SUPREME COURT OF NOVA SCOTIA
Citation: ***R. v. Simon***, 2019 NSSC 69

Date: 20190226
Docket: PH No. 475341
Registry: Port Hawkesbury

Between:

Sean Dale Simon

Applicant

v.

Her Majesty the Queen

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Frank C. Edwards

Heard: January 30, 2019 in Port Hawkesbury, Nova Scotia

Subject: CDSA
CCC s. 495(1)
Charter ss. 8, 9, 24(2)

- Arrest without Warrant
- Search Incidental to Arrest
- Search Warrants & ITO

Facts: Applicant charged with possession for the purpose of trafficking. Police, acting on a tip from a confidential source had stopped Applicant when he was driving home from work. Applicant arrested for possession for the purpose; search of vehicle found dexamphetamine capsules in centre console. Police then prepared an ITO; warrant issued and Applicant's home searched. No drugs found in residence but did find scales and cash counter. Applicant made application pursuant

to ss. 8, 9, and 24(2) of Charter.

Result: Arrest and detention unlawful. Police acting upon unreliable and vague source information. Search incidental to unlawful arrest likewise unlawful.

Search of residence also unlawful. ITO did not have sufficient information to enable issuing authority to form reasonable grounds to justify issue of warrant. The warrant **could** not have been issued based upon the relevant information provided.

Cases Noticed:

R. v. Castillo 2011 ONSC 3257
R. v. Debot 1989 Can II 13 (S.C.C.)
R v MacDonald, 2014 NSSC 218
R v Storrey [1990] 1 SCR 241
R v Dunbar, 2008 NSPC 39 (Can LII)
R v Grant, 2009 SCC 32
R v Capson, 2019 NSSC 20

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Counsel:	Robyn L.M. Fougere, for the Applicant Wayne MacMillan for the Respondent

By the Court:

Background:

[1] The Applicant is charged with possession of dexamphetamine and codeine for the purpose of trafficking; substances listed in schedule l of the *Controlled Drugs and Substances Act.* He now applies under sections 8, 9 and 24(2) of the Charter for an Order excluding evidence obtained at a vehicle stop on August 30, 2017 and during a search of his home on the same date.

[2] On August 30, 2017, Cpl. Kuchta alleges that he received source information that the Applicant was in possession of dexamphetamine capsules and was selling these capsules in the Port Hawkesbury area. At 5:11 pm on August 30, 2017, Cpl. Kuchta stopped the Applicant's vehicle, in Port Hastings, Nova Scotia, and placed him under arrest for possession for the purpose of trafficking. He proceeded to search the Applicant's vehicle and located 13 dexamphetamine capsules and one codeine pill in the centre console.

[3] Cpl. Kuchta was aware that the Applicant was working on that date at Island Concrete on Highway 105 (outside of Port Hawkesbury). Cpl. Kuchta made numerous patrols past Island Concrete on that particular day and confirmed that the Applicant's vehicle was parked at his place of work. Cpl. Kuchta parked and waited for the Applicant at the Rotary in Port Hastings.

[4] After the traffic stop and incidental search, Cpl. Kuchta contacted Cst. Darren Legere and requested he prepare an *Information to Obtain* a Warrant to search the Applicant's residence.

[5] A warrant was issued, and executed. The attending officers did not locate any illegal drugs in the Applicant's home. They did locate a cash counter in a box wrapped in black plastic in the rafters of the garage and two scales.

Issues:

[6] **Issue 1: Arrest and Subsequent Search of the Vehicle**

i) Was the arrest of the Applicant lawful or in violation of his s. 9 right to be free from arbitrary arrest and detention?

ii) Was the warrantless search of the Applicant's vehicle a valid search incident to arrest or did it violate the Applicant's section 8 Charter Rights against unreasonable search and seizure?

Issue 2: Information to Obtain and Search of the Home

i) Did the Information Sworn to Obtain a Search Warrant contain sufficient evidence to properly satisfy the Justice of the Peace that reasonable grounds existed to authorize the warrant?

