<u>PROVINCIAL COURT OF NOVA SCOTIA</u>
Citation: *R. v. Payne,* 2024 NSPC 12

Date: 20240109
Docket: 854259 to 8543264
8544944 to 8544955
Registry: Halifax

Between:

Joshua Payne

Applicant

v.

His Majesty the King

Respondent

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

Judge:	The Honourable Judge Elizabeth A. Buckle
Heard:	November 27, 2023
Decision:	January 9, 2024
Charges:	Sections 5(2) x 2, 7.1(1)(b) and 7(1) of the *Controlled Drugs and Substances Act* Sections 86(2), 88(11) x 2, 91(1), 91(2), 92(2), 95(1) and 354(1)(a) of the *Criminal Code*
Counsel:	Ian Hutchison for the Applicant David Schermbrucker for the Respondent

By the Court:

Introduction

[1] Joshua Payne is charged with offences relating to the possession of weapons (including a loaded handgun), drugs (cocaine and hydromorphone), and proceeds of crime (cash). The charges arose out of an investigation that included the execution of judicial authorizations: production of documents from a self-storage company; tracking the location of Mr. Payne's vehicle; and searches of a storage locker, apartment, vehicle, and cell phones.

[2] Mr. Payne argued that these authorizations were invalid, rendering the searches unreasonable and in violation of his rights under s. 8 of the *Charter*. He applied to have the resulting evidence, including the tracking data, weapons, Canadian currency, drugs, and alleged paraphernalia of drug trafficking excluded under s. 24(2) of the *Charter*.

[3] The Crown conceded that Mr. Payne had standing to make the s.8 argument. There was no dispute that he had a reasonable expectation of privacy in the information or locations that the police searched.

[4] Mr. Payne argued that the affiant who prepared the Informations to Obtain (ITOs) for the authorizations failed in her duty to make full and frank disclosure by deliberately misrepresenting and removing necessary information. He submitted that this failure was so subversive of the pre-authorization process that I should exercise my residual discretion to quash the authorizations, even if the grounds were sufficient. Alternatively, he argued that I should excise the misleading information and what remained was insufficient for their issuance.

[5] The Crown argued that while the affiant used a bad drafting technique, there was no evidence of any bad faith that would justify quashing otherwise valid authorizations. Further, the Crown submitted that the impugned information was not erroneous or misleading so should not be excised. In the alternative, the Crown argued that even if the impugned information was excised, the justices could have issued the authorizations based on the remaining content.

[6] The Crown and the Defence also disagreed on whether the evidence should be excluded if the police did violate Mr. Payne's s. 8 rights. The focus of their

disagreement was on the first *Grant* factor – the seriousness of the *Charter* offending conduct.

[7] For the reasons that follow, I have concluded that the police violated Mr. Payne's right to be free from unreasonable search and seizure guaranteed by s. 8 of the *Charter*. The affiant failed in her duty to make full and frank disclosure. While that failure was not sufficiently egregious to justify quashing the authorizations, it did require the excision of erroneous and misleading information. What remained was not sufficient to support the issuance of the authorizations to produce documents from the self-storage facility or to search the storage locker, Mr. Payne's apartment, vehicle, and cell phones.

[8] I have also concluded that the admission of the evidence obtained through these authorizations would bring the administration of justice into disrepute. As such, I excluded the evidence under s. 24(2) of the *Charter.*

[9] As a result, the Crown could not prove the charges against Mr. Payne, so all charges were dismissed.

The Hearing

[10] A *Garofoli* hearing was held. Mr. Payne did not seek leave to cross-examine the affiant and the Crown did not call any evidence.

[11] The evidentiary record consisted of:

> The ITO for an authorization that was not granted, sworn on September 2, 2021 (JPC #21-1458) and the Justice of the Peace's reasons for not granting it (Ex. 1, Tab 1);
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> The authorizations and ITOs for the five authorizations that were granted (JPC# 21-1899 on November 18, 2021; JPC#21-2024 on December 10, 2021; JPC#21-2026 on December 10, 2021; JPC#21-2027 on January 21, 2022; and JPC#22-0140 on January 21, 2022) (Ex.1, Tabs 2 to 6); and,
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> An Agreed Statement of Fact (Ex. 2).

Legal Principles

[12] Mr. Payne alleges that the police violated his right to be secure from unreasonable search and seizure as guaranteed by s.8 *Charter*. He bears the burden of proving the alleged violation on a balance of probabilities (*R. v. Collins,* [1987], 1 S.C.R. 265, para. 21).

[13] A search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the search is carried out in a reasonable manner (*Collins*, para. 23).

[14] The searches here were judicially authorized. Those authorizations are presumptively valid, and the burden is on Mr. Payne to displace that presumption.

[15] The police make a search warrant application *ex parte*. As a result, there is a duty on the affiant 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, 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.

[16] The law recognizes a variety of remedies where an affiant fails to make full and frank disclosure. I will start by summarizing the broad principles and then focus on those that are most relevant here.

[17] Errors in an ITO, even fraudulent, misleading or otherwise 'bad faith' errors, do not automatically invalidate a warrant (*R. v. Morris,* (1998), 134 C.C.C. (3d) 539, p. 553, cited with approval in *R v Araujo*, 2000 SCC 65, para. 54; and, *R. v. Booth,* 2019, ONCA 970, para. 64).

[18] Where an affiant has not made full and frank disclosure, a reviewing judge may choose to 'correct' the ITO to achieve that and then assess whether the issuing justice could have issued the warrant based on that corrected ITO. For example:

- Minor, inadvertent or technical errors made in good faith can be corrected through the process of amplification (*Araujo*, para. 59; *Morelli*, para. 41; and, *Booth,* para. 59);

- Erroneous information that should not have been in the ITO or that does not meet the requirements for amplification must be excised (*Araujo,* paras. 57 & 58; *Morelli,* para. 45; and, *Booth,* para. 58); and,

- Where material facts are omitted that might have detracted from the grounds, the omitted information can be, essentially, 'read in' by the reviewing court (*Morelli,* para. 60; and, *R. v. Paryniuk,* 2017 ONCA 87, para. 45).

[19] However, in some cases, an affiant's errors or omissions are so egregious and subversive to the pre-authorization process that a reviewing judge may declare the warrant invalid, regardless of whether it could have been issued had there been full and frank presentation of the information (*Morris,* para. 92; *R. v. Paryniuk,* 2017 ONCA 87, para. 45, leave to appeal dismissed [2017] SCCA 81; and, *Booth,* paras. 64 - 65). This residual discretion to invalidate a warrant on review was described by Cromwell, J.A. (as he then was), in *Morris*, para. 92:

> Fraudulent or deliberately misleading material in the information does not automatically invalidate the warrant. However, it may have this effect if the reviewing judge concluded, 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…

[20] This exercise of a residual discretion to invalidate a warrant was subsequently considered by the Ontario Court of Appeal in *Paryniuk* where Watt, J.A. said:

> [66] As I will explain, I agree with the appellant that a trial judge has a residual discretion to set aside a properly issued search warrant or authorization where the judge is satisfied that the conduct of the police has been subversive of the pre-authorization process leading to the issuance of the search authority. In this case, however, I am satisfied that the circumstances do not justify such an order and that the trial judge was right to refuse it.
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> [69] What is clear, however, is that previous authority in this court has recognized a residual discretion to set aside a warrant despite the presence of a proper evidentiary predicate for its issuance where police conduct has subverted the pre-

> authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like: Colbourne, at para. 40; R. v. Kesselring, [2000] O.J. No. 1436, 145 C.C.C. (3d) 119 (C.A.), at para. 31; Lahaie, at para. 40; Vivar, at para. 2. Courts of appeal in other provinces have reached the same conclusion: Bacon, at para. 27; Evans, at paras. 17, 19; R. v. McElroy, [2009] S.J. No. 416, 2009 SKCA 77, 337 Sask. R. 122, at para. 30, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 281; Morris, at paras. 90, 92.
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> [70] These same authorities, both in Ontario and elsewhere, describe the standard to be met to invoke this discretion as high. Indeed, some require that the conduct amount to an abuse of process: Vivar, at para. 2; Bacon, at para. 27.

