S.C.C. File No. 38616

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

- and -

JUSTIN JAMES

Respondent
(Respondent)

RESPONDENT'S FACTUM
(Pursuant to Rule 42 the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

1) Overview of the Respondent's Position

1. This appeal involves the application of uncontroversial rules to a particular set of facts. Jurisprudentially, it sits at the intersection of the well-known statutory "present-tense" precondition to search warrant applications, and the legal and logical limits on relying on dated profile reasoning as a basis for establishing a factual precondition to obtaining a warrant. The question is just how stale the particular items of information can be before that information is considered so stale that it no longer supports a finding that there are reasonable grounds to believe that evidence will be found at the place to be searched on the day the warrant issues.

2. Woven into the facts of this case is the reliance by the police and the issuing justice on profile reasoning – essentially embracing the improper reasoning (repeated in fancier dress by the Appellant here) "once a drug dealer, always a drug dealer".

3. The evidence relied on by the police here was simply too stale to conclude that on the day the warrant issued, there would be evidence in the Respondent's car. The precondition to issuance - that there be reasonable grounds to believe that evidence "***is***" in the place to be searched was not met in this case. The freshest information put forward was almost a month old (3 ½ weeks) but was relied upon to obtain a warrant to search a Mr. James' personal vehicle under s. 11 of the *Controlled Drugs and Substances Act* ("the *CDSA*"). Having in mind the nature of the things being searched for (drugs and paraphernalia) and the place (a vehicle), weeks old information (which was itself thin) was simply stale to the point that it could not support an inference that evidence would be in the vehicle at the time of the search.

4. The late Justice Rogin of the Ontario Superior Court and the majority of the Ontario Court of Appeal all concluded that the warrant in this case couldn't have issued on this stale information. Justice Rogin exercised his discretion under s. 24(2) to exclude the evidence obtained pursuant to the invalid warrant; the majority of the Court of Appeal agreed with his conclusion.

5. The Crown's appeal to this Court must fail. Justice Rogin's decisions on s. 8 and s. 24(2), and the majority's assessment of those decisions, are to be afforded deference, and no proper basis has been shown to interfere with them.

6. Justice Rogin and the majority of the Court of Appeal were right—the warrant applicant relied on thin, stale, and ultimately insufficient assertions. They could not reasonably support the required *reasonable* belief that evidence would be in the vehicle on the day when the warrant was

finally sought by police. When the factors from this Court's decision in *Grant*[1] are balanced under s. 24(2), it is clear that the admission of the evidence would bring the administration of justice into disrepute.

2) Respondent's Statement as to Facts

7. The Respondent accepts as generally accurate the statement of facts set out by the Appellant, subject to the following clarifications and additions.

a) The Investigation and The Search

8. The real target of "Project Kirby" was Franco Marentette-DeRose ("MD"). The police believed MD was based in Windsor and trafficking weapons over the border. Other suspects at the outer edge of MD's group came on their radar from time to time. Compared to the central figures, the police collected precious little evidence in relation to Mr. James (the Respondent) over the course of their 14-month investigation. They only moved to search and arrest the Respondent after the investigation into MD's weapons trafficking was complete.[2]

b) The Tenuous Link to the Respondent

9. The Information to Obtain ("the ITO") asserted that (1) a person referred to as "Primo" was a cocaine supplier for MD and (2) the Respondent was "Primo".[3] There are multiple problems with this theory. The case against "Primo" (whoever he was) was vanishingly thin. In fact, the ITO references "Primo" only in relation to two drug transactions, inviting an inference at most that he actually supplied cocaine on only one of those occasions. The ITO said that on December 18, 2015, (3.5 months before any warrant was sought) MD told a police agent (when discussing purchasing cocaine) that "Primo" would not be coming to Windsor until the next day. MD then

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[1] *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

[2] The investigation began in January 2015 and concluded at the end of February 2016. During that time period, the police relied on a number of investigative techniques, including the use of tracking warrants beginning in June 2015 and authorizations to intercept communications beginning in December 2015. The police executed at 10 "project scenarios" involving a police agent and/or undercover operative. Despite the involved nature and the length of the investigation, the police only collected evidence that tangentially connected the Respondent to two possible drug deals. The bulk of the evidence collected was in relation to MD. ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at paras. 16, 26, 32, 35, 41, 43, 48, 51, 56, 54, 61, 67, 77, 88, 91, 93–94.

