SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacLean*, 2024 NSSC 141

Date: 20240513
Docket: CRS No. 526310
Registry: Sydney

Between:

His Majesty the King

Respondent

v.

John Leonard MacLean

Applicant

***Canadian Charter of Rights and Freedoms*, ss. 7, 8 , 9, 24(2)**
D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	May 7, 2024, in Sydney, Nova Scotia
Written Decision:	May 13, 2024
Counsel:	Greg McNeil, for the Applicant Christa MacKinnon, for the Respondent

By the Court (Orally):

INTRODUCTION

[1] By Notice of *Charter* Motion John Leonard Francis MacLean applies pursuant to ss. 7, 8, 9, 24(1) and 24(2) for an order excluding evidence or such other relief deemed fit. The Applicant relies on his Motion, brief and book of authorities filed December 15, 2023.

[2] The Crown asks for the application to be dismissed. The Respondent relies on their brief and authorities filed May 1, 2024.

[3] The *voir dire* took place during the morning of May 7, 2024 with the sole *viva voce* evidence coming from Crown witness, RCMP Cst. Jason Forrest. One exhibit was entered by consent and the parties provided oral submissions. This is the only anticipated pre-trial application with the trial scheduled for December 19 and 20, 2024.

[4] By Indictment dated September 10, 2023, Mr. MacLean stands charged:

> 1. **THAT** on or about 6 September 2022, at or near Bras D'Or, NS [sic], Province of Nova Scotia, he did unlawfully have possession of Hydromorphone (6 mg) for the purpose of trafficking a substance included in Schedule I of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said **Act**;
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> 2. **AND FURTHER THAT** on or about 6 September 2022, at or near Bras D-Or, NS [sic], Province of Nova Scotia, he did unlawfully have possession of Hydromorphone (9 mg) for the purpose of trafficking a substance included in Schedule I of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said Act;
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> 3. **AND FURTHER THAT** on or about 6 September 2022, at or near Bras D'Or, NS [sic], Province of Nova Scotia, he did unlawfully have possession of Codeine for the purpose of trafficking a substance included in Schedule I of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said **Act**;
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> 4. **AND FURTHER THAT** on or about 6 September 2022, at or near Bras D'Or, NS [sic], Province of Nova Scotia, he did unlawfully have possession of Buprenorphine icking [sic, for the purpose of trafficking] a substance included

in Schedule I of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said **Act**;

5. **AND FURTHER THAT** on or about 6 September 2022, at or near Bras D'Or, NS [sic], Province of Nova Scotia, he did unlawfully have possession of Benzodiazepine for the purpose of trafficking a substance included in Schedule I of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said **Act**;

6. **AND FURTHER THAT** on or about 6 September 2022, at or near Bras D'Or, NS [sic], Province of Nova Scotia, he did unlawfully have possession of Methylphenidate for the purpose of trafficking a substance included in Schedule IV Schedule I of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 5(2) of the said **Act**;

BACKGROUND

[5] The background leading up to the within charges originates with Cst. Forrest receiving information on September 6, 2022, from a confidential informant (CI) that Mr. MacLeod was selling prescription drugs at the Petro Canada gas station on Hwy 105 in Bras d'Or, Nova Scotia. The CI described Mr. MacLean's location and attire to Cst. Forrest. At approximately 1:30 p.m. Cst. Forrest along with Cst. Richard MacKenzie attended at the Petro Canada where they observed and then arrested Mr. MacLean. Incidental to arrest, Mr. MacLean was searched and police located in his backpack two wallets containing $4,030.00 Cdn, two cell phones and a number of prescription drugs.

CST. JASON FORREST - TESTIMONY

[6] Cst. Forrest has been with the RCMP for 14 years. He was posted in Eskasoni and most recently with the North East Traffic Services, policing highways 4, 105 and 125 along with the Prince Mine Road, all in Cape Breton. Recalling his experience in Eskasoni and while conducting highway patrol, Cst. Forrest said "I've had a lot of success doing drug work".

[7] Cst. Forrest provided background leading up to the September 6, 2022, arrest of Mr. MacLean. Exhibit 1 was introduced, Cst. Forrest's "Can Say" statement prepared by him about a year after the arrest and following the August 22, 2023 Preliminary Inquiry (PI) where he testified. Exhibit 1 reads as follows:

Cst. FORREST 'Can Say'

I am a member of the North East Traffic Services RCMP.