[21] A reviewing judge's residual discretion to invalidate a warrant was more recently considered by Paciocco, J.A. in *Booth.* Justice Paciocco places this 'remedy' in context and provides a helpful summary of the duty to make full and frank disclosure, the reasons for it, and the hierarchy of remedies when there has been a failure (paras. 54-65). Because his thorough comments provide a helpful roadmap to my analysis, I will quote them at length:

> 54 Obviously, it is imperative that issuing judges or justices have an accurate understanding of the material, known facts available to the affiant officer. If the ITO contains erroneous, incomplete, or dishonest information relating to known information, an issuing judge or justice could be misled, and provide an authorization that should not have been provided. To ensure accuracy, anyone seeking an ex parte authorization, such as a search warrant, is required to make full and frank disclosure of material facts: R. v. Araujo, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 46. This is because an ex parte warrant application is not adversarial. As a corollary of the privilege of being the only party permitted to present evidence in an ex parte application, a search warrant affiant bears the burden of presenting the facts accurately and fairly, from the perspectives of both sides.
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> 55 Therefore, a search warrant ITO should never try to trick its readers, or offer misleadingly incomplete recitations of known facts, and the affiant officer must not "pick and choose" among the relevant facts in order to achieve a desired outcome: Araujo, at para. 47; R. v. Morelli, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 58. Nor should the affiant officer invite inferences that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed: Morelli, at para. 58.
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> 56 What, then, is the frame of material information that should be included to make full and frank disclosure? To answer that question, consider what is required to issue a "reasonable and probable grounds" search warrant. For such a search warrant to issue, the grounds for the warrant must be adjudged not only to be probable, but reasonable to rely upon. The ITO affidavit has to disclose what Dickson J. described

in Hunter et al. v. Southam Inc. as a "credibly-based probability [that] replaces suspicion": [1984] 2 S.C.R 145, at p. 167; see also R. v. Floyd, 2012 ONCJ 417, 263 C.R.R. (2d) 122, at para. 9. As a result, the frame of material information required to achieve full and frank disclosure includes all material information that: (a) could undercut the probability that the alleged offence has been committed; (b) could undercut the probability that there is evidence to be found at the place of the search; and (c) that challenges the reliability and credibility of the information the affiant officer relies upon to establish grounds for the warrant.

57 Where full and frank disclosure has not been made, a reviewing court will correct the warrant ITO to achieve full and frank disclosure, and then determine based on that corrected ITO whether the warrant could properly have issued if full and frank disclosure had been made. "What is involved is an analysis [of the corrected ITO] to determine whether there remains sufficient reliable information upon which the search authority could be grounded": R. v. Paryniuk, 2017 ONCA 87, 134 O.R. (3d) 321, at para. 45.

58 Sometimes erroneous information in an ITO will be corrected by simply removing it. Information that should not have been included in the warrant will always be "excised" in this way: Morelli, at para. 45.

59 Erroneous information that would have been appropriate for inclusion in the ITO if presented accurately will sometimes be corrected by "amplification" so that it can be considered during the sufficiency review. Amplification entails adding information that should have been disclosed in order to give an accurate picture or replacing mistakenly inaccurate information with accurate information. When material information that would hinder a finding of reasonable and probable grounds has been improperly omitted, the ITO must be amplified to include it. However, amplification relating to information that could advance the warrant application is permissible only if the error in not making full and frank disclosure is: (1) a "minor, technical error"; and (2) made in "good faith": Araujo, at para. 59; Morelli, at para. 41.

60 Whether the omission satisfies the first of these two amplification prerequisites - the "minor technical error" requirement - depends on the significance and nature of the error.

61 Errors that have been corrected by amplification include: mistakenly attributing observations to the wrong observer (Araujo, at para. 61; R. v. Lewis, 2012 NBQB 312, 395 N.B.R. (2d) 201, at para. 24); mistaken dates and typographical errors (R. v. Crevier, 2015 ONCA 619, 330 C.C.C. (3d) 305, at para. 75; Lewis, at para. 15); and erroneous but unimportant errors in the description of the source of information (R. v. Plant, [1993] 3 S.C.R. 281, at pp. 298-299; R. v. Lall, 2019 ONCA 317, 432 C.R.R. (2d) 195, at para. 39; R. v. Van Diep, 2015 BCCA 264, 373 B.C.A.C. 230, at para. 5.)

> 62 In contrast, amplification was not available for errors that are too significant to qualify as "minor, technical" errors, including: the failure to identify properly the target unit in a plaza (R. v. Ting, 2016 ONCA 57, 333 C.C.C. (3d) 516, at para. 71); the failure to include information supporting the expertise of a police officer (Morelli, at para. 74); and the failure to provide evidence supporting the provenance and reliability of a document of disputed authenticity (R. v. Voong, 2013 BCCA 527, 304 C.C.C. (3d) 546, at para. 52.)
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> 63 Where the erroneous information cannot be corrected because the error is not a "minor, technical" one, it is obvious that it must be excised in its entirety. This is because the uncorrected, erroneous information simply cannot be permitted to remain in the ITO, thereby providing an inaccurate boost to the case for reasonable and probable grounds.
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> 64 The same is true where an officer has not acted in good faith when failing to make full and frank disclosure - the second amplification prerequisite. Given that amplification is confined to "good faith" error correction, it follows that by acting in bad faith, an affiant officer squanders the opportunity to have intentionally misleading information considered in its corrected form by the reviewing judge. The misleading information cannot remain.
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> 65 In some cases, bad faith on the part of an affiant officer can have an even more profound effect. Where an affiant officer's failure to make full and frank disclosure is egregious enough to "[subvert] the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like", a court has the "residual discretion" to set aside the search warrant, even if there would have been reasonable and probable grounds, had there been full and frank presentation of the information: Paryniuk, at para. 69.

The Evidence

[22] Between September of 2021 and January of 2022, D/Cst. Melanie Ross swore ITOs in support of six authorizations relating to the investigation into alleged drug trafficking by Mr. Payne (Ex. 1). The first was denied and the subsequent five were granted.

[23] On September 2, 2021, the affiant applied for a warrant under s. 487 of the *Criminal Code* to search Mr. Payne's residence (JPC #21-1458, Tab 1). That warrant was denied because the Justice of the Peace (JP) was not satisfied there were reasonable grounds to believe that cocaine would currently be found in the residence. The specific problem identified was that the only information that cocaine was presently in the residence was a bald, unsourced, statement from a

police officer that "Joshua Payne was in possession of cocaine in the last 24 hours" (Tab 1, letter and ITO, para. 31).

[24] On November 18, 2021, the affiant applied for an authorization under s. 492.1(1) to track the location of Mr. Payne's vehicle (JPC #21-1899, Tab 2). That authorization was granted. In the ITO to support that authorization, the affiant added information obtained after September 2nd but also modified her description of the information that had been included in the ITO for the earlier warrant that had been denied. The ITOs filed in support of the subsequent authorizations all included the same modified grounds that had been included in the ITO in support of the November 18th Tracking Warrant but also included additional information that had been obtained in the intervening period (Tabs 3 – 6).

[25] The ITOs all included information from the same two confidential sources ("A" and "B"). One of the areas modified by the affiant related to the information provided by Source A. That modification was the focus of argument. Other modifications were less significant but are relevant to whether they disclose a pattern of strategic and misleading edits.

[26] In her ITO sworn on September 2nd, the affiant stated that Source A provided information to Cpl. Andy Bezanson, the Source's handler, about "vetted name" (Tab 1, para. 19). It is agreed that the name vetted from the ITO is not "Joshua Payne" or a variant of that name and that Source A did not use the name "Joshua Payne" or a variant of that name when the source reported information to Cpl Bezanson (Ex. 2). In the ITO, the affiant then stated that Cpl. Bezanson was able to determine that "vetted name" is Joshua David Maxwell Payne and set out the steps he took to arrive at that conclusion (para. 19).

[27] In her ITO sworn on November 18th and all subsequent ITOs, in each case where she reports information provided by Source A to Cpl. Bezanson, she substituted the name Joshua Payne or variants such as "Josh", "Payne" etc. for "vetted name" (Ex. 2; and, see for example, Ex. 1, Tab 2, para. 22).

[28] She also removed the paragraph explaining how Cpl. Bezanson had determined that "vetted name" was Joshua Payne.

<u>Is that Information Erroneous and/or Misleading?</u>

[29] The Crown argued that the substitution was unfortunate but was not erroneous or misleading because "vetted name" is Joshua Payne. The Crown submitted that the affiant's conclusion, based on Cpl. Bezanson's investigation and reasoning, that "vetted name" was Joshua Payne was reasonable and correct. So, presenting it in the way that she did in her subsequent ITOs, did not mislead the issuing JPs because they would have reached the same conclusion if the affiant had drafted the ITO properly.

[30] In support of that argument, the Crown relied on two decisions where it submits the same or a similar situation arose. The first is *R. v. Plant*, [1993] 3 SCR 281. In that case, the affiant for a warrant "deposed that a tipster had reported that there was marihuana being grown in a house at "2618-26th Street SW", in Calgary. In fact, the tipster had reported that marihuana was being grown in "a cute house", beside a house with many windows, on 26th Street between two identified cross streets in Calgary. Police did surveillance of the relevant block on 26th Street, found the "cute house" and noted its civic address. The attribution to the tipster of the exact municipal address – 2618-26th Street – was therefore incorrect." (Crown Brief, para. 24).

