render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute".

[110] However, in discussing this factor, the Court in *Grant* specifically noted that it is not determinative, should not be given disproportionate significance and must be considered in the context of the case as a whole. In *Grant* and *Harrison*, the Court confirmed that automatic admission of reliable evidence regardless of how it is obtained is inconsistent with the *Charter* and, specifically, inconsistent with the wording of s. 24(2) (*Grant*, paras. 81-84).

[111] The Crown acknowledges that the *Cannabis Act* and recent sentencing decisions indicate a shift in how cannabis charges are viewed, however, argues that given the quantity here, the charges are serious. The Crown correctly maintains that offences involving sale or possession for the purpose of sale of Cannabis continue to be criminal with punishment on indictment of imprisonment for a term of not more than 14 years.

[112] The Crown's view of the continuing seriousness of the offence finds some support in the case law, especially in cases involving prolonged large scale trafficking for profit (*R v Strong*, 2019 ONCA 15)

[113] However, in *R. v. Murphy*, 2021 NLCA 3, the Appeal Court upheld a suspended sentenced with probation for a first time offender who pleaded guilty to possession for the purpose of trafficking of 25 pounds of marijuana, under s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, (*CDSA*). In doing so, the Court found that it was not an error for the sentencing judge to have considered the impact of the *Cannabis Act* on the appropriate sentence. The Court concluded that the Act reflected society's values towards cannabis use. A key feature of the new legislation involved lesser maximum penalties for possession for the purpose of trafficking than had existed under the *CDSA*, reflecting a diminution in the objective seriousness of the equivalent offence.

[114] Similarly, in *R. v. Daniels*, 2021 NSSC 103, a recent decision of Justice Bodurtha, a 42 year old with no criminal record who had pleaded guilty to operating a cannabis dispensary was sentenced to a suspended sentence with probation. The quantities in that case were significantly less than in this case, however, Justice Bodurtha's consideration of the applicable principles and his comprehensive review of sentencing cases is very helpful.

[115] I accept that given the quantity of Cannabis and money involved, this is a serious *Cannabis Act* offence. I also accept that there are dangers associated with the sale of cannabis, including those involving dispensaries which purport to provide a medical service. However, given the changes in society's view of cannabis, the changes in sentencing brought about by the *Cannabis Act* and the recent decisions involving sentencing for cannabis, I conclude that trafficking or possession for the purpose of cannabis can no longer be viewed as a serious offence in the category of crimes of violence or trafficking in hard drugs.

[116] Given the relative seriousness of the offences and the nature of the evidence, this factor weighs moderately in favour of admitting the evidence.

Balancing and Weighing

[117] The police conduct did not demonstrate a wilful disregard for *Charter* rights. However, it did demonstrate an unacceptable ignorance of the law, carelessness in drafting, and negligence or an unacceptable inattention to the constitutional standard for obtaining a warrant. The first factor strongly favours exclusion. Given that there was a search but the premise was a business premise and the lack of evidence to suggest that private health care information was sought or seized, the second factor, the impact of the breach on *Charter* protected right, slightly favours exclusion. The third factor, society's interest, marginally favours admission. The evidence is important to the prosecution and the public interest in prosecution is moderate given the changing views of cannabis.

[118] Having considered and balanced these factors, I find that my conclusions on the first factor tip the balance in favour of exclusion. In the circumstances, admission of the evidence would bring the administration of justice into disrepute.

[119] The application to exclude evidence under s. 24(2) of the *Charter* is granted.

Elizabeth Buckle, PJP