The Law:

[7] Section 11 of the *Controlled Drugs and Substances Act*, 1996, Chap. 19, provides as follows:

11 (1) A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that

(a) a controlled substance or precursor in respect of which this Act has been contravened,

(b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,

(c) offence-related property, or

(d) any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the Criminal Code

is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

[8] Sections 8, 9 and 24 of the *Canadian Charter of Rights and Freedoms* provide:

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

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

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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

[9] **Criminal Code:**

Section 495(1) – A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence,

(b) a person whom he finds committing a criminal offence, or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII is

> relation thereto, is in force within the territorial jurisdiction in which the person is found.

[10] The starting point in the case at bar, as well as in ***R v MacDonald,*** 2015 NSSC 297**,** was outlined by Justice Arnold as follows:

> [27] In *R. v. Loewen*, 2011 SCC 21, McLachlin, C.J. determined that (para. 3):
>
> > If the arrest was unlawful, the detention of Mr. Loewen violates s. 9 of the *Charter*. In that case, the search cannot have been incidental to arrest, and hence would violate s. 8 of the *Charter*. The first question is therefore whether the arrest was unlawful.
>
> [28] Therefore, the starting point for analysis in this case is the lawfulness of Mr. MacDonald's arrest. With regard to the burden, when dealing with a warrantless search the Crown bears the burden of proving on a balance of probabilities that the search was authorized by law, that the law is reasonable and the search was conducted in a reasonable manner (*R. v. Collins*, [1987] 1 S.C.R. 265).
>
> [29] Cory J. made the following comments about reasonable and probable grounds for arrest in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-251:
>
> > Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.
> >
> > The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

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

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

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

[…]

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

> 17 The grounds for an arrest must be both subjectively and objectively reasonable. (*R. v. Storrey,* [1990] S.C.J. No. 12) I do not think an argument can be sustained in this case that the Crown, which has the burden of showing on a balance of probabilities that a warrantless search was reasonable, has failed to establish a subjective basis for Mr. Dunbar's arrest. Cst. Hussey testified that he believed Mr. Dunbar was "arrestable"

based on the information he had received from Cst. Barna, information he regarded as reliable. He knew the information had come from another police officer and had his own knowledge of Mr. Dunbar's involvement in drugs. Believing that Mr. Dunbar could be arrested for drug possession, Cst. Hussey directed Cst. Walsh to effect the arrest. I am satisfied that Cst. Hussey personally believed that there were reasonable and probable grounds to arrest Mr. Dunbar and that Cst. Walsh was entitled to rely on Cst. Hussey's belief in making the arrest. (*R. v. Lal*, [1998] B.C.J. No. 2446 at paragraph 24 (B.C.C.A.))

18 The issue in this case is whether Mr. Dunbar's arrest was justified from an objective point of view. Would a reasonable person, standing in Cst. Hussey's shoes, have believed that reasonable and probable grounds existed to make the arrest? (*R. v. Storrey, supra,* at paragraph 16)

19 The totality of the circumstances must be assessed in determining whether the police officer (in this case, Cst. Hussey) had an objectively reasonable belief that Mr. Dunbar was in possession of cocaine. (*R. v. Warford,* [2001] N.J. No. 330 (Nfld. C.A.) at paragraph 15, referring to Wilson, J.'s judgment in *R. v. Debot,* [1989] S.C.J. No. 118) There is no dispute that there was nothing about the parked truck or Mr. Dunbar's behaviour that gave police reasonable and probable grounds to arrest him. That leaves the tip received by Cst. Willett and then transmitted through Cst. Barna to Cst. Hussey. Assessed objectively, was the tipster information enough to justify Mr. Dunbar's arrest?

20 The Supreme Court of Canada in *R. v. Garofoli,* [1990] 2 S.C.R. 1421, held that a tip could provide the requisite grounds for a search if its reliability could be satisfactorily established. A variety of factors are to be examined in making the reliability determination:

* The degree of detail of the tip;

* The informer's source of knowledge;

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

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

***Garofoli* Analysis**

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

1. The degree of detail of the tip;

2. The informer’s source of knowledge;

> 3. Indicators of the informer's reliability such as past performance or confirmation from other investigative sources.