[31] The Crown argued that, as in the case before me, the affiant in *Plant* simply compounded the tipster's information with the results of the follow-up police inquiries. In *Plant,* the Alberta Court of Appeal disagreed with Mr. Plant's submission that this was "a serious and deliberate misstatement which would significantly mislead" the issuing judge. Rather, the Court described it as "elision" (an omission or "the process of joining together or merging things, especially abstract ideas", Oxford Languages online dictionary) and said the Court took a "much milder view" of it. The Court found that the description provided by the tipster "unequivocally pointed to a single house". As such, "a step in reasoning has been omitted, but this is not a misstatement of any significance" (*Plant*, 1991 ABCA 116, para 2).

[32] The Crown submits that the Supreme Court of Canada also "had no difficulty with it" (Crown Brief, para. 26). I do not agree with that statement. I accept that the Supreme Court agreed with the decision not to quash the warrant. However, the Court did say that the information included in the ITO "gave the impression that the informant had supplied more detailed facts than was actually the case" and that it was an "erroneous… attempt to draft the information concisely by omitting reference to the step between the general tip and the conclusion as to

the exact address of the residence identified" (*Plant*, SCC, p. 298-299). The Court agreed the warrant should not be quashed because there was no evidence of an absence of good faith or of a deliberate attempt to mislead the issuing justice (*Plant*, SCC, p. 298-299).

[33] The second case relied on by the Crown was *R. v. Feizi*, 2022 ONCA 517. In that case, "the affiant for a general warrant authorizing a controlled delivery and related police action deposed that the package "is addressed to be shipped to Farhad FEIZY at 4 Fernwood Court in Richmond Hill, Ontario", and "was shipped from Iraq to be delivered to Farhad FEIZY of 4 Fernwood Court in Richmond Hill, Ontario." In fact, the parcel was addressed to "4 Frin-Wood Curt Rich Mond Hill Ont Canada, L4B-3C2". The affiant deduced that this was a non-existent address and was meant to be 4 Fernwood Court, Richmond Hill, which he then recited in the ITO. But he did not explain his deductions in the ITO..." (Crown Brief, para. 27).

[34] The Ontario Court of Appeal relied on *Plant* and found that the compounding of details in the ITO was not significant. The Court concluded that the delivery address on the intercepted package was "obviously" not a real address (para. 10). The Court recognized that "the claim that the police had a precise address to be searched" was "inaccurate" and said that the affiant "should have disclosed his reasoning and not just his conclusion" (para. 10). However, the Court went on to say that "what matters is that in *Plant*, as in this case, the Crown was permitted to amplify an inaccurate claim that the police had a precise address to be searched, with evidence explaining how the police identified the address to be searched" (para. 10).

[35] These decisions offer some support for the Crown's position that I should not exercise the residual discretion to quash the authorizations. However, they do not stand for the proposition that the errors were meaningless and that there should be no remedy. Nor do they assist the Crown on the question of whether the name substitution was erroneous or misleading. In both *Plant* and *Feizi*, the reviewing courts agreed that the information provided in the ITO was inaccurate.

[36] I have concluded that the substitution of the name "Joshua Payne" or a variant for "deleted name" was erroneous and could reasonably have misled the issuing JPs.

[37] Source A did not use Mr. Payne's name and the affiant misrepresented that he did. So, irrespective of the accuracy of the conclusion that 'vetted name' and Joshua Payne were the same person, stating that Source A had used his name was erroneous.

[38] The Crown argued that the underlying information was not erroneous, so the substitution was not misleading and did not strengthen the grounds. Essentially, the Crown suggests that since it is accurate to say that Source A was reporting that Mr. Payne was involved in criminal activity, the JPs were not misled, and the grounds were not improved.

[39] I disagree. I have concluded, again irrespective of the accuracy of the underlying conclusion, that the affiant's misrepresentation could reasonably have misled the JPs in a way that improved the grounds.

[40] In my view, the affiant's misrepresentation could reasonably suggest a closer relationship between Source A and Mr. Payne. That would be relevant to the issuing JPs' assessment of the strength of the information because it would also suggest a more intimate knowledge of his illegal behaviour. I say that because stating that Source A used Mr. Payne's real name also, of course, tells the JPs that Source A knew his real name. Knowing someone's real name, especially in the criminal world, suggests a closer and more trusting relationship. Conversely, the fact that Source A never used Mr. Payne's real name could reasonably suggested that Source A did not know his real name. This would be indicative of a more superficial or less trusting, relationship. That would be even more so if "deleted name" was not a nickname, but a different name entirely.

[41] It is also of some relevance that there is no information in the ITO, whether from Source B or police, that Mr. Payne used a nickname or went by another name. If the issuing JPs knew that Source A referred to Mr. Payne by a nickname or different name, that may have caused the issuing JP to assess the information provided by Source A or Source B differently.

[42] The Crown further argued that it was, essentially, inevitable that the issuing JPs would have accepted Cpl. Bezanson's deductions and, combined with the other information in the ITO, concluded that "deleted name" was Joshua Payne. As such, the substitution was not significant.

[43] That was the result in *Plant* and *Feizi*. In *Plant* the Supreme Court concluded that the description provided by the tipster "unequivocally" pointed to the street address used in the ITO, and in *Feizi,* the Court of Appeal concluded that the address on the package was "obviously" not real.

[44] I agree with the Crown's submission that it was always clear that Source A was reporting on an identifiable person. The issue is whether that person was 'unequivocally' or 'obviously', Mr. Payne.

[45] I accept that the path between "vetted name" and Mr. Payne is relatively strong, but it is not without gaps and I cannot conclude that Cpl. Bezanson's information pointed 'unequivocally' to a conclusion that they were the same person. So, I cannot automatically assume that the issuing JPs would have accepted Cpl. Bezanson's determination that "vetted name" was in fact Mr. Payne.

[46] First, on the evidence before me, I cannot say whether Source A used a name that was obviously a nickname or a different name entirely (Ex. 2, ASF – Source A "used another name, identified as 'vetted'"). This is a relatively minor distinction but one that has some impact. If Source A had used a name such as 'Sharkey', an issuing JP might well conclude that it was an 'obvious' nickname, making the path to concluding that Source A was not speaking about an entirely different person easier. However, the path would not be so clear if "vetted name" was not obviously a nickname. For example, if Source A used the name 'Robert' or 'Robert Jones' it might contribute to a conclusion that Source A was reporting on an entirely different person. Alternatively, it might suggest that Mr. Payne had used a false name which, as I said, could suggest a more superficial or less trusting relationship.

[47] The affiant's belief that "deleted name' and Mr. Payne are the same person is based on Cpl. Bezanson's investigation and belief (Tab1, para. 20). It relies on the Source's report that "vetted name" drives a 2020 Grey Acura TLX and that he used to drive a 2019 Black Acura TLX but he crashed it (Tab 1, para. 19(b) & (c)). Cpl. Bezanson then used Nova Scotia RMV and police data base to find all Acura TLX vehicles registered in Nova Scotia and then searched by their plate numbers to find those that had been in accidents (para. 20(a) & (b)). He discovered that NS plate FND 523 was in an accident on July 11, 2020 (para. 20(c)). He then stated that "Nova Scotia license plate was associated to a 2018 Black Acura registered to Joshua Payne (para. 20(d)). This statement discloses three potential issues with Cpl. Bezanson's chain of reasoning. First, he does not say that it was NS Plate

'FND 523' that was associated to the Acura that was registered to Mr. Payne. Second, the vehicle registered to Mr. Payne was a <u>2018</u> Acura, not a <u>2019</u> Acura as reported by the Source. Third, Cpl. Bezanson's information does not confirm that the 2018 Acura was a <u>TLX</u>, a specific model of Acura, as reported by the Source. Cpl. Bezanson did discover that NS Plate FND 523 was currently associated to a "2020 Grey Acura" registered to Mr. Payne so there is a link between that plate and Mr. Payne (para. 20(e)). However, again he does not say this was a TLX as reported by the Source. So, a plate registered to Mr. Payne was in an accident in July of 2020, a 2018 Black Acura (which may or may not be a TLX) was registered to Mr. Payne and the plate that was in the accident in 2020 was currently associated to a 2020 Grey Acura (which may or may not be a TLX).

[48] In the later ITOs there is some cross-corroboration of information that might strengthen the conclusion that Source A is speaking about Mr. Payne, however, that is less so in the November 18th ITO.

[49] Clearly, if the issuing JPs would not have accepted the Affiant's conclusion that "deleted name" and Mr. Payne were the same person, the misrepresentation would have misled them in a more significant way.