- On September 6th 2022 I had a conversation with a Confidential Source who provided me with the following information;
- John MACLEAN is selling Ritalin and Hyrdos [sic].
- John MACLEAN is selling at the Petro Canada gas station in Bras Dor. John MACLEAN is on foot wearing Red Shorts, Blue T-shirt and carrying a black back pack.
- John MACLEAN is carrying the pills in the front of the black back pack.
- This information was observed within three hours prior to the arrest.

Source Qualification

- I have known the source in excess of 1 year.
- I maintain intermittent contact with the source through telephone conversations.
- The Source has provided information that has led to arrests, charges, and search warrant executions under the Criminal Code of Canada or the Controlled Drugs and Substances Act on no less that three occasions.
- The source is financially motivated and has been paid for information in the past.
- The source had personal knowledge of the information provided based upon conversations and / or observations with the persons involved.
- The source has been providing information for over 1 year on people involved in the drug community.
- The Source has never been charged with public mischief or fraud.
- This Source has never provided me with information that was found to be false, or that has led to a negative search.

Background known at the time (the information was provided)

- I knew that John MACLEAN was involved in previous police files for Fail to comply, Possession of break and enter instruments, Mischief, trespassing at night and possession of a controlled substance offences.

Corroborating Information

- Once I obtained the source information, I contacted Cst Cory MACKENZIE and advised him of the information provided. I also spoke to Cst Gord MACPHERSON and advised him of the same. Myself along with Cst MACKENZIE attended the Petro Canada in Bras Dor. John MACLEAN was present at the front of the Petro Canada with a coffee in his hand. I along with Cst MACKENZIE observed John MACLEAN was wearing red shorts, a blue T-Shirt and was carrying a black backpack which corroborated the information provided. Writer observed John MACLEAN and recognized him form [sic] pictures obtained from Social Media. The information at the scene was consistent with the information provided by the source.

[8] Cst. Forrest clarified that the above timeframes are as at the time he provided the "Can Say" and not at the time of the arrest. He said that he received source information from the CI in early August, 2022. Given the CI's information that the individual was in possession of "hydromorphone, Ritalin and various different pills", Cst. Forrest searched for him in PROS and JEIN. He also searched for him on social media and did area patrols to see if he could locate him.

[9] On September 6, 2022, Cst. Forrest started his shift at 1 p.m. He received information from the CI which precipitated Mr. MacLean's arrest. Cst. Forrest expanded on the first five "bullet" points of exhibit 1. He was told that Mr. MacLean was outside the gas station in Bras d'Or.

[10] Cst. Forrest and his partner, Cst. Richard MacKenzie (both wearing RCMP uniforms) drove in an unmarked grey Taurus police vehicle to the Petro Canada. The Taurus had no external police lights or decals. The vehicle did have antennas, which Cst. Forrest said could result in it being identified as a police vehicle.

[11] Cst. Forrest pulled off the 105 Hwy into the gas station parking lot where they observed Mr. MacLean. The officers exited the vehicle and within "30 seconds" Cst. Forrest arrested Mr. MacLean. Cst. Forrest said that having observed the individual being where the CI said he was and wearing what the CI told him what he wearing, "I corroborated the information as true". Later he added that the description was "dead on, perfect". He added that he had "sufficient information that in the past [from the CI] he was selling".

[12] On cross-examination he added that he observed Mr. MacLean at 1:30 p.m. "seated on the ground in front of the store, he was talking on a cell phone". Later, police obtained a statement at the police station from Mr. MacLean and a search warrant to examine his phone.

[13] As Cst. Forrest arrested and *Charter* and police cautioned Mr. MacLean, Cst. MacKenzie carried out the incident search of the backpack. Cst. Forrest noted that the search turned up "several pill bottles and cash". The bottles were not labelled. He recognized the following pills contained within the bottles:

- 28 Hydromorphone 6 mgs
- 10 Ritalin – 9 mgs
- 14 Buprenorphine
- 58 Benzodiazepine
- 5 Codeine

[14] Given his background involving several years working in Eskasoni ("riddled with prescription drugs"), Cst. Forrest could immediately identify the pills. He added that they were "sent off and analyzed and confirmed what I thought".