[11] At para 7 of ***R. v. MacDonald,*** 2014 NSSC 218**,** Justice Arnold discussed the principles that should be applied when conducting a review of search warrants. He cited paras. 39-41 of ***R. v. Morelli,*** 2010 SCC 8, wherein Justice Fish stated:

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

[12] In ***MacDonald****, supra*, at para 11, it is stated:

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

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

[13] In ***R. v. Castillo*** 2011 ONSC 3257, Justice Allen reviewed the law for a reviewing court with respect to judicial authorizations and sufficiency of information in ITO as set down in the case of ***R. v. Debot*** 1989 Can II 13, p.17 (S.C.C.), at paragraph 14, in stating:

> [13] The Supreme Court of Canada set down tests to be applied in examining the sufficiency of the information provided in support of the application for a warrant. Three questions should be asked in determining whether the information relied on by the police is sufficient to justify a search where the police rely on information from a source outside the police. [para. 53]:
>
> (a) Was that source credible?
>
> (b) Was the information predicting the commission of a criminal offence compelling?
>
> (c) Was the information corroborated by police investigation prior to making the decision to conduct the search?
>
> [14] *R. v. Debot* provides principles to guide the review court's approach to applying the three inquiries:
>
> (a) The factors in the inquiries are not to be applied as separate tests.
>
> (b) It is the "totality of the circumstances that must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two."
>
> (c) Bald or conclusory statements and statements amounting to gossip are not sufficient. A mere statement by an affiant that an informant told him that drugs would be found in a particular place is insufficient to constitute reasonable grounds to issue a warrant. More is required.
>
> (d) The underlying circumstances given by the informant for his or her conclusion must be set out in the ITO so that the authorizing judge might have sufficient information to satisfy themselves there are reasonable grounds for believing what the informant has alleged.
>
> (e) The source and quality of the information provided at the time the search was executed must be examined in determining the validity of the warrant.

THE ITO:

I. Source Qualifications

[14] **A. Source A** – Paragraph 9 of the ITO reads:

> 9. Cpl Curtis KUCHTA (Cpl KUCHTA) and I have a believed reliable source who associates freely with persons involved in criminal activity and whom I believe. The source has provided information with the expectation that I keep their identity confidential;
>
> 9.1 I have known this source, referred to as **Source "A"** since July 2017, in the capacity of a source;
>
> 9.2 **Source "A"** has a criminal record and is currently charged with Criminal Code offences. **Source "A"** does not have any convictions for public mischief or perjury;
>
> 9.3 **Source "A"** is known to use controlled drugs and substances;
>
> 9.4 **Source "A"** has provided information that is consistent with other source information and police investigation on other CDSA investigations;
>
> 9.5 **Source "A"** has provided information about controlled drugs and substances on 20 occasions;
>
> 9.6 **Source "A"** has personal knowledge of the information contained herein, unless otherwise stated;
>
> 9.7 **Source "A"** has been paid financial awards on 1 occasion to date;
>
> 9.8 **Source "A"** has provided information which has been used in Criminal Code investigations which led to charges;
>
> 9.9 The motivation for **Source "A"** to provide information is financial;
>
> 9.10 **Source "A"** has not received special benefits or promises from the RCMP in return for the information provided;
>
> 9.11 **Source "A"** has not testified in court on any information provided, nor is **Source "A"** willing to testify in court on the information provided in this affidavit;
>
> 9.12 I believe the information provided by **Source "A"** to be truthful and reliable.

Discussion:

[15] The most glaring aspect of Source A's qualifications is Source A's lack of a proven track record. Police had only known Source A since July 2017, about one month prior to August 20, 2017. (Para. 9.1). Source A has outstanding criminal charges (Para. 9.2). This is a risk factor regarding any information Source A provides. There is a risk that he may embellish the information he conveys to police in anticipation of favorable consideration with upcoming court appearances.

[16] Paragraph 9.4 does nothing to enhance Source A's reliability. He has provided information that is "consistent with other source information and police investigation on other CDSA investigations." What does that mean? What can the issuing authority possibly take from that? How does that statement in any way enhance Source A's reliability? Without any specifics, it is a meaningless bit of non information.

[17] Paragraph 9.8: "Source A has provided information which has been used in Criminal Code investigations which led to charges." This is no more helpful than the statement in Paragraph 9.4. Was it .001 per cent or 99 percent of the information gathered in the Criminal Code investigations? To what extent, if any, was the information provided by Source A used in forming the grounds for the laying of charges? Did the charges lead to convictions or were they all

withdrawn by the Crown as soon as they saw the light of day? Was the information provided first-hand or fifth-hand? Was it gossip or rumor? Same problems and same comments as noted above re Paragraph 9.4.