[3] See ITO, Appendix J, Appellant's Record, Volume 1, **Tab 9F**.

supplied the police agent with drugs from his own stash. There was no evidence nor any available inference that "Primo" came to Windsor or supplied him with cocaine the next day or later. [4]

10. The only other reference to cocaine coming from "Primo" relates to a transaction that supposedly took place on February 3, 2016. The ITO says that MD told the police agent on that day that he was buying cocaine from "Primo" and that "Primo" would be in Windsor within 30 minutes. The agent did in fact purchase cocaine from MD later that day. But MD, who was under surveillance, wasn't observed meeting with "Primo".[5]

11. The most significant issue with the theory contained in the ITO is that the last date on which "Primo" is mentioned in the ITO was three and a half weeks before the police sought the warrant. (This notwithstanding that this was an apparently well-resourced investigation employing an agent and extensive surveillance.)[6]

c) The Criminal Record – Once a Dealer Always a Dealer

12. The ITO lists a number of offences that the Respondent had been convicted of sometime between 2003 and 2007, including convictions for two offences under the *CDSA*. It is not clear from the ITO whether the last conviction under the *CDSA* was in 2003, 2007, or sometime in between, nor is it clear when those offences would have been committed (beside being something more than five years before the warrant was sought).[7]

d) The Misleading References to the 2012 Charge

13. The affiant chose to include material, misleading information in the ITO. He referred to *CDSA* charges that were laid against the Respondent in 2012. However he hid from the issuing justice the obviously significant fact that those charges were stayed by the Crown almost immediately.[8]

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[4] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at paras. 56(d), (k)–(p); ITO, Appendix J, Appellant's Record, Volume 1, **Tab 9F** at para. 4(b) and (e).
[5] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at para. 88; ITO, Appendix J, Appellant's Record, Volume 1, **Tab 9F** at para. 4(e)–(k).
[6] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at para. 88; ITO, Appendix J, Appellant's Record, Volume 1, **Tab 9F** at paras. 20–22; Warrant to Search, Appellant's Record, Volume 1, **Tab 9C**.
[7] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at para. 103.
[8] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at para. 78(f); Notice of *Charter* Application, Appellant's Record, Volume 1, **Tab 9B** at para. 17.

e) The Execution Period

14. The warrant authorized the police to search the James's car between 8:00 PM on February 25, 2016, and 8:59 P.M. on February 29, 2016.[9] The police executed a "dynamic arrest" at the time of the search. The arrest was described as a high-risk 'takedown' in public.[10]

f) The Trial Judge's *Charter* Ruling

15. Mr. James challenged the warrant to search the car on a number of grounds. He argued that the warrant was invalid, because the thin, stale information in ITO could not support a reasonable inference there would be drugs or other evidence in the Lexus on February 26, 2016. The Respondent challenged the use of misleading information about the 2012 stayed charges. He also argued that the evidence failed to make out that he was the "Primo" referred to by others.[11]

16. Justice Rogin accepted that one could infer that the Respondent and "Primo" were the same person."[12] However, he agreed that there were no grounds to believe that there would be evidence in the vehicle on February 26, 2016. "Primo" was only mentioned in the ITO in reference to December 18, 2015 and February 3, 2016.

17. He found as a fact that the ITO did not demonstrate that the respondent was engaged in a pattern of drug-dealing. He held that a finding that the issuing judge could have issued the warrant "would allow the authorities to obtain warrants based on a person's reputation, in this case as a drug dealer, as opposed to credibly based evidence of probability."[13]

18. He noted that the complexity of the case did not excuse the police from affording the Respondent his constitutional right under s. 8. He held that that if the police "do not have the evidence they must back off and wait until they obtain it."[14]

19. Justice Rogin exercised his discretion to exclude the evidence under s. 24(2) of the *Charter*. When assessing the seriousness of the breach, he noted that the police deliberately delayed

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[9] Warrant to Search, Appellant's Record, Volume 1, **Tab 9C**.
[10] Notice of *Charter* Application, Appellant's Record, Volume 1, **Tab 9B** at para. 40; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at pp. 61, 113.
[11] Notice of *Charter* Application, Appellant's Record, Volume 1, **Tab 9B** at paras.17, 28–29, 31, 36; Applicant's Factum on the *Charter* Application, Appellant's Record, Volume 1, **Tab 10** at paras. 26–45, 50–57; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at pp. 17, 20–21, 23, 30–34, 40–42.
[12] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 4–6.
[13] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 7–9.
[14] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 9–12.