[15] The drugs were placed on the hood of the Taurus and then placed in bags. Cst. Forrest recalled that Cst. MacKenzie wore gloves while handling the backpack contents. He added that all of the items were "removed, logged and documented properly".

[16] Referring to Mr. MacLean, Cst. Forrest formed the opinion that it was "pretty much impossible for the drugs to have been prescribed to him". He said this is because the combination would lead to a "precipitated withdrawal". He determined that "nothing found indicated that they were his lawful pills".

[17] With respect to his grounds for arrest, Cst. Forrest noted the recency of the information as the CI provided it "within the past few hours". He added that Mr. MacLean was wearing exactly what the CI had described. He said that he arrested Mr. MacLean "because I believed he was selling prescription drugs". He stated that the backpack was found "right at his [Mr. MacLean's] feet".

[18] Cst. Forrest repeated that the search was carried out incidental to arrest. He said they wanted to be sure that there were no weapons. He added that he did not want to seize "any bag without knowing if there is Fentanyl; just breathing it can harm you".

[19] Cst. Forrest elaborated that gloves are worn and if Fentanyl is located that masks are worn; "…its my practice". On cross-examination he acknowledged that prior to today, he had not mentioned anything about Fentanyl in his PI testimony or in the "Can Say".

[20] Cst. Forrest did not have any concerns about the CI's reliability given that there was no past perjury, mischief or misleading police. On cross-examination Cst. Forrest confirmed that there was one previous occasion when the CI provided information about Mr. MacLean but could not recount what the CI's personal knowledge was based upon.

[21] Cst. Forrest acknowledged that Hwy 105 by the Petro Canada is known as "gasoline alley" and that it can be busy. He could not say how busy it was at the time of the arrest as he was pre-occupied with the task at hand and "there's a bit of tunnel vision going on".

ISSUES

[22] Four issues emerge on this application:

i. Were Mr. MacLean's s. 7 *Charter* rights violated?

ii. Were Mr. MacLean's s. 8 *Charter* rights violated?

iii. Were Mr. MacLean's s. 9 *Charter* rights violated?

iv. If any of Mr. MacLean's *Charter* rights were violated, should the evidence be excluded pursuant to s. 24 (2) of the *Charter*?

[23] The burden on each issue rests with Mr. MacLean, on a balance or probabilities. The Crown concedes that Mr. MacLean has standing in this application.

LEGAL FRAMEWORK

[24] Section 7 of the *Charter* reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[25] In *R. v. Hebert*, [1990] 2 SCR 151 at para. 64 the Supreme Court declared:

> 64 The *Charter* through s. 7 seeks to impose limits on the power of the state over the detained person. It thus seeks to effect a balance between the interests of the detained individual and those of the state. On the one hand s. 7 seeks to provide to a person involved in the judicial process protection against the unfair use by the state of its superior resources. On the other, it maintains to the state the power to deprive a person of life, liberty or security of person provided that it respects fundamental principles of justice. The balance is critical. Too much emphasis on either of these purposes may bring the administration of justice into disrepute -- in the first case because the state has improperly used its superior power against the individual, in the second because the state's legitimate interest in law enforcement has been frustrated without proper justification.

[26] Section 8 of the *Charter* provides:

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

[27] The search of Mr. MacLean was warrantless. Warrantless searches are presumptively unreasonable. The presumption that a warrantless search is unreasonable can be rebutted, but the onus rests on the Crown to do so: *R. v. Buhay*, 2003 SCC 30 at para. 32.

[28] The presumption that a warrantless search is unreasonable is rebutted where the Crown demonstrates, on a balance of probabilities, that the search was justified. A search is justified where it is authorized by law, the law itself is reasonable, and the manner in which the search was carried out was also reasonable. These three elements are conjunctive. The Court must be satisfied all three elements have been established for a warrantless search to be found reasonable.

[29] Whether a search is authorized by law is determined based on the two-part test, as articulated in *Dedman v. the Queen*, [1985] 2 S.C.R. 2, 1985 CanLII 41 and *R. v. Mann*, 2004 SCC 52:

1) Did the police action fall within the general scope of a police duty imposed by statute or recognized by common law? And if so,

2) Does the police action constitute a justifiable exercise of the power associated with that duty?