[18] Paragraph 9.5 reads: "Source A has provided information about controlled drugs and substances on 20 occasions." Yet the information was only good enough to merit payment on one occasion. (Para. 9.7). There are no specifics. Was the provided information readily accessible off the internet or was it first-hand information obtained from known drug dealers?

[19] Without corroboration, the best that can be said about Source A information is that it might occasionally cause police to do further investigation.

[20] **B. Source B –** Paragraph 10 of the ITO reads:

> 10 Cpl KUCHTA and I have a believed reliable source who associates freely with persons involved in criminal activity and whom I believe. The source has provided information with the expectation that I keep their identity confidential;
>
> 10.1I have known this source, referred to as **Source "B"** since July 2016, in the capacity of a source;
>
> 10.2 **Source "B"** has a criminal record but is not currently charged with Criminal Code offences, and does not have any convictions for public mischief or perjury;
>
> 10.3 **Source "B"** is known to use controlled drugs and substances;
>
> 10.4 **Source "B"** has provided information that is consistent with other source information and police investigation on other CDSA investigations;
>
> 10.5 **Source "B"** has provided information about controlled drugs and substances on 50 occasions;

> 10.6 **Source "B"** has personal knowledge of the information contained herein, unless otherwise stated;
>
> 10.7 **Source "B"** has been paid financial awards on 7 occasions to date;
>
> 10.8 **Source "B"** has provided information which has been used in Criminal Code investigations which led to charges;
>
> 10.9 The motivation for **Source "B"** to provide information is financial;
>
> 10.10 **Source "B"** has not received special benefits or promises from the RCMP in return for the information provided;
>
> 10.11 **Source "B"** has not testified in court on any information provided, nor is **Source "B"** willing to testify in court on the information provided in this affidavit;
>
> 10.12 I believe the information provided by **Source "B"** to be truthful and reliable.

Discussion:

[21] At least Source B has been known to police for more than a month; that is, since July 2016. Slightly more than one year, however, is not much time to compile a proven track record of reliability. Cpl. Kuchta has only known Source B since January 2017 when Cpl. Kutcha joined the Port Hawkesbury unit.

[22] Paragraph 10.4 re "…consistent with other source information…" is identical to paragraph 9.4 re Source A. My comments are the same.

[23] Paragraph 10.5 is the same as 9.5 except that Source B's number is 50 rather than 20. It could be 150 or 250 and it would still be too vague to be of any assistance to the issuing authority. Source B has been paid seven times but the

issuer does not know, for example, whether any of the information from Source B led to convictions. Presumably it did not or the affiant would have said so.

[24] Paragraph 10.8 is exactly the same as paragraph 9.8 re Source A. ("…information which has been used in Criminal Code investigations which led to charges"). The same comments apply.

[25] Paragraph 10.6 states that Source B "has personal knowledge of the information contained herein, unless otherwise stated." "Personal knowledge" is not defined and might include hearsay information as well as first-hand information.

[26] In short, the police and the issuing authority should be very cautious about relying upon information provided by Source B. There is an apparent need for some corroboration of Source B's information.

II. Source Information

[27] Cpl. Kuchta's information obtained from Source A is outlined in three paragraphs of the ITO:

> 15.On August 10, 2017 Cpl Kuchta spoke to **Source "A"** and learned the following information;
>
> 15.1 Sean SIMON is selling cocaine in Port Hawkesbury by the gram;
>
> 15.2 Sean SIMON is getting his cocaine from Sylvain LANDRY;

> 15.3 **Source "A"** knows this from speaking to Sean SIMON in the last 12 hours;
>
> 16. On August 19, 2017 Cpl KUCHTA spoke to **Source "A"** and learned the following information;
>
> 16.1 Steve MACEACHERN is supplying Sean SIMON with cocaine;
>
> 16.2 Sean SIMON is selling cocaine by the gram and multi gram;
>
> 16.3 **Source "A"** knows this from speaking to Sean SIMON in the last 6 hours;
>
> 18. On August 30, 2017 Cpl KUCHTA spoke to **Source "A"** and learned the following information;
>
> 18.1 Sean SIMON has a quantity of dexies which he is selling;
>
> 18.2 **Source "A"** knows this from speaking to Sean SIMON in the past 6 hours;
>
> (From my experience as a police officer I know "dexies" to be the street term for the prescription drug Dexedrine)

[28] I am troubled by the wording of subparagraphs 15.3, 16.3 and 18.2. In each case, in reference to the preceding subparagraph(s), Source A "knows this from speaking to Sean Simon in the last ____ hours."