[50] That leads me to address an important problem with the way the information was presented. It completely removed the ability of the issuing JPs to assess the strength of Cpl. Benzanson's deductive path. It is broadly recognized that conducting an independent assessment of whether the affiant's belief is reasonable and grounded in credible and reliable information is vital to the ability of the issuing JP to carry out their constitutionally mandated role and an important component of the pre-authorization process. That is why issuing justices insist on proper sourcing of information and courts often say that bald conclusory statements are not entitled to any weight. In this case, by including her conclusion that "vetted name" is Joshua Payne without including her reasons for reaching that conclusion, the affiant essentially made what courts refer to as a bald conclusory statement. If the affiant had stated that Source A reported information related to "vetted name" and then said "I believe 'vetted name' is Joshua Payne" without explanation, that conclusion would have been treated by the issuing JP as a bald, unsourced, statement that was entitled to no weight. The way it was presented meant that the issuing JPs would not have known that's what it was. Rather, they would have understood that Source A had used Mr. Payne's name.

<u>What is the Appropriate 'Remedy'?</u>

[51] As Justice Paciocco stated in *Booth,* "uncorrected, erroneous information simply cannot be permitted to remain in the ITO" (para. 63). There are remedial options to 'correct' grounds in an ITO: omissions that detracted from the grounds can be 'read in' (*Morelli,* para. 60; *Paryniuk,* para. 45; *Booth,* para. 59); minor, inadvertent or technical errors made in good faith can be corrected through the amplification process (see: *Booth,* para. 59); or, inaccurate information can be excised (*Booth,* para. 59). When these options are used, the corrected ITO is then assessed to determine whether what remains can ground the authorization. Where certain types of bad faith have been established, the ITO will not be corrected, and the authorization will be quashed (*Morris; Paryniuk;* and *Booth*).

[52] The question of whether the affiant acted in good faith or bad faith is central to my determination of whether the authorizations must be quashed and, if not, what corrective action may be taken. To exercise my discretion to quash the warrant, essentially, the Applicant must satisfy me that the affiant acted in bad faith. To correct the erroneous information through amplification, the Crown must satisfy me that the affiant acted in good faith. The absence of one does not equate to the presence of the other (*R. v. Beaver,* 2022 SCC 54, para. 209; *R. v. Caron,* 2011 BCCA 56, paras. 33-46; and, *R. v. Lambert and Bailey,* 2023 NSCA 8, paras. 66-76).

[53] The question of bad faith versus good faith turns on the affiant's intent. There is a range of possibilities. At one end, a finding that she deliberately misrepresented the information with the intent to deceive or mislead the JP to improve her grounds would amount to bad faith. At the other end, a finding that she was simply attempting to edit her ITO to make it more concise without intent to deceive or improperly strengthen her grounds would not amount to bad faith (see *Plant,* p. 298-299). However, the latter finding would not necessarily amount to good faith for amplification purposes. As the Supreme Court said in *Morelli,* "[c]oncision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure" (para. 58).

[54] The Defence did not seek leave to cross-examine the affiant and the Crown did not seek to call her for the purpose of amplification. As a result, I have no direct evidence of what was in the affiant's mind when she edited the ITO. The only evidence is in the documents themselves and the ASF. So, I have to determine whether the Applicant has established bad faith and whether the Crown has established good faith based on the inferences I can draw from that evidence.

[55] I have compared the September 2nd ITO with the subsequent ITOs to determine whether there is a pattern to the changes. No changes were made in the subsequent ITOs except to add new information that had become available so I will reference only the ITOs from September 2nd and November 18th:

September 2nd ITO (Tab 1)	**November 18th ITO (Tab 2)**
"He has entries for a traffic accident, tickets and domestic disputes <u>but no previous drug possession or trafficking charges</u>" (para. 21(b), emphasis added)	Removed words "but no previous drug possession or trafficking charges" (para. 23(b))
Surveillance at address associated to Mr. Payne, January 15, 2021: vehicle with plate FND 523 in underground parking; vehicle went to a local mall; and, "no drug transactions were observed" (para. 22(c)).	Surveillance at address associated to Mr. Payne, January 15, 2021: vehicle with plate FND 523 in underground parking. Removed reference to vehicle going to the mall and no drug transactions were observed (para. 26(a))).
Dates upon which she learned about reliability of Source A and Source B from handlers: Source A - September 1, 2021; and, Source B - January 28, 2021 (paras. 16 & 17).	Dates upon which she learned about reliability of Source A and Source B from handlers: Source A - January 14, 2021; and, Source B - May 11, 2021 (paras. 19 & 20)
Information provided by Source B, May 6: para. 25(a) - "Josh Payne "vetted""; and 25(c) – "Payne keeps cocaine at his <u>home</u>" (emphasis added)	Information provided by Source B, May: "Josh Payne "vetted"" removed (para. 28); and, "Payne keeps cocaine at his <u>apartment</u>" (para. 28(d), emphasis added)
Updated query of Mr. Payne on JEIN on September 1, 2021: plate FND 523 still registered to Mr. Payne; and Mr. Payne's driver's licence lists same address (para. 27(d))	Reference to updated query on September 1st removed (paras. 30, 34 & 35)

Information provided by Source A, September 1: para. 30(a)(i) – "vetted"	Information provided by Source A, September 1: that subparagraph removed (para. 34)
Conclusory statement that learned from Cpl. Bezanson that "Joshua Payne was in possession of cocaine in the last 24 hours" (para. 31)	Statement sourced to Source A (para. 35)

[56] It is also informative to look at one aspect of the ITOs that should have been corrected in the November 18th and subsequent ITOs but that was not. In all ITOs, the affiant included reliability information for Source C (Tab 1, para. 18; and Tab 2, para.21 etc.). However, no information was provided from Source C in any of the ITOs.

[57] The Applicant also submitted in their Brief that the affiant made a notable omission in her December ITOs (para. 50). However, that submission is incorrect. The results of the Production Order for the storage facility disclosed that the storage locker that had been accessed by Mr. Payne was rented to a different person (different name, date of birth and credit card). The Applicant incorrectly submitted that the affiant failed to include that in the December ITOs, however, she did include it (Tab 4 & 5, para. 51(b)).

What can I infer about the affiant's intent?

[58] The Crown properly cautions that a finding that the affiant deliberately misled the JPs is a significant finding and the Applicant has the burden to establish it.

[59] I have also considered that the affiant had received specific training on 'Search Warrant Drafting' and dealing with 'human sources' (Ex. 1, Tab 2, paras. 6 & 7). However, 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, para. 19; and, *R. v. Sanchez,* 20 O.R. (3d) 468 (Ont. Ct. (Gen. Div.)).

[60] The affiant made two changes to her ITO that cause me significant concern about her intent: the substitution of Mr. Payne's name for "deleted name"; and, the

removal of the statement that Mr. Payne had no prior record for drug offences. Both were deliberate choices that had the effect of improving the grounds. The latter did not mislead the issuing JPs since, in the absence of a statement that there was a record, they would assume there was none. However, the decision to remove it is concerning. The inclusion of that statement in the first ITO was appropriate and drew the attention of the JP to information that could detract from the grounds. The conscious and deliberate decision to remove it, when taken together with the substitution of the name, can support an inference that she was improperly editing the ITO in order to strengthen the grounds.

[61] The affiant made another change that improved the grounds. She changed the wording of the information provided by Source B on May 6th from Payne keeps cocaine in his "home" to his "apartment" (Ex. 1, Tab 1, para. 25(a) and Tab 2, para. 25(c)). That improved the grounds because databases and photographs confirmed that he lived in an apartment, so, if the Source used the word 'apartment', that would show some familiarity with Mr. Payne's residence. However, I can't draw any inference from this change since I don't know what word the Source used. If the source used the word 'apartment' and the affiant substituted the more generic 'home' in the first ITO and then used the more precise word in the subsequent ITOs, that is not problematic. The substitution only suggests a nefarious intent if the Source said 'home' and the affiant substituted 'apartment'.

[62] Some changes were not improper and suggest editing to remove irrelevant information and to make the document more concise. For example, when modifying the results of surveillance at the address associated to Mr. Payne on January 15, 2021, the affiant removed the reference to the vehicle going to the mall and that no drug transactions were observed (Ex. 1, Tab 2, para. 26). In the context of an alleged 'dial a dope' operation involving drug deliveries at public parking lots, if she had only removed the latter reference, that might support an inference of malicious intent. However, the removal of both the visit to the mall and the absence of any observed drug transactions supports an inference of intent to remove irrelevant information and to make the document more concise. Another example is the removal of an updated database query on September 1st.