[30] This case involves a search incidental to arrest. The Supreme Court of Canada addressed the power to search incident to arrest in *R. v. Caslake*, [1998] 1 S.C.R. 51, 1998 CanLII 838, setting out the principles which guide the analysis at paras. 13-16.

[31] If the arrest is unlawful, then the search incidental to the arrest is also unlawful.

[32] Section 9 of the *Charter* provides:

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

[33] Section 9 protects against arbitrary detention. If a detention is for a purpose authorized under a statutory provision or some other police power, it is not arbitrary and will therefore not constitute a violation of s. 9.

[34] Once again, the arrest in this case was warrantless. In *R. v. Beaver*, 2022 SCC 54, the Supreme Court of Canada extensively addressed the legal principles governing warrantless searches which are authorized under the *Criminal Code*, R.S.C 1985, c. C-46 at paras. 71 – 73.

[35] Accordingly, as it is argued that specific rights under ss. 8 and 9 of the *Charter* were breached, it is alleged that those actions that led to those rights being breaches also led to the rights under s. 7 of the *Charter* being breached.

[36] In *R. v. MacDonald*, 2015 NSSC 297, Justice Arnold considered an application for exclusion of drugs found in the accused's vehicle on the ground that this arrest was unlawful. Justice Arnold touched on Supreme Court of Canada seminal cases which I find applicable here. I have heavily borrowed from Arnold, J's helpful analysis and below reproduce the apposite paras. 27 – 34:

> 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).
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> 29 Cory J. made the following comments about reasonable and probable grounds for arrest in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-251:
>
> > Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an

important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

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

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

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

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the

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

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

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

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

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

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

> I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search. . . . Highly relevant . . . are whether the informer's "tip" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.

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

(i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.

(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

(a) the degree of detail of the "tip";

(b) the informer's source of knowledge;

(c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.

(iii) The results of the search cannot, ex post facto, provide evidence of reliability of the information.

32 *Garofoli* involved examining informer information used as the basis to obtain judicial authorization for intrusion into someone's privacy. The *Garofoli* analysis was applied in the context of a warrantless search and arrest following a vehicle stop prompted by an informant's tip in *R. v. McCabe* (2008), 238 C.C.C. (3d) 33, 2008 NLCA 62, where Barry J.A. said, for the court:

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

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

17 The grounds for an arrest must be both subjectively and objectively reasonable. (*R. v. Storrey*, [1990] S.C.J. No. 12) I do not think an argument can be sustained in this case that the Crown, which has the burden of showing on a balance of probabilities that a warrantless search was reasonable, has failed to establish a subjective basis for Mr. Dunbar's arrest. Cst. Hussey testified that he believed Mr. Dunbar was "arrestable" based on the information he had received from Cst. Barna, information he regarded as reliable. He knew the information had come from another police officer and had his own knowledge of Mr. Dunbar's involvement in drugs. Believing that Mr. Dunbar could be arrested for drug possession, Cst. Hussey directed Cst. Walsh to effect the arrest. I am satisfied that Cst. Hussey personally believed that there were reasonable and probable grounds to arrest Mr. Dunbar and that Cst. Walsh was entitled to rely on Cst. Hussey's belief in making the arrest. (*R. v. Lal*, [1998] B.C.J. No. 2446 at paragraph 24 (B.C.C.A.))

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

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

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.

POSITIONS OF THE PARTIES

Crown

[37] The Crown argues that in all of the circumstances there was enough to allow the police to make a lawful arrest. The Crown submits that the CI had a history of reliability given that charges resulted from the time when the CI provided information previous to the September 6, 2022 arrest.

[38] With respect to this case, the Crown notes that the CI's description of what the individual was wearing and where he was located were accurate.

[39] The Crown acknowledges that there was a quick turnaround between the time Mr. MacLean was located and arrested. They posit that had police waited, their presence could have been a giveaway.

[40] The Crown argues that police seized and searched the backpack owing to the potential for weapons and Fentanyl being inside. While conceding that ideally a search warrant would have been sought, the Crown points to the context and the officer's experience with drugs in the area. They note that there was a valid concern about Fentanyl.