[29] Consider 15.1 for example: "Sean Simon is selling cocaine in Port Hawkesbury by the gram." If 15.1 and 15.3 are considered together; the reader is left with the impression that Sean Simon **told** Source A that he was selling cocaine in Port Hawkesbury. If that is correct, why not say it directly?

[30] Likewise paragraph 15.2: "Sean Simon is getting his cocaine from Sylvain Landry." If this was something Source A was told, the affiant should have said so directly.

[31] Both 15.1 and 15.2 are conclusory statements. Leaving aside 15.3 for a moment, the issuing authority does not know whether Source A is quoting Sean Simon or relaying what Source A personally observed. Consider whether 15.3 really adds anything: "15.3 Source "A" knows this from speaking to Sean Simon in the past 12 hours."

[32] At first blush, having read 15.3, the reader is tempted to conclude that Sean Simon **told** Source A the information contained in 15.1 and 15.2. If that were in fact the case, the affiant would (should) have said so directly; e.g. "Source A says Sean Simon told Source A that he was selling cocaine in Port Hawkesbury" and "Source A says that Sean Simon told Source A that Sean Simon was getting his cocaine from Sylvain Landry." But the affiant obviously chose not to make a direct statement. Possibly the affiant was trying to protect Source A's identity. The other possibility is that Source A is not alleging that Sean Simon said any such thing.

[33] Paragraph 15.3 is patently ambiguous. If 15.3 is strictly interpreted, it could mean that Sean Simon said nothing whatever to Source A. The sentence says that Source A knows (the information in 15.1 and 15.2) from speaking "**to**" Sean Simon. **(Emphasis added**). Maybe Sean Simon said nothing. Maybe Source A means that, while he was speaking to Sean Simon, Source A went on

to draw certain conclusions about what Sean Simon was up to. Or, Source A could mean that he saw Sylvain Landry drive away and deduced that Landry must have provided Sean Simon with his cocaine. That deduction may have no basis in reality.

[34] The point is that the reader is without the underlying detail needed to evaluate the conclusory statements in 15.1 and 15.2. The other paragraphs concerning Source A are paragraphs 16 and 18. Paragraphs 16.3 and 18.2 are set up the same way as 15.3. My criticism applies equally to them.

[35] In an apparent effort to mask Source A's identity, the affiant is employing rather convoluted and ambiguous phraseology. The need to protect the source's identity does not absolve the affiant of the obligation to provide the issuer with clear, unambiguous information. If that is not possible, police must resort to other investigative techniques to acquire the necessary grounds for a warrant. Surveillance, for example, might be an option.

[36] Paragraphs 14 and 17 pertain to information provided by Source "B".

> 14. On May, 2017 Cpl KUCHTA spoke to **Source "B"** and learned the following information;
>
> 14.1 Sean SIMON is selling cocaine;
>
> 14.2 Sean SIMON is driving a grey Hyundai SUV;
>
> 14.3 **Source "B"** knows this from speaking to Sean SIMON is the past 12 hours;

> 17. On August 28, 2017 Cpl KUCHTA spoke to **Source "B"** and learned the following information;
>
> > 17.1 Sean SIMON is selling cocaine and prescription pills;
> >
> > 17.2 Sean SIMON lives at 16 Oak Crescent, Port Hawkesbury, Nova Scotia;
> >
> > 17.3 Sean SIMON stores most of his cocaine and pills in his house, shed or garage;
> >
> > 17.4 **Source "B"** knows this information from speaking to Sean SIMON in the past 12 hours;

[37] Paragraphs 14.3 and 17.4 are the same as 15.3 above. The same criticism applies. They are ambiguous statements which do not provide the necessary underlying detail to support the previous conclusory statements.

[38] Before I deal with the events of August 30, 2017, I will deal briefly with Paragraph 12 of the ITO.