[63] The affiant also properly sourced the statement that had caused the JP to reject the first application (para. 31 and para. 35).

[64] There are other problems in the ITO that I will address in a moment. However, I attribute them to careless drafting and inattention. Cumulatively, they may support a finding of overall carelessness or negligence but they do not suggest an intent to deceive for the purpose of improving the grounds. None of these other problems improved the grounds.

[65] Despite my concerns, I cannot infer from the evidence before me that the substitution of Mr. Payne's name for "vetted name" was calculated to deceive or mislead in the sense that the affiant knew the substitution could mislead the JP. It is reasonable to infer that the affiant believed "vetted name" and Mr. Payne were the same person, did not think she was including erroneous information, and did not avert to the possibility that the JP could be otherwise misled.

[66] However, she was, at the very least, careless in how she dealt with that information and failed to present it accurately and fairly to both sides so was not properly focused on her duty to make full and frank disclosure.

[67] Further, the cumulative impact of the problems with the ITOs, leads me to conclude that the affiant was generally careless in her preparation of the ITOs. An example of this is a discrepancy in the dates upon which she received reliability information for Source A. That can be an important detail since the recency of the reliability statement informs the issuing JP's assessment of reliability. It is not uncommon to have two different dates for a source's reliability check. Ideally, an affiant would update the reliability information for a source shortly before swearing the ITO so later ITOs will have a later date for that reliability statement. Here, for Source A, the later ITO had an earlier 'reliability check' date (Ex. 1, Tab 1, para. 16 and Tab 2, para. 19). The affiant also included and failed to remove reliability information for Source C which was entirely irrelevant given that no information was included from Source C in any ITO. She also provided dates upon which the affiant acquired information from the source handlers for each source but did not include the dates upon which each source provided the information to the handler. That is an important detail since recency of information provided by sources is highly relevant.

<u>What is the appropriate 'remedy'?</u>

[68] In deciding whether to exercise my residual discretion to quash the authorizations, I have to ask myself whether, on the record before me, I am satisfied that the conduct of the affiant is egregious enough to subvert the pre-

authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like? I have reminded myself of Justice Paciocco's comments from *Booth* concerning the purpose of the pre-authorization process, the significance of the fact that it is an *ex parte* process, the privilege that affords Affiants, and the corollary duty.

[69] I have also considered the decisions in *Plant* and *Feizi.* I view the misrepresentation in the case before me to be more significant than in those cases. Here, the affiant swore that Source A repeatedly said that Mr. Payne was involved in criminal activity when the source had used a different name. That is more serious than substituting a civic address for a description that "unequivocally pointed to a single house" (*Plant*) or substituting a real address for a non-existent address where the difference was essentially two letters in the street name (*Feizi*). However, the significance of the misrepresentation is only one factor in the decision to quash.

[70] The central question is whether the Applicant has established that the affiant acted with bad faith. Based on the evidentiary record before me, I am not satisfied that she did. The two problematic changes did strengthen the grounds and directly impacted the duty to make full and frank disclosure because they related directly to the suspicion that an offence had been committed, the suspicion that tracking Mr. Payne's vehicle would assist the investigation, and/or the weight the issuing JPs should place on the information provided by Source A. However, on the record before me, I cannot infer that the Affiant deliberately sought to deceive the issuing JPs or that her conduct was otherwise so egregious that the pre-authorization process was subverted. Therefore, I will not exercise my residual discretion to quash the Authorizations.

[71] However, as I have said, the Affiant misrepresented the information from Source A and there was a real risk that the issuing JP was misled about the strength of that source's information. The use of Mr. Payne's name was erroneous. Uncorrected erroneous information cannot be permitted to remain in an ITO.

[72] That requires me to consider whether the Crown can amplify the information by including the information that was provided in the first ITO. That is essentially what was done in *Plant* and *Feizi* - the courts excised the erroneous information and allowed the Crown to amplify to correct it.

[73] The two requirements for amplification are that the error is "minor and technical" and that the error has been made in good faith. The errors in *Plant* and *Fiezi* were treated as minor and technical and, in *Booth,* Justice Paciocco provides examples of errors that were and were not found to be minor and technical (paras. 61 & 62). What is meant by 'good faith' has been addressed by courts in the amplification and s. 24(2) contexts. It is present where officers act in accordance with what they honestly, reasonably, and non-negligently believe to be lawful (see: *R. v. Van Diep,* 2015 BCCA 264, paras. 32 & 49-50; and, *R. v. Washington,* 2007 BCCA 540, para. 78).

[74] Here, for the reasons set out above, I do not believe the error was minor and technical. Further, while I have not been persuaded the error was made in bad faith, I am also not persuaded it was made in good faith. The Crown did not call the officer to explain her error so I am left with what I can infer from the ITOs and the Agreed Statement of Fact. If, as I have found, the affiant honestly believed she was not including erroneous information or misleading the J.P.s when she made the name substitution, that belief was not reasonable. She was negligent toward her duty to make full and frank disclosure. She was an experienced officer who had received training on the preparation of search warrants and the handling of confidential sources. She should have known she could not depose that Source A had named the subject of the investigation when that was not the case.

[75] Therefore, I will not permit amplification and the erroneous information must be excised. Technically, the erroneous information is the name "Joshua Payne" or its variants, not the entirety of the information provided by Source A. However, the Crown agrees that removing the name guts Source A's information of any relevance, so it is the equivalent of excising Source A's information in its entirety.

<u>Are the ITOs Sufficient?</u>

[76] I must now assess the sufficiency of the grounds in the ITOs based on the revised record.

[77] 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, <u>could</u> grant it (*R. v. Garofoli,* [1990] 2 S.C.R. 1421). I am aware that, as the reviewing judge, I should not substitute my view for that of the authorizing judge (*Garofoli,* p.1452). However, in this case, the revised record has produced fundamentally

different grounds so I have to consider whether the authorizations could have been issued on this record.

[78] The authorizations here were issued under different provisions, with different requirements and different standards for issuance. The standard for issuance of the first, the tracking warrant, was 'reasonable grounds to suspect'. That standard is framed in terms of possibilities rather than probabilities. A 'reasonable suspicion' requires something more than a 'mere suspicion' but less than a reasonable belief (*R. v. Kang-Brown*, 2008 SCC 18, para. 75; and, *R. v. Mahmood*, 2011 ONCA 693, paras. 113-114).

[79] The subsequent authorizations all had the higher standard for issuance – reasonable grounds to believe – albeit with different specific requirements. That standard has been interpreted to mean 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, para. 114; *R. v. Jir,* 2010 BCCA 497, 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).

[80] In each ITO, the affiant stated her subjective belief or suspicion that each of the requirements for the respective authorization were met.

[81] However, that is not sufficient. She also had to show the issuing justice that her suspicion or belief was objectively reasonable and grounded in credible and reliable information (*Araujo*, para. 51; *R. v. Bisson*, [1994] 3 S.C.R. 1097, p. 1098).

[82] The affiant's suspicion or belief does not have to be based on personal knowledge. Hearsay is permitted but it must be sufficiently sourced to allow the issuing JP to carry out their constitutionally mandated role - to independently assess whether the affiant's belief is reasonable and grounded in credible and reliable information.

[83] 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.

[84] To assess whether information from Source B provides reasonable grounds, I will consider the three factors identified in *Debot* and applied in *Garofoli*:

(1) Is the tip (information) compelling?

(2) Is the source credible?

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

[85] 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.

[86] The exercise of reviewing an ITO for sufficiency necessarily involves critiquing it. However, the issue is not the quality of the product from an editorial perspective, nor is the question whether more could have been done by investigators. The question is whether what is present could have met the standard for issuance.

<u>Authorization for Vehicle Tracker, November 18, 2021 (Ex. 1, Tab 2)</u>

[87] I'll first assess whether the ITO sworn November 18th met the requirements for issuance of the tracking warrant under s. 491.1(1). The requirements for that warrant are reasonable grounds to suspect that:

- An offence, in this case a CDSA offence, has been or will be committed; and,

- tracking the location of the vehicle will assist in the investigation.

[88] After excision, the ITO includes information from one confidential source, Source B, police surveillance, information obtained from various databases and the experience-based opinions of the affiant and other officers.

[89] The ITO was sworn on November 18th and the affiant acquired information from Source B's handler on May 6th, September 20th, and November 3rd (Ex. 1, Tab 2). The ITO does not include the dates that Source B provided the information to the handler, but the Crown submits that there is nothing to suggest a large delay

between when Source B gave the information to the handler and when it was conveyed to the affiant.

[90] On May 6th, the affiant learned that the Source had reported that Payne: is busy selling cocaine; meets people in parking lots to sell them cocaine; keeps cocaine in his apartment; and, keeps smaller amounts on him when he goes to sell and goes back and forth to his apartment to get more (para. 28).