[41] In the circumstances the Crown submits that Mr. MacLean's *Charter* rights were not breached. Alternatively, they say that the s. 24 *Grant* analysis should result in no exclusion. The Crown points out that to exclude the evidence would effectively end the prosecution. On balance they submit that it would not shock society in the event that the analysis resulted in the drugs being kept in as evidence. In this regard, the Crown points out that the search was not of Mr. MacLean's person; i.e., not his pockets or a cavity search. They argue that the search was much less invasive and did not amount to a residence search where a door might be kicked in. Indeed, the Crown likens this to a search of a vehicle, albeit pointing out that the search of a backpack may require more imminent action, again referencing safety issues.

Defence

[42] The Defence emphasizes the reasonable expectation of privacy. They assert that the arrest was unlawful, noting that it occurred within 30 seconds of Mr. MacLean being seen. They emphasize para. 41 of the Defence brief which reads:

> 41. …a warrantless search is presumed to be prima facie unreasonable" unless it falls under an exception. It is respectfully submitted that in the case at hand, the initial search of the backpack of Mr. MacLean was done without a warrant and is thereby "prima facie unreasonable." Accordingly, the burden shifts to the Crown Attorney to proved that the search was not unreasonable. Further, it will be further argued that the police did not have reasonable and probable grounds to effect an arrest of Mr. MacLean, and, therefore, cannot rely upon the search incidental to arrest exception for warrantless searches.

[43] The Defence points out that the onus here shifts to the Crown to prove an exception applies. That is, it is the Crown who must prove that the search was not unreasonable.

[44] The Defence reminds the Court that the totality of the circumstances must be examined. They argue that police could easily have taken the time while parked to first observe Mr. MacLean. They maintain that there was no need to urgently arrest Mr. MacLean.

[45] While conceding that the CI's description and location matched up, the Defence says that otherwise, the information provided was vague. They point out that there was a lack of corroborating information noting that, for example, no photographs of Mr. MacLean were provided.

[46] With respect to Cst. Forrest's Fentanyl evidence, the Defence notes that this was never before raised. In any case, any fears could have been dispelled by placing the backpack in a package for safekeeping.

[47] The Defence points out that the CI had not been known for long and questions the level of rapport. They argue that "scant and vague" information was heavily relied upon. The Defence questions the urgency of the arrest, arguing that more steps ought to have been taken. They also point to practical concerns and the potential for a number of people to have been in the vicinity of this relatively busy area.

[48] With regard to the *R. v. Grant*, 2009 SCC 32 test, the Defence submits that there must be an exclusion of the impugned evidence as the search was clearly illegal.

ANALYSIS AND DISPOSITION REGARDING THE ARREST

[49] This was a warrantless search. The onus, therefore is on the Crown on balance of probabilities to show that the search was reasonable. To be reasonable the search must be authorized by law, the law itself must be reasonable and the search must be carried out in a reasonable fashion. (*R. v. Collins*, [1987] 1 S.C.R. 265.)

[50] Section 495(1) of the *Criminal Code* provides that 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; or (b) a person whom he finds committing a criminal offence.

[51] The law with respect to what constitutes reasonable grounds to arrest is well established. The requirement of reasonable grounds involves a subjective belief in the grounds by the arresting officer. The subjective belief must also be objectively grounded (*R v. Storrey*, [1990] 1 SCR 241). In this case it is not argued that Cst. Forrest did not subjectively believe that reasonable grounds to arrest existed. The issue is whether that belief was an objectively reasonable one.

[52] When examining whether an officer's subjective belief was objectively reasonable, the totality of the circumstances known to the officer must be considered. Individual factors should not be evaluated in isolation.

[53] Reasonable grounds may be based on direct and/or circumstantial evidence, partial information and reasonable inferences.

[54] In assessing whether the grounds for arrest are objectively reasonable the Court should consider the officer's observations through the lens of someone with the same experience, training, knowledge and skills as the officer.

[55] Reasonable grounds to believe is not a high or overly onerous standard to meet. It is more than a suspicion but less than a prima facie case or proof beyond a reasonable doubt.

[56] Reasonable grounds is often described as credibly based probability. In other words, is there a reasonable probability that an offence has been committed?