> 12.On February 22, 2017 I performed a traffic stop on Sean SIMON's grey 2007 Hyundai Tucson vehicle;
>
> > 12.1 Sean Dale SIMON was arrested for Possession for the Purpose of Trafficking cocaine;
> >
> > 12.2 Cpl KUCHTA assisted in the search of SIMON's vehicle and located 6 dime bags of cocaine in quantities of 2.9 grams, 1.8 grams, 2.7 grams and 3 bags of 8 grams in his possession.
> >
> > (From my experience as a police officer when cocaine is portioned off in small plastic bags I believe this to be for the purpose of resale)

[39] It is now acknowledged that 12.2 is misleading. In cross-examination, Cpl. Kuchta acknowledged that the drugs in question were not in Sean Simon's possession. There were in the pockets of the passenger in Sean Simon's

vehicle. The charges against Sean Simon were withdrawn. Paragraph 12 should therefore be deleted from the ITO.

III: The Events of August 30, 2017

[40] On August 30, 2017 at 5:11 pm, Cpl. Kuchta stopped the vehicle driven by the Applicant. Cpl. Kuchta was acting upon the information outlined in paragraph 18 of the ITO (quoted above). Cpl. Kuchta subjectively believed that he had reasonable grounds to detain Sean Simon because of the paragraph 18 information. He would obviously have used that information in conjunction with that he had obtained from Source A on August 10 and August 19, 2017 (ITO paras. 15 and 16 respectively), and from Source B in May, 2017 and August 28, 2017 (ITO paras. 14 and 17 respectively). I do not question Cpl. Kuchta's subjective belief.

[41] The issue is whether a reasonable person, standing in Cpl. Kuchta's shoes, would have believed that reasonable and probable grounds existed to make the arrest. (***R v Storrey*** [1990] 1 SCR 241, at 249-251). The totality of the circumstances must be assessed in determining whether the police officer had an objectively reasonable belief that Sean Simon was in possession of illegal drugs. [See ***R v Dunbar***, 2008 NSPC 39 (Can LII)]

[42] For the reasons outlined above re the frailty, lack of detail, and ambiguity of the information supplied by both Sources A and B, and because of their dubious track records, I am satisfied that, viewed objectively, the evidence does not establish reasonable and probable grounds for the arrest. The arrest was therefore unlawful. It follows that a search incident to an unlawful arrest is also unlawful.

[43] I would note also that Source A's August 30, 2017 tip appears to be contradicted by Cpl. Kuchta's own observations. Sean Simon was obviously not selling "dexies" on that day. Cpl. Kuchta observed the Applicant's vehicle parked at his place of employment over the span of several hours. There was no information that Sean Simon was selling drugs at work. Prior information had indicated that Sean Simon was selling drugs in Port Hawkesbury. Sean Simon's place of employment was not in Port Hawkesbury nor was the stop made in Port Hawkesbury. I am not persuaded by the amplification evidence that Cpl. Kuchta understood the information to include the Port Hawkesbury "area", thus including Sean Simon's place of employment and the location of the stop.

[44] **The Search Warrant for Sean Simon's Residence:** The ITO relies heavily on the fruits of Cpl. Kuchta's search incident to the August 30, 2017 arrest. I

have demonstrated above why that search was unlawful. It follows that paragraph 20 of the ITO must be deleted.

[45] With the deletion of paragraphs 12 and 20, the warrant's fate now hinges on the validity of the paragraphs dealing with the Sources "A" and "B" provided information. I have already outlined why those paragraphs are not sufficient to convert suspicion into credibly-based probability. Paragraph 38 of the Crown brief reads:

> [38] To correctly determine whether an ITO did contain reasonable and probable grounds to issue a Search Warrant, the Court must apply the appropriate standard of review. The standard of review to be applied by a Judge when reviewing an issuing justice's decision to issue a search warrant was discussed by the Nova Scotia Court of Appeal in ***R v Durling***, 2006 NSCA 124 (NS CA), at paragraphs 15-16:
>
> > What then was the judge's role when reviewing the JP's decision to issue a search warrant? Simply put, he was to consider not whether he would have issued the warrant but instead whether the warrant could have been issued based on the relevant information provided.
> >
> > This test can be traced back to the Supreme Court of Canada decision in **R. v. Garofoli**, [1990] 2 S.C.R. 1421, where in the analogous context of a wiretap authorization, Sopinka, J concluded:
> >
> > > ¶ 56 The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge **concludes that the authorizing judge could have granted the authorization, then he or she should not interfere**. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.
> >
> > [Emphasis added]

[46] I am satisfied that the warrant **could** not have been issued on the basis of the information provided in the ITO. In short, the warrant should not have been issued.