executing the warrant directed at the Respondent "for a greater cause" of pursuing the broader investigation of weapons trafficking thereby "sacrificing" the Respondent's s. 8 right. Justice Rogin also referenced the dynamic arrest of the Respondent in public. When assessing the impact of the breach on the Respondent's interests, Justice Rogin observed that the warrant was, in effect, issued based on the "personal reputation" of the Respondent, and the ITO misled the issuing justice regarding the 2012 charges laid against the Respondent. He also acknowledged that the Respondent had a lower expectation of privacy in the vehicle. Finally, Rogin J. acknowledged that the charges were serious and that the evidence was crucial to the prosecution. However, he concluded that the "philosophy of s. 24(2)" favoured exclusion of the evidence.[15]

g) The Court of Appeal's Decision

i) The Majority

20. The majority found that there was no basis to disturb the trial judge's decision that the ITO was insufficient to support the issuance of the warrant, because he did not make an error of law, misapprehend evidence, or fail to consider relevant evidence.[16]

21. The majority agreed with the trial judge's conclusion that the evidence connecting the Respondent to the drug transactions on December 18, 2015, and February 3, 2016, was not sufficient to find a pattern of drug dealing or to establish the necessary reasonable grounds to believe that evidence, drugs, or paraphernalia would be found in the car at the time of the search. The majority noted that the trial judge's "factual conclusion" that there was insufficient evidence to form a basis for the warrant was owed deference.[17]

22. The majority also made the following apt observation:

> Implicit in the ITO here is an assertion that because the respondent had a dated record for drug offences, might have dealt in drugs on December 18, 2015, and could well have done so on February 3, 2016, he could be presumed to have drugs or evidence of drug dealing in a vehicle more than three weeks later, on February 25 or 26, 2016.

The majority applied the rule from this Court in *Morelli* and concluded that "[e]vidence of a propensity of a general type of offender is a thin basis to justify the issue of a search warrant."[18]

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[15] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 12–15.
[16] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 26.
[17] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 21.
[18] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at paras. 22–23.

23. (Note that contrary to the Appellant's summation of the facts, the majority did not conclude that there were reasonable grounds to believe that the Respondent was involved in a drug transaction on December 18, 2015. Rather, the majority noted that the "ITO establishes that the Respondent might have been involved in a drug transaction on December 18, 2015.")[19]

24. With respect to s. 24(2), the majority correctly applied a deferential standard and concluded that there was no basis for appellate intervention. The majority remarked that the fact that the police applied for a warrant does not in itself signify good faith. The majority disagreed that the *Charter* breach was merely a matter of timing. Rather, "it was a failure to comply with a mandatory statutory requirement, to establish reasonable grounds that evidence would be found in the place sought to be searched."[20]

ii) The Dissent

25. The crux of Nordheimer J.s dissent was his assessment of the facts. He thought that the ITO supported an inference that the Respondent engaged in a "pattern" of drug-dealing behaviour such that evidence would still be in the vehicle almost a month later. He did find, however, that the ITO did not establish that "Primo" was MD's only supplier of cocaine.[21]

26. Nordheimer J.A. concluded that the omission fact the 2012 charges were stayed was a minor error, and deprecated that significance of a stay.[22]

27. Nordheimer J.A. found that even if there was a s. 8 breach, the evidence should not have been excluded. He found that the breach was not serious. However, he accepted that almost any time there is an invalid search, it has a serious impact on the accused. He found that the third *Grant* factor strongly favoured admission, because the evidence was crucial to the Crown's case.[23]

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[19] Appellant's Factum at para. 19; Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at paras. 21.
[20] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at paras. 37, 39, 41–42, 45
[21] Court of Appeal Dissenting Reasons, Appellant's Record, Volume 1, **Tab 3** at paras. 48, 56, 57, 68.
[22] Court of Appeal Dissenting Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 59.
[23] Court of Appeal Dissenting Reasons, Appellant's Record, Volume 1, **Tab 3** at paras. 77, 79, 80, 82, 87–90.

PART II: POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

ISSUE 1: Did the majority of the Court of Appeal for Ontario err in law by deciding the respondent's section 8 *Charter* right was violated because there were insufficient grounds to support the issuance of a *CDSA* warrant?

28. No. The trial judge correctly concluded that the Respondent's s. 8 right was violated, because the ITO did not provide reasonable grounds to believe that evidence of an offence would be found in the Respondent's vehicle on February 26, 2016. The trial judge did not err in law, misapprehend evidence or fail to consider relevant evidence. The majority of the Court of Appeal, therefore, correctly upheld his ruling.