[57] The *Charter* issue turns on why the officers actually did what they did and not what the law would have permitted them to do. In a similar vein, Doherty J.A. in *R. v. Santana*, 2020 ONCA 365, emphasized that the justification for a warrantless search must be assessed based on what the officer was actually thinking at the time of the search (at para. 28):

> The scope of the power to search as an incident to an arrest is fact-specific: *R. v. Fearon*, at para. 13. Valid police purposes associated with searches incidental to arrest include police safety, public safety, securing evidence, and discovering evidence. Two points should be stressed. First, the purpose relied on to justify the search at trial must have been the actual reason the police conducted the search. After-the-fact justifications that did not actually cause the police to conduct the search or seizure will not do. Second, the police purpose must be related to the specific reason for the arrest.

After-the-fact justifications advanced by the Crown cannot provide constitutional shelter for an officer's unconstitutional exercise of some putative authority for a warrantless search.

[58] When I perform the *Garofoli* analysis to the evidence in this case, I find that the police did not have reasonable and probable grounds to arrest Mr. MacLean on September 6, 2022. The arrest was not lawful. The search incident to arrest was not lawful. Mr. MacLean was arbitrarily detained contrary to s. 9 and was unreasonably searched contrary to s. 8.

[59] I make these determinations based upon the vagueness of the CI's information. While the attire and location of Mr. MacLean were accurately provided by the CI, there is nothing before the Court indicating how the CI knew that the items were prescription drugs. Nothing was provided as to the quantity. There was no information imparted concerning the alleged selling of the substances.

[60] Cst. Forrest testified that the CI was reliable; however, this was only as a consequence of one previous charge during a relatively short period of time; i.e., as at September 6, 2022, Cst. Forrest had received information from the CI for about three months. While I accept that the CI had not previously misled police, this was based on a brief period of knowing the CI. I would add that the Court received no details regarding the previous charge.

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

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

[62] There are numerous cases on the topic of sufficiency of search warrants that are helpful in determining whether the police had reasonable and probable grounds to arrest and search Mr. MacLean without a warrant on September 6, 2022, based on the single source relied on by Cst. Forrest.

[63] The Nova Scotia Court of Appeal addressed the role of a reviewing court when dealing with an application to quash a search warrant in *R. v. Durling*, 2006 NSCA 124, where Oland, J.A. stated, at para. 19:

> [19] This reference to the issuing judge having a "credibly-based probability" has been the subject of much judicial discussion over the years. In *R. v. Morris*, 1998 CanLII 1344 (NS CA), [1998] N.S.J. No. 492 (C.A.), Cromwell, J.A. of this court provided the following guidance:
>
> > 30 Without attempting to be exhaustive, it might be helpful to summarize, briefly, the key elements of what must be shown to establish this "credibly based probability":
> >
> > (i) The Information to obtain the warrant must set out sworn evidence sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence and that the things in question will be found at a specified place: (*R. v. Sanchez* (1994), 1994 CanLII 5271 (ON SC), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.) at 365).
> >
> > (ii) The Information to obtain as a whole must be considered and peace officers, who generally will prepare these documents without legal assistance, should not be held to the "specificity and legal precision expected of pleadings at the trial stage." (*Sanchez, supra*, at 364)
> >
> > (iii) The affiant's reasonable belief does not have to be based on personal knowledge, but the Information to obtain must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant's belief: *R. v. Yorke* (1992), 1992 CanLII 2521 (NS CA), 115 N.S.R. (2d) 426 (C.A.); aff'd 1993 CanLII 83 (SCC), [1993] 3 S.C.R. 647.
> >
> > (iv) Where the affiant relies on information obtained from a police informer, the reliability of the information must be apparent and is to be assessed in light of the totality of the circumstances. The relevant principles were stated by Sopinka, J. in *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421 at pp. 1456-1457...

> ...
>
> 31 The fundamental point is that these specific propositions define the basic justification for the search: the existence of "credibly-based" probability that an offence has been committed and that there is evidence of it to be found in the place of search.