IV. Charter

A. Section 24(2) re the search incident to arrest

[47] The Supreme Court of Canada in ***R v Grant***, 2009 SCC 32 [Grant], at paragraph 71, set out three considerations to evaluate whether or not the admission of evidence would bring the administration of justice into disrepute:

> (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
>
> (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little); and
>
> (3) society's interest in the adjudication of the case on its merits.

1. The seriousness of the Charter-infringing state conduct:

[48] Here the Charter infringing conduct was the Applicant's unlawful arrest and detention contrary to s. 9 of the Charter. The search incidental to the unlawful arrest would therefore violate s. 8 of the Charter. The police were acting without a warrant on the basis of very questionable source information. I would

consider this to be a serious Charter breach which tips the scale toward inadmissibility of the evidence.

2. The impact of the breach on the Charter-protected interests of Applicant:

The Applicant had an expectation that he would not be subject to arbitrary arrest and detention. He had the right to drive from his place of employment to his home without the prospect of police interference. Though the expectation of privacy is not as great with one's vehicle as with one's home, it still exists. There was a significant impact on the Charter protected privacy interests of the Applicant. The weight is decidedly toward inadmissibility.

3. Society's interest in the adjudication of the case on its merits.

[49] The exclusion of the evidence would essentially leave the Crown without a case to present. Exclusion of the evidence would therefore seriously undermine the truth-seeking function of the trial. This factor thus weighs against exclusion of the evidence. While that is so, the law is clear that this factor must not take on disproportionate significance. (See ***R v MacDonald,*** 2014 NSSC 218 at para 84).

4. Balancing

[50] In MacDonald supra at Para. 86, Arnold, J. quotes McLaughlin CJ in R***. v. Harrison***, [2009] S.C.J. No. 34:

> 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.

[51] In this case, police conduct was so unjustified that the Court should not in any way condone it. The long-term repute of the administration of justice demands that the Courts be vigilant in ensuring that police only interfere with citizens' rights when they have demonstrable appropriate grounds to do so. I would therefore exclude the evidence of the search incident to the Applicant's unlawful arrest.

B. Section 24(2) and the search of the Applicant's home

1. The seriousness of the Charter-infringing state conduct:

[52] The officers who conducted the search believed they were acting under the lawful authority of a warrant. But the search involved the Applicant's private residence. As such it was an interference with the one place where the citizen's

expectation of privacy is highest. The illegal search of a private residence is an extremely serious Charter breach which weighs toward inadmissibility.

2. The impact of the breach on the Charter-protected interests of the Applicant:

The entry by state authorities into someone's home is profoundly intrusive. Admission of the evidence in the face of such a breach risks signalling the public that its Charter rights are meaningless. (See for example, ***Grant*** *supra* para. 78). Here the s. 8 breach had a significant impact on the Applicant's Charter-protected privacy interests. The breach weighs heavily on the inadmissibility side of the scale.

3. Society's interest in the adjudication of the case on its merits:

[53] The exclusion of the evidence would essentially leave the Crown without a case to present. Exclusion of the evidence would therefore seriously undermine the truth-seeking function of the trial. This factor thus weighs against exclusion of the evidence. While that is so, the law is clear that this factor must not take on disproportionate significance. (See R v MacDonald, 2014 NSSC 218 at para 84).

4. Balancing

[54] As in R. v. Capson, 2019 NSSC 20, I repeat paragraphs 87 and 88 of MacDonald, supra:

> [87] I reiterate the comments of Justice Fish in **Morelli**, *supra*. The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. The failure to do so in this case resulted in an unconstitutional search of a private residence.
>
> [88] The police must draft ITOs requesting authorization to search private homes such that the authorizing body has accurate, complete and sufficient information to move from suspicion to credibly-based probability. The police can and must do better than they did in this case. *Ex post facto* discovery of drugs and money does not eradicate the deficiencies and inaccuracies plaguing this ITO. To admit the illegally and unconstitutionally obtained evidence in this case and similar cases in the future would undermine the public's confidence in the long term.

[55] I feel the same way about the present situation. I am excluding the evidence.

Edwards, J.