[91] On May 12th, surveillance officers observed Mr. Payne (para. 31): drive away from his residence; enter and exit a dead-end street; return to his residence for a "short time"; leave again and enter a pizza parlour without ordering food; drive into a bank parking lot where he parked for a couple of minutes; and, then return home. The affiant stated that the surveillance officer believed that when Mr. Payne entered and exited the dead-end street, he was conducting a "heat check where a person is looking to see if the police are following them" (para. 31(c)(i)). That kind of lay opinion from a police officer is permissible, however, in the absence of further rationale for the belief, its weight is considerably diminished. Surveillance officers lost sight of Mr. Payne when he was in the bank parking lot so they could not say whether he met with anyone (para. 31(f)(i)).

[92] On August 5th, surveillance officers observed Mr. Payne (para. 33): drive from his residence to a parking lot; park next to another vehicle and a woman got out of the passenger side of Mr. Payne's vehicle and entered the other vehicle, a rental vehicle; return to his residence; leave his residence and go to an address where he parked in front of the main door for six minutes; leave and go to a gas station where he bought gas. The affiant states that police believed the female who was seen getting out of Mr. Payne's vehicle at the first stop had originally been in the other vehicle and got into his vehicle when he arrived. The affiant states this is consistent with drug trafficking (para. 33(d)(i) & (ii)). The affiant does not state the basis for her belief (or that of the surveillance officer) that the female had originally been in the other vehicle. For example, the information does not suggest that Mr. Payne was observed to be alone in his vehicle when he left his residence and drove to that location.

[93] On September 20th, the affiant learned that Source B had reported that Payne: was in possession of a lot of cocaine; makes deliveries personally; and was in possession of cocaine in the last 48 hours (para. 37).

[94] On October 13th, surveillance officers observed Mr. Payne (para. 39): drive from his residence to a hotel parking lot where he met a male in another vehicle for less than three minutes; and, return to his residence. During the same surveillance, police observed the male whom Mr. Payne had met drive to another parking lot where he remained in his vehicle for about 10 minutes. During that time, police observed him moving around and holding a large zip lock bag (para. 39 (e)-(h)).

[95] On October 27th, surveillance officers observed Mr. Payne (para. 43): drive from his vehicle to a parking lot; leave that lot and drive to a self storage facility; and enter the facility where he remained for four minutes before leaving. The affiant states that his conduct in the first parking lot, staying in his car without turning it off, was a 'heat check' (para. 43(b)(i)). Again, that conclusion is not expanded on.

[96] The affiant states that it is common for drug traffickers to use multiple addresses to store drugs, money, and weapons, including storage lockers, and explains the basis for her belief (para. 44).

[97] On November 3rd, the affiant learned that Source B had reported that: Payne sold cocaine over the weekend; his busiest nights for selling cocaine are Friday and Saturday nights; he was in possession of multiple bags of cocaine on the weekend; he sells cocaine by the gram, 5 grams or larger; and, he keeps cocaine in his vehicle when he is selling (para. 46).

Analysis of Grounds

[98] I will use the *Debot* factors to guide my analysis of the Source information. Of course, I have to assess the strength of that information globally and I also have to assess that information together with the other information in the ITO to determine whether the standard for issuance is met.

(1) Is the information compelling?

[99] This requires consideration of whether the information is sufficiently detailed to preclude the possibility that it was based on mere rumour, gossip, speculation or coincidence.

[100] The information from Source B about the drug operation is relatively detailed in that it includes knowledge of the type of drug, quantity of drug, and

specifics about his method of operation. Source B provides very little information about Mr. Payne or his lifestyle. Source B reports that he lives in an apartment and drives a car. However, Source B does not provide: any physical description of Mr. Payne that might suggest he knew Mr. Payne personally (no approximate height, hair colour, approximate age, or ethnicity); information about his occupation; information about his marital status; any information that would show that he'd ever been inside his residence (no description of the layout or details of where he keeps his drugs); or, any information suggesting he had personally seen Mr. Payne deliver cocaine (no description of his vehicle).

[101] When Source B's information is read as a whole, it contains quite a bit of detail about Mr. Payne's criminal activity and method of operation.

[102] However, in assessing whether the information is 'compelling', I also must consider that it is not clearly based on personal knowledge. The affiant stated that Source B provided information based on "direct contact with the persons informed on and also from speaking with persons who spoke directly with the person informed on" (para. 20(j), emphasis added). The ITO does not distinguish between what information came from direct contact and what information came from others who had direct contact. So, unless the context suggests otherwise, it is equally possible that each observation came from others. The reliability and credibility of that intermediary or intermediaries cannot be assessed. As a result, even if Source B had good reliability and credibility, that would not establish the reliability and credibility of the information. This makes corroboration much more important.

[103] Further, recency of the information provided by a source is relevant to the assessment of whether the information is compelling. As I mentioned, the affiant did not specify what dates the Source provided the information to the handler, just the date the handler provided it to the affiant. There is nothing in the information itself that suggests it is either current or dated. I have inferred that the information received from the handler on November 3rd was provided by Source B sometime after September 20th and the information received from the handler on September 20th was provided sometime after May 6th. I say that because I believe that if the information provided to the affiant on each date was known to the handler when he spoke with the affiant on the previous date, it would have been passed on then. As such the November 3rd information was relatively recent but it is difficult to reach any such conclusions for the May 6th and September 20th information.

(2) Is the source credible?

[104] The credibility of a confidential informant can be assessed through past performance, a review of a criminal record, or through details that can be corroborated through other investigative means, scrutinized for plausibility, and assessed to determine whether they support what might otherwise be a bald assertion or statement of belief by a source.

[105] The ITO contained information about Source B's history with police (para. 20). Source B had a limited history as an informant. Source B had provided information that had been relied on and partially validated but had not led to charges or convictions. Specifically:

- Source B had been a confidential informant for six years and provided information that had been corroborated through information from other confidential informants, database checks and physical surveillance;
- In 2018 and 2019, Source B had provided information that led to:
    - a tracking warrant and transmission data recorder warrant;
    - a search warrant that disclosed some evidence of CDSA trafficking but not enough to allow for charges; and,
    - a search warrant that led to the seizure of drugs; and,
- Source B was financially motivated and had been paid for information more than five times with the most recent payment in the summer of 2019;

[106] There is no reference to Source B having a criminal record, so I assume there is none.

[107] In my view, Source B had relatively weak 'past proven reliability'. That is not fatal to a conclusion that a source is credible. Even information from anonymous tipsters can provide reasonable grounds. However, where there is limited history to support reliability, other means become more important, such as details that speak to personal knowledge and corroboration.

[108] Source B was financially motivated and had been paid for information. Financial motivation and payment tend to increase confidence in a source's credibility because presumably the source will know that if they provide false information, they will not be paid for information in the future.

(3) Has the information been independently corroborated?

[109] Independent confirmation can be a powerful tool to assess a source's reliability, so corroboration or lack thereof is inextricably linked to the assessment of a source's credibility and reliability. If information provided by a source is confirmed in some respects, the issuing justice and reviewing court can have more confidence that it is safe to rely on other pieces of information that are not capable of corroboration. In contrast, where information provided by a source is proven to be incorrect, it can cause concern that the source is unreliable or incredible.

[110] The quality and type of confirmation also matters. It is not necessary and usually not possible to have independent corroboration of criminal behaviour. As has been repeatedly said, police will rarely be able to corroborate information of criminality to the extent that they observe the commission of the offence (eg. *R. v. Caissey*, 2007 ABCA 380). However, confirmation of information that would be public knowledge or easily discoverable will not help much in assessing the reliability of a source's information.

[111] There is some corroboration of the information provided by Source B. Through database checks, the affiant obtained Mr. Payne's address and information about the vehicle that was registered to him which corroborated information provided by Source B that Mr. Payne lived in an apartment and drove a vehicle (May 11th, para. 30 and address updated on September 14th, para. 36).

[112] Police surveillance also broadly corroborated Source B's information that Mr. Payne was engaged in criminal activity and the Source's description of Mr. Payne's method of operation. For example, observations of what were believed to be 'heat checks' on May 12th and October 27th and observations of conduct that would be consistent with Mr. Payne delivering drugs on August 5th and October 13th. Their observations from October 13th are more suggestive of a drug delivery and less amenable to innocent interpretation (para. 39). In contrast, their observations from August 5th would be equally consistent with non-criminal activity (para. 33). The woman may have been in Mr. Payne's car and he simply gave her a drive to the other car and he was not seen meeting anyone at the building where he stopped.

[113] On October 27th, surveillance officers observed conduct that is consistent with keeping drugs or money in a storage locker but equally consistent with

keeping anything else in a storage locker (para. 43). Source B made no mention of a storage locker.