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

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

[65] Returning to *MacDonald*, Justice Arnold's extensive analysis at paras. 48 – 55 is of assistance, guidance and application:

> 48 In the instant case, Cst. Underwood was relying on a single source. While each case must be determined on its own facts, a review of search warrant cases where a single source was relied upon in an Information to Obtain ("ITO") is helpful in determining whether there is credibly-based probability in this case. In *R. v. Hosie* (1996), 107 C.C.C. (3d) 385, [1996] O.J. No. 2175 (Ont. C.A.), Rosenberg J.A., speaking for the Court, stated:
>
> > 14 Thus, what remains of paragraph 5 is information from an unproven source. Mr. O'Connell asked us to place substantial weight on the detail supplied in paragraph 5, namely, that the appellant had recently moved to Everts Avenue and that he had established a "very hightech hydroponic Marihuana growing operation". In my view, the information supplied is far from detailed and could not be described as compelling, in the sense referred to by Wilson J. in *Debot*. There is no indication as to the informer's source of knowledge or how current the information is. There is no way to know whether the informer has obtained this information through personal

observation as opposed to rumour or second or third hand information. The use of the phrase "very hightech" does not advance the case in any real sense. Had the informer provided information as to the type of equipment and similar details then the justice might have been able to infer that the informer had obtained the information first hand. That kind of detail, however, is lacking.

15 As Wilson J. said in *Debot, supra* at page 218, "the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater". Since in this case the credibility of the informants cannot be assessed and few details were supplied, a relatively higher level of verification was required. The validity of the warrant thus depends upon the sufficiency of the police investigation to corroborate the informer's tip as set out in paragraph 3. For ease of reference I will repeat that crucial paragraph:

> A check with Windsor Utilities Commission on September 8, 1993 confirms that George Hosie resides at 1498 Everts St. and that he along with Mary Smith have been paying the hydro bill since March 1993. Hosie's hydro bills appear to be significantly larger than normal.
>
> The fact that the appellant and Ms. Smith had been paying the bills since March 1993 confirms Campbell's information that the appellant "recently" moved to Everts Ave. Otherwise, the somewhat tentative opinion is not sufficiently detailed nor is its source sufficiently identified to be an opinion that supports the allegation that marihuana was being grown in the house. The justice of the peace could not have properly inferred from this paragraph the basis of the opinion, or that the opinion as to the size of the hydro bills was that of an informed person at the Commission.

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

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

51 The mere assertion by an informer that a certain person is engaged in criminal activity or that drugs would be found at a certain place does not necessarily provide a sufficient basis for the granting of a warrant (or affecting an arrest), which depends on such factors as the degree of, or lack of, detail provided in the tip; the existence of, or lack of, supporting police investigation and/or other reliable information; and the existence of, or lack of, past proven reliability of the source: see *R. v. Debot*, (1986), 30 C.C.C. (3d) 207 (Ont. C.A.). As Martin, J.A. stated in *Debot, supra*, at p. 218:

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

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

> In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Secondly, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.

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

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

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

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

> [159] On behalf of the accused it is argued that the efforts of the police amounted to insufficient corroboration of what the tipster had advised the

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

[66] In addition to my findings regarding the vagueness of the single source CI's information, along with the other identified issues, I must address the alleged safety issues prompting the seizure and search of the backpack.

[67] On the evidence, this was not a "ticking time bomb" situation. There was no indicia that the backpack contained anything dangerous. There was nothing from the CI regarding Fentanyl, guns or bombs. Indeed, I find Cst. Forrest's explanation regarding his fear of being harmed by Fentanyl to be without proper foundation. Certainly, there was no expert evidence proffered. Although Cst. Forrest spoke to his safety concerns about the drug based on his experience, I am left to wonder why these concerns were never previously articulated in any of the Crown disclosure or at the PI. In short, I find that officer concerns, if they existed, about Fentanyl should have played no part in the decision making.

[68] Just as the police decided to obtain a warrant for the seized cell phone, they ought to have done so for the backpack. On all of the evidence I fail to see the urgency necessitating an arrest within 30 seconds of observing Mr. MacLean. They easily could have waited in the lot in the unmarked car and observed Mr. MacLean for a reasonable period of time before deciding to arrest and effect the backpack search.

REMEDY

[69] The *Charter* gives anyone whose rights have been infringed the ability to seek a remedy from a Court of competent jurisdiction. Section 24 reads:

> 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.

[70] Once again, the warrantless search and arrest were a violation of Mr. MacLean's *Charter* rights. Accordingly s. 24(2) of the *Charter* may apply to exclude the evidence produced by the unlawful search.