ISSUE 2: Did the majority of the Court of Appeal for Ontario err in law by excluding the evidence under s. 24(2) of the *Charter*?

29. No. The trial judge correctly excluded the evidence. The trial judge considered the proper factors, and there was, therefore, no basis for appellate intervention. In any event, the admission of the evidence would have brought the administration of justice into disrepute.

PART III: STATEMENT OF ARGUMENT

ISSUE 1: The ITO Did Not Establish Reasonable Grounds to Believe that Evidence of an Offence Would Be Found in the Vehicle on February 26, 2016

1) Introduction

30. This case involves the application of settled law to a specific set of facts. There is no reason for this Court to interfere with the decision of the Court of Appeal or exercise of its error correcting function.

2) The Standard of Appellate Review

31. The findings of the trial judge with respect to the disposition of the s. 8 *Charter* application are owed deference. Appellate courts across the country have recognized that an appellate court should decline to interfere with the reviewing judge's decision absent a clear error of law, a misapprehension of evidence, or a failure to consider relevant evidence.[24]

3) The Test for Reviewing the Sufficiency of the Search Warrant

32. The trial judge applied the well-settled legal test. He knew he was required to determine whether there was a reasonable basis upon which the issuing justice could have issued the warrant. As explained by Fish J. for the majority in *Morelli*,

> [t]he 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.[25]

4) The Statute and Section 8 Include a "Present Tense" Requirement

a) The Test for the Issuance of the Warrant

33. Section 11(1) of the *CDSA* permits an issuing justice to grant the warrant application if he or she is satisfied that there are reasonable grounds to believe that evidence "*is*" in a place to be searched.[26]

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[24] *R. v. Sadikov*, 2014 ONCA 72 at para. 89. See also *R. v. Bissky*, 2018 SKCA 102; *R v. Brown*, 2017 NSCA 44; *R. v. Morey*, 171 OAC 36, 2003 CanLII 11041 (Ont. C.A.).
[25] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 3, 8–9; *R. v. Morelli*, 2010 SCC 8 at para. 40, [2010] 1 S.C.R. 253 citing *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 54. See also *Sadikov*, *supra* at paras. 37–38.
[26] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 11(1) [*CDSA*].

34. The requirement that the thing sought "is" in the place to be searched is referred to as the "present tense" requirement.[27]

35. This temporal requirement is a fundamental prerequisite of all search warrant applications. As this Court noted in *Hunter v. Southam Inc. "*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, constitutes the minimum standard, consistent with section 8 of the *Charter,* for authorizing search and seizure" [emphasis added].[28]

b) The Test for Staleness

36. Information in an ITO is considered "stale" if it no longer satisfies the "present tense" requirement. The evidence relied on in the ITO must be "current so as to lead credence to the reasonable and probable grounds". Relying on stale information in an ITO provides "at best suspicion and at worst mere speculation" that evidence of an offence currently exists in the place to be searched. Warrants that issue on the basis of stale information fail the statutory test, and are unconstitutional.[29]

37. Whether the information is too stale to support the issuance of the warrant "is a question to be answered on a case by case basis, confined to its particular facts."[30] That is the ***fact-driven*** question answered by Justice Rogin.

i) The Nature of the Things to Be Seized and the Place to be Searched

38. The nature of the items, and place to be searched, are factors to consider when assessing whether or not dated information in an ITO is too stale to rely on for the issuance of a warrant. Collectible items, such as videos, books, and child pornography in a home are different than items that are consumable, perishable, or acquired for quick resale, such as drugs present in a vehicle.[31]

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[27] Scott C. Hutchison, *Hutchison's Search Warrant Manual 2015*, (Toronto: Thomson Reuters Canada Limited, 2014) at p. 63.
[28] *Hunter v Southam Inc.*, [1984] 2 S.C.R. 145 at p. 168.
[29] *R. v. Turcotte*, [1987] S.J. No. 734 (C.A.); *R. v. Goodfellow*, 2014 ONCJ 567 at para. 107. See also *R. v. Adansi*, 2008 ONCJ 144; *R. v. Chen*, 2007 ONCJ 177; *R. v. Colby*, [1999] S.J. No. 915 (Q.B.); *R. v. Jamieson*, [1987] N.S.J. No. 280 (C.A.).
[30] *R. v. Porter*, 2016 ONSC 5589 at para. 58.
[31] *R. v. Burke*, 2013 ONCA 424 at para. 32; *R. v. Neveu*, 2005 NSPC 51 at para. 15; *R. v. Ballendine*, 2009 BCSC 1937 at para. 74 aff'd in *R. v. Ballendine*, 2011 BCCA 221; *R. v. Campbell*, [2005] O.J. No 2369 (Sup Ct.).