[114] Other information has not been corroborated, apparently because police did not seek to confirm it. For example, Source B reported on November 3rd that Mr. Payne's busiest nights for selling cocaine are Friday and Saturday nights (para. 46). The ITO does not include any surveillance from a Friday or Saturday night.

[115] This authorization could only be issued if the ITO contained credible and reliable evidence that would permit a finding that there are reasonable grounds to suspect that an offence had been or would be committed and that tracking Mr. Payne's vehicle would assist the investigation.

[116] Despite the weaknesses, when the ITO is viewed as a whole, I am satisfied that standard has been met. The information provided by Source B, together with evidence from police surveillance and allowing for reasonable inferences, supports a reasonable suspicion that Mr. Payne was involved in drug trafficking and that tracking the location of his vehicle would assist the investigation.

Subsequent Authorizations

[117] The subsequent authorizations all have the 'reasonable grounds to believe' standard for their issuance. Each has its own specific requirements which I will address later where the differences are relevant.

Production Order for Documents from Storage Inn, JPC# 21-2024 (Ex. 1, Tab 3)

[118] The affiant sought the production of documents pursuant to s. 487.014: the storage unit rental agreement; the PIN code associated with the locker entered by Mr. Payne on specific dates; and, video for those same dates. The requirements for issuance are reasonable grounds to believe that:

- An offence had been or will be committed;
- The document or data is in the possession of the named business; and,
- The document or data will afford evidence respecting the commission of the offence.

[119] The ITO for this Authorization was sworn December 9, 2021, and the grounds are the same as for the Tracking Warrant with the exception of the addition of Tracking Data (para. 47), additional surveillance observations (para. 48) and summarizing paragraphs where the affiant links the evidence to the specific information being sought (paras. 49-52).

[120] The tracking data covered the period between November 24th and December 5th. From that information (para. 47), the affiant learned that the vehicle made numerous quick stops. Specifically:

- Wednesday, November 24th – one quick stop at Chadwick Place;
- Thursday, November 25th between 11:52 a.m. and 1:35 p.m., the vehicle made two quick stops at a plaza and one stop at a street address interspersed with a 15-minute stop at the Storage Inn Self Storage and a brief stop at Mr. Payne's residence;
- [Saturday] December 4th (the ITO says both December 4th and 5th were Sundays but the 4th was a Saturday) at 12:50 p.m., the vehicle made a 10-minute stop at a shopping area parking lot; and,
- Sunday, December 5th between 3:30 p.m. and 12:30 a.m. the vehicle made about 13 brief stops at various shopping plazas, street addresses, or parking lots, interspersed with two stops at the Storage Inn Self Storage and five stops at Mr. Payne's residence.

[121] This information is consistent with drug trafficking and broadly corroborates the information provided by Source B that Mr. Payne personally makes deliveries and goes back and forth to his apartment to restock. However, it contradicts Source B in an important detail. Source B said that Mr. Payne's busiest nights were Fridays and Saturdays (para. 46). The summary included in the ITO shows that over the two weeks the tracker was collecting data, the only time Mr. Payne's vehicle was active at night was on a Sunday evening and there is virtually no evidence of activity on Fridays and Saturdays. Mr. Payne's vehicle made only one quick stop on one Saturday. No suspicious stops are reported for Friday, November 26th, Saturday November 27th, or Friday, December 3rd.

[122] The Tracking data does show frequent trips to the storage locker interspersed with the alleged drug deliveries and the affiant explains, based on her experience,

how that potentially supports drug trafficking. However, again I note that Source B did not provide any information about a storage locker.

[123] Further surveillance was conducted on December 8th, a Wednesday. On that date Mr. Payne's vehicle was observed at a street address that his vehicle had been tracked to on November 25th. Mr. Payne left the residence and got into the vehicle. He then put something in the trunk, turned off the vehicle, and went back into the residence. Mr. Payne then left the residence and drove to the Storage Inn where he stayed for 10 minutes. The activity at the residence is consistent with Mr. Payne using the address as a 'stash house' (Tab 4, para. 53)

Conclusion on Sufficiency

[124] For this Production Order to issue, the ITO, when viewed as a whole, must contain ". . . 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 or would be committed (*Morelli*, para. 40).

[125] A decision about sufficiency of grounds will always be highly contextual and fact specific. However, other decisions can provide guidance on how the sufficiency analysis should be applied to different evidence (Eg. *Wallace*; *R. v. Liberatore*, 2014 NSCA 109; *R. v. Rocha,* 2012 ONCA 707; *R. v. Caissey,* 2007 ABCA 380; *R. v. Campbell,* 2003 MBCA 76; and, *Plant*).

[126] Here, the evidence of a criminal offence comes primarily from Source B.

[127] Like the case before me, in *Wallace*, there was only one source who had limited previous history. However, the Source in *Wallace* provided information that was detailed, recent and corroborated. The Court of Appeal upheld the trial judge's conclusion that the search warrant was valid. The source also provided information that was detailed and specific in terms of type and quantity of drug, the presence of a specific weapon in the house, and a description of the house. That information was sufficiently detailed to show that they had been in the residence recently and had seen drugs there. Further, there was information that Mr. Wallace had been charged just three weeks earlier with possession of the very substances the source was saying he was selling.

[128] In the case before me, Source B had limited past proven reliability. As I said, shortfalls in one area may be made up for by strengths in another. So, the

Source's limited past reliability could be compensated for if they provided details that demonstrated direct knowledge and/or there was corroboration. In my view, they do not.

[129] Given the description of Source B's qualifications, it is possible that their information has come from an intermediary and there is nothing in the information or surrounding context that suggests personal/direct knowledge. That intermediary is of unknown reliability. The limited 'lifestyle' information provided by Source B is corroborated. However, Source B did not provide any other details that would suggest direct knowledge of Mr. Payne or that were capable of corroboration. Source B's general information that Mr. Payne delivers drugs personally and meets people in parking lots was corroborated by surveillance and the tracking data. However, the absence of detail such as the make or model of car makes it unclear whether Source B personally saw this. Further, the specific information that he is busiest on Friday and Saturday nights is not consistent with the tracking data and not corroborated by any surveillance. Finally, Source B did not mention that Mr. Payne used a storage locker as part of his operation. The tracking data and surveillance observations establishes that Mr. Payne has a storage locker and, together with the affiant's experience, supports a belief that if Mr. Payne is involved in drug trafficking, he probably used the storage locker in connection with that business. The lack of information from Source B about the storage locker shows some lack of familiarity with Mr. Payne's alleged operation.

[130] Based on the revised record, the ITO, viewed as a whole, does not contain sufficient credible and reliable information to support reasonable grounds to believe that an offence had been or would be committed.

[131] As such, I find that the production of documents from Storage Inn was a violation of Mr. Payne's s. 8 right to be free from unreasonable search and seizure.

Remaining Authorizations (Ex. 1, Tabs 4 - 6)

[132] The warrants to search the residence, vehicle, and storage locker were granted under s. 11 of the *Controlled Drugs and Substances Act* and the warrant to search the phones was granted under s. 487 of the *Criminal Code.* They all require the information in the ITO to meet the 'reasonable grounds to believe' standard and all require, either directly or indirectly, a reasonable belief that an offence has been committed.

[133] The *CDSA* warrants obtained on December 10th do not contain any additional evidence except the results of the Production Order for Documents from Storage Inn (JPC# 21-2024) and summarizing paragraphs tying the information contained in the ITO to the specific requirements of the authorization that was sought. The Crown did not dispute that if I concluded that grounds for the Production Order were insufficient, information obtained as a result of that authorization should be excised from subsequent ITOs (Tab 4 & 5, paras. 51& 52).

[134] For essentially the same reasons as for the Production Order, I have concluded that the grounds for these additional warrants were insufficient.

[135] Similarly, the warrant to search the cellular phones, obtained on January 21, 2022, added the results of the searches of the storage locker, Mr. Payne's apartment and vehicle. The Crown agreed that if the *CDSA* warrants were invalid, the information resulting from those authorizations should be excised from subsequent ITOs (Tab 6, paras. 17 & 18).

[136] As such, I find that these searches also violated Mr. Payne's s. 8 right to be free from unreasonable search and seizure.

Should the Evidence be Excluded under s. 24(2)?

[137] The Applicant seeks exclusion of all evidence obtained pursuant to these authorizations. Details about what information was produced from the Storage Inn is included in the ITOs for the December warrants (Tabs 4 & 5, paras. 51 & 52). Information about what was seized from the storage locker, residence, and vehicle is included in the ITO for the cell phone warrant (Ex. 1, Tab 6, paras. 17 and 18).