[71] In analysing the seriousness of the *Charter*-infringing state conduct, para. 72 of the majority's decision in *Grant* reads:

> The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing not dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberated the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[72] At para. 74 Chief Justice McLachlin (as she then was) and Justice Charron (writing for themselves and Justices LeBel, Fish and Abella continued:

> State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through 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 bring the administration of justice into disrepute.

[73] At para. 75 the Supreme Court of Canada said:

> …[w]ilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence.

[74] Returning to *R. v. MacDonald*, I find Justice Arnold's comments at para. 66 to be of application here:

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

[75] In my view, the breach of Mr. MacLean's *Charter* rights were serious. In any event, the *Charter* cases tell us that even if the actions undertaken by police officers are not found to have been deliberate in terms of intentionally breaching the accused's *Charter* rights, such actions can be determined to be reckless if the police showed disregard to the accused's *Charter* rights. I would add that citizens have a right to expect a high level of privacy to extend to their person, clothing and belongings such as a backpack. Unauthorized state presence in searching of such is a highly invasive breach of a person's privacy. Here, the situation is made worse given that the police had no permission to search Mr. MacLean and his belongings. Further, there were no exigent circumstances present. In the result, I must conclude that these grounds showed disregard for the *Charter* and favour exclusion of the evidence.

[76] In *Grant*, at para. 76, the Supreme Court of Canada stated that the impact on the accused ranges from "fleeting and technical to profoundly intrusive," and that the more severe the impact on the accused, "the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute". At para. 77 the Court continued by stating; "[t]he more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute."

[77] In my view, the search of Mr. MacLean's person and personal property was one that violated his privacy and dignity. The arrest was intrusive. Accordingly, Mr. MacLean was denied his rights to liberty and security of person.

[78] In *Grant*, at para. 79, the Supreme Court noted that the third part of the 24(2) analysis "asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion", and that it "should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence". At para. 80 the Court continued noting that, "[t]he view that reliable evidence is admissible regardless of how it was obtained …is inconsistent with the *Charter*'s affirmation of rights."

[79] It is obvious that drugs seized from the backpack of Mr. MacLean are likely to be reliable, and that the exclusion of the evidence, practically speaking, leaves the Crown without a case. Nevertheless, this does not mean it should automatically be included.

[80] It is recognized that society has an obvious interest in seeing a case be tried upon its merits. The allegations against the applicant are serious; however, this is all the more reason to ensure that his constitutional rights are safe guarded. In *R. v. Harrison*, 2009 SCC 34, the Supreme Court of Canada allowed the accused's appeal and refused to permit the 35 kg of cocaine seized by police to be admitted into evidence. Chief Justice McLachlin (as she then was) noted at para. 40:

> 40 As Cronk J.A. put it, allowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of criminal law 'the ends justify the means'" (para. 50). *Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences. In relying on Puskas in these circumsta6nces, the trial judge seemed to imply that where the evidence is reliable and the charge is serious, admission will always be the result. As *Grant* makes it clear, this is not the law.

[81] In the final analysis, although important to the serious charges of trafficking, these factors should not be given undue weight in the final balancing.

CONCLUSION

[82] Once again, to determine whether the evidence should be excluded, the three factors outlined in *Grant* must be weighed against each other. The breach of Mr. MacLean's *Charter* rights was of the most serious degree – the police arrested him and subjected him to the full force and power of the state after illegally arresting him

and searching his property. In doing so, the police conducted a search of his person and belongings over which he had a reasonable expectation of privacy. Though the charge is serious and the evidence likely reliable, this factor must not be used to outweigh the seriousness of the breach and its effect on the repute of the administration of justice.

[83] I find the above referenced authorities apposite. The arrest and search and seizure of Mr. MacLean and his property infringed his *Charter* rights in a significant manner. These factors favour exclusion. On the other hand, the drugs found are likely to be found reliable and relate to serious charges. This alone favours admission. When I balance these factors, I determine that admitting unconstitutionally obtained evidence in this case would serve to undermine the public's confidence in the criminal justice system and bring the administration of justice into disrepute.

[84] In the result I find that the applicant's rights under ss. 7, 8 and 9 of the *Charter* were violated. As a result of these violations, the evidence seized by police following his arrest shall be excluded pursuant to s. 24(2) of the *Charter*.

Chipman, J.