39. Of course, even if the police are permitted to rely on dated information that would be insufficient to authorize a search for drugs to search for non-transitory items, such as packaging or debt lists, they are required to establish in the ITO that there actually are reasonable grounds to believe that these items will be found in the place to be searched.[32]

ii) A Pattern of Behaviour Can Only Support the Issuance of a Warrant if there is a Case-Specific Foundation for Relying on Profile Reasoning in the ITO

40. The underlying premise of the Appellant's argument is that a person who is believed to have been involved in one drug deal, or perhaps two drug deals, can be assumed to keep or have drugs in a car he is associated with at any time in the future.

41. The Canadian authorities are clear—for sound policy reasons—that this sort of "profile reasoning" cannot be used to justify the intrusion associated with a warrant without the inclusion of a *case-specific foundation* in the ITO. This Court made clear in *Morelli* that if an affiant intends to rely on a target's propensities in an ITO, he or she is required to include a proper evidentiary basis for doing so. The ITO must include evidence that establishes the characteristics of an identified class of drug dealers *in addition to* evidence of the target's membership in that class.[33]

42. As this Court has stressed in *Morelli*, the "main difficulty with generalizations about certain 'types of offenders' is that they are entirely devoid of meaningful factual support." Without an evidentiary foundation, such generalizations are insufficient to enable a justice of the peace to conclude that reasonable grounds to believe exist.[34]

43. Numerous Canadian cases have held that generalized statements about the generic propensities of traffickers or conclusions about where, when, or how they might store drugs cannot be used by the affiant to justify the issuance of a warrant without some case-specific evidentiary support.[35]

44. The Appellant relies heavily on American jurisprudence for the proposition that gaps in time are acceptable in cases involving drugs, because continued involvement in the drug trade is

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[32] *CDSA, supra* note, s. 11(1).
[33] *Morelli, supra* at para. 82 citing *R. v. Fawthrop* (2002), 161 O.A.C. 350, 2002 45004 (C.A.)
[34] *Morelli, supra* at para. 73.
[35] See *R. v. Rocha*, 2012 ONCA 707 at para. 26; *R. v. Aboukhamis*, 2015 ONSC 2860 at paras. 34–40; *R. v. McKenzie*, 2016 ONSC 4919 at paras. 60–68.

to be expected.[36] This approach should be rejected. In the Canadian context, such a conclusion requires case specific evidence, and there simply isn't any in in this case.

iii) The Prohibition Against Relying on "Stale" Information is Not a Flexible Rule

45. The rule against 'stale' information is fact driven, but not "flexible" as the Crown suggests.[37] The requirement of *current* grounds to support a search of a place is the opposite of "flexible" - it is a logical and constitutional minimum.[38] If the information in the ITO is not sufficient to meet the "present tense" requirement, there is no room (or need) for flexibility. The warrant application should be rejected, and a warrant (like this one) issued in these circumstances must necessarily be revoked.

46. The Appellant's reference to paragraphs 72–74 of Nordheimer J.A.'s dissenting reasons is misplaced. These paragraphs do not stand for the proposition that the staleness assessment is "flexible". In fact, even Nordheimer J.A. acknowledged that the decision to wait to move on a target in the interest of protecting a broader investigation "does not, of course, remove the need for the police to have the requisite grounds for the authorization at the time they obtain it."[39]

47. Put simply, the strategic decisions around the investigation do not reduce the constitutional requirement of current information to support the warrant.[40] The choice was not "stale or nothing". If they were correct in their belief, the police could have continued to investigate the Respondent proximate to the "take-down" date. They didn't, and the record to support the warrant was therefore deficient. As Rogin J. observed, if the police do not have enough evidence to search, then they must "wait until they obtain it."[41] There was nothing preventing the police, for example, from asking the police agent to inquire further about "Primo" or otherwise investigating.[42]

48. They could also have conducted further surveillance leading up to February 26, 2016. This is especially true when the Appellant's position on the Respondent's involvement in the drug trade is considered. But they didn't. They could not delay searching the Respondent, do nothing to keep their information 'fresh' and expect to get a constitutionally acceptable warrant.