[138] That includes:

Storage Inn

- Rental Documents
- Access PIN for locker
- Video surveillance.

Storage Locker

- Loaded 22 caliber hand gun, magazine with 8 rounds and case
- $40,000 Canadian Currency
- 85 Hydromorphone pills
- A Safe
- 154.1 grams suspected cocaine

Mr. Payne's Residence and Vehicle

- Knife / brass knuckles
- 22 calibre ammunition
- $3,560 Canadian currency
- 40 Hydromorphone pills
- Scales and other paraphernalia associated with cocaine trafficking
- Two cell phones
- 666 grams of powder believed to be cutting agent

Cell Phones

- Variety of data

[139] Having found that the searches breached Mr. Payne's *Charter* rights, there is no dispute that the threshold requirement for a s. 24(2) remedy, that the evidence has been "obtained in a manner" that breached Mr. Payne's *Charter* rights, has been met. 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. This requires me to consider the general principles and the three well-known factors outlined in *R. v. Grant,* 2009 SCC 32*,* and *R v. Harrison,* 2009 SCC 34.

[140] Those factors are (*Grant,* 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.

[141] The focus of the disagreement here relates to the first factor.

Factor 1 – The Seriousness of the *Charter* - infringing Conduct

[142] This first factor requires me to consider whether there is a need for the Court to disassociate itself from the police misconduct (*R. v. Tim*, 2022 SCC 12, para. 82). 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).

[143] Courts recognize a spectrum of misconduct. At one end are inadvertent or minor violations and at the other is conduct that demonstrates willful or reckless disregard because police knew or should have known their conduct breached the *Charter* (*Grant,* para. 73).

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

> **27** … Police conduct that shows "a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute": *R v Grant*, at para. 74.
>
> **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.

[145] 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 should 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). These comments by Justice Rosenberg have been recently cited with approval by the Nova Scotia Court of Appeal (*Lambert and Bailey*, paras. 85-87)

[146] 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. 33-36). 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).

[147] Justice Rosenberg's analysis from *Rocha* was implicitly adopted by the Nova Scotia Court of Appeal in *Lambert and Bailey* (paras. 85-91). *Rocha* was also 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.

[148] 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. (emphasis added)

[149] I again have to consider the 'good faith' or 'bad faith' of the affiant. In refusing to exercise by discretion to quash the warrants under the residual ground, I found I was not satisfied that that the affiant had knowingly relied on false information, deliberately misled the JP or that her conduct otherwise subverted the pre-authorization process.

[150] In the s. 24(2) context, it has been said that 'bad faith' and 'good faith' "connote mental states that are at the opposite poles of a spectrum" (*Lambert and Bailey,* para. 70, citing *R. v. Fan,* 2017 BCCA 99, para. 71; and, *Caron,* para. 38). The Nova Scotia Court of Appeal has said that "'bad faith' equates with 'flagrant disregard'" (*Lambert and Bailey,* para. 70). The British Columbia Court of Appeal has said that "[t]o constitute bad faith the actions must be knowingly or intentionally wrong" (*R. v. Smith,* 2005 BCCA 334, para. 61).

[151] I do not conclude that the affiant showed a 'flagrant disregard' for her duties or that she 'knowingly or intentionally' sought to mislead the JPs. However, I repeat that the absence of 'bad faith' does not equate with 'good faith' (*Lambert and Bailey,* para. 70; and, *Caron*, paras. 33-46).

[152] The affiant is an experienced officer with training in the preparation of search warrants and the handling of confidential informants. The affiant included erroneous and misleading information in the ITOs, she was negligent in relation to her duty to full and frank disclosure, and, overall, she demonstrated carelessness in her drafting. I would place her conduct closer to the 'bad faith' end of the spectrum than to the 'good faith' end.

[153] As such, I view the *Charter* offending conduct here to be serious, high on the spectrum, and reduced only slightly by the fact that warrants were obtained. Admitting the evidence would send a message that the court condones this kind of attitude toward the duty to make full and frank disclosure and the *ex parte* nature of the pre-authorization process.

[154] This factor strongly favours exclusion.

Factor 2 – The Seriousness of the Impact

[155] Analysis of the second factor, the seriousness of the impact of the breach on the *Charter*-protected interests of the accused, requires me 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,* para. 77).

[156] The Crown concedes that Mr. Payne had a high expectation of privacy in the storage locker, his apartment, and his phones. So, for those, the degree to which his right was violated is high on the spectrum of intrusiveness. He had a lower expectation of privacy in the documents produced from the business and in the vehicle so the impact is also lower.

[157] This factor strongly favours exclusion of the evidence seized from the storage locker, apartment and cell phones, and much less so for the documents obtained from the business and the evidence seized from the vehicle.

Factor 3 – Society's Interest in an Adjudication of the Case on its Merits

[158] Under the third factor, 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,* 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.

[159] The evidence here is reliable and crucial to the Crown's case. This type of evidence "will generally pull toward inclusion" (*Tim,* para. 96). As was stated in *Grant,* "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" (para.81). Of course, the 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).

[160] The offences here are very serious. They include possession of a loaded handgun, possession of Schedule I substances, and the toxic combination of the two. The firearm was in the storage locker, not in a motor vehicle or on Mr. Payne's person, but that only slightly lessens the seriousness of the offences.

[161] The Crown concedes that the seriousness of the offences has the potential to 'cut both ways' in the s. 24(2) analysis (*Grant,* para. 84). That is because "… while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high. (*Grant,* para. 84).

[162] However, handguns may require special consideration under this factor. I recognize that there is no 'firearms exception' under s. 24(2) requiring guns to be admitted where *Charter* rights are breached (*R. v. Omar,* 2018 ONCA 975*,* paras. 56 & 122-123). However, there is no question that guns and drugs are a grave problem, the "proliferation of illegal handguns is a compelling societal concern", and the "prevalence of gun violence" threatens public safety (*Omar,* paras. 54 & 123; and, *R. v. White,* 2022 NSCA 61, para 88).

[163] In *Omar,* Brown, J.A. said that illegal firearms must be treated differently than other evidence for s. 24(2) purposes (paras. 122-139). He was writing in dissent, but a majority of the Supreme Court allowed the appeal, confirming the trial judge's decision to admit the gun, substantially for the reasons given by Brown, J.A. (2019 SCC 32). That suggests a recognition by some members of the Supreme Court of Canada that possession of a loaded handgun is in a special category of seriousness.

[164] In *White,* the Nova Scotia Court of Appeal endorsed parts of Brown J.A.'s analysis from *Omar,* including his comments that the term "administration of justice" in s. 24(2) includes the need to maintain the rule of law, including the rational desire of the community to be free from the "lethal threat of illegal handguns" and live in safe and ordered communities (*Omar,* para. 135, cited in *White,* para. 88).

[165] In all the circumstances, this factor strongly favours admission.

Balancing

[166] 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,* para 70; and, *Harrison,* para. 36). As was stated in *Harrison* (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.

[167] As I said, the third factor strongly favours admission. The Supreme Court in *Grant* specifically noted that the third factor is not determinative, should not be given disproportionate significance, and must be considered in the context of the case as a whole. This was reiterated in *R. v. Paterson,* 2017 SCC 15, where the Court said it is important not to let this third factor 'trump' the other considerations (para. 56). However, in *Omar*, a majority of the Supreme Court, by agreeing with Justice Brown's reasons, seem to view the third factor as carrying more weight in the balancing when the evidence includes an illegal handgun (*Omar,* ONCA, para. 138).

[168] Handguns have been excluded since *Omar,* including loaded handguns in vehicles, in the personal possession of accused, and when possessed along with drugs. In fact, not long after its decision in *Omar*, a different majority of the Supreme Court in *R. v. Le,* 2019 SCC 34, overturned a trial judge's decision and excluded a firearm. Lower courts have also excluded handguns, including loaded handguns that are in vehicles or carried by the accused (see: *R. v. Mitchell,* [2021] O.J. No. 5019 (C.J.); *R. v. Frederick,* 2021 ONSC 7140; *R. v. Mohammed,* [2023] O.J. No. 5085 (C.J.); and *R. v. Stevens,* 2020 ONCJ 196).

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

[170] The *ex parte* nature of the pre-authorization process is vital to effective law enforcement. That process will only continue to have the respect and confidence of those involved in the criminal justice system and the general public if its fundamental tenets are assiduously respected by police and monitored by the courts. One of those tenets is the duty of affiants to make full and frank disclosure.

[171] Exclusion of a handgun and Schedule I substances in circumstances where that will result in acquittals is a large price for society to pay, but necessary in this case to ensure ongoing faith in the pre-authorization process and to maintain *Charter* standards (*Harrison*, para. 42).

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

Elizabeth Buckle, JPC