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[36] Appellant's Factum, at paras. 29–30.
[37] Appellant's Factum, at para. 32.
[38] *Hunter v. Southam Inc.*, *supra* at p. 168; *CDSA*, *supra*, s. 11(1).
[39] Court of Appeal Dissenting Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 72.
[40] Court of Appeal Dissenting Reasons, Appellant's Record, Volume 1, **Tab 3** at paras. 74–76.
[41] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at p. 10.
[42] Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at pp. 75–76.

c) The Trial Judge's Use of the Word "Contraband" is Not a Reviewable Error

49. The Appellant argues that Justice Rogin erred when assessing the validity of the warrant by only considering whether there were reasonable grounds to believe "contraband" would be found in the Lexus and not whether there were reasonable grounds to believe that other drug-related items (such as packaging, debt lists, or cell phones) were located in the vehicle.[43]

50. With respect, this semantic attack on the reasons for decision is foreclosed and, with respect, does a disservice to the record.

i) The Appellant is Barred from Relying on this Argument Because It is Being Raised for the First Time on Appeal

51. The Appellant argues that *even if* there were no reasonable grounds to believe that drugs would be found in the Lexus on February 26, 2016, there were reasonable grounds to believe drug-related items would be found on that date, because they are somehow more permanent than drugs.[44] No evidence supports that claim.

52. The Appellant never raised this "in the alternative" argument before Justice Rogin. The Appellant never suggested that even if the information in the ITO was too stale to rely on in relation to drugs, it was not too stale in relation to other items—*the Appellant never argued that the test for staleness should be applied differently to drug-related items than to drugs*.

53. The Respondent's counsel on the application clearly challenged the grounds in relation to all the evidence, including drug-related items, being found in the vehicle. The Appellant simply did not deal with this argument in its response. Even when pressed by Justice Rogin on the use of dated information in the ITO, the Appellant did not argue that the ITO was still sufficient to authorize a search for non-transient drug-related items. Instead, the Appellant only advanced the following arguments to justify delay in obtaining the warrant:

i. the complexity of the investigation;
ii. the risk of undermining the investigation if the warrant was issued on February 3, 2016; and
iii. because "Primo" was believed to have dealt *cocaine* on February 3, 2016, it could be inferred that he would be in possession of *cocaine* on February 26, 2016.[45]

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[43] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at p. 8–9.
[44] Appellant's Factum at para. 37.
[45] See e.g. Notice of *Charter* Application, Appellant's Record, Volume 1, **Tab 9B** at paras. 27–29, 31; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at 17, 20, 23, 32, 53, 56, 61, 73–7–77, 89; Her Majesty's Factum, Appellant's Record, Volume 1, **Tab 12**, at paras. 40–44.

54. Appellate courts do not allow an issue to be raised for the first time on appeal (especially by the Crown). As noted by Karakatsanis J. in *Youvarajah*, when a *voir dire* proceeds primarily on the basis of the Crown's prosecutorial decisions, the Crown "cannot ask for a new trial on the basis that the prosecution should have been conducted differently." Appellate courts frequently refuse to entertain new arguments, including on the same *Charter* challenge, that are raised for the first time on appeal.[46]

55. In the context of an appeal *by the Crown*, double jeopardy considerations are also engaged. In *Varga* (a Crown appeal), the Ontario Court of Appeal noted that the Crown can't "raise arguments on appeal that it chose not to advance at trial"; that the Crown must live with its decision not to litigate an issue at first instance both at trial and on appeal; and that it would offend "double jeopardy principles, even as modified by the Crown's right of appeal, to subject an accused, who has been acquitted, to a second trial based on arguments raised by the Crown for the first time on appeal."[47] Put simply, it cannot be an error of law alone for a trial judge to fail to give effect to an argument the Crown only thinks of on appeal.

ii) The Trial Judge Considered the Reasonable Grounds to Believe All Forms of Evidence Would be Found

56. Even if the Crown was permitted to raise the issue of the warrant's validity with respect to a search for drug-related items, fixating on Justice Rogin's use of the word "contraband" is not a proper basis upon which to find an error of law alone.

57. First, it is not reasonable to suggest that Rogin J.'s reference to "contraband" means that he did not consider the probability of drug-related items being found weeks after the date of the last information about the Respondent. At the outset of his decision, he identified the correct test to be applied in his review of the warrant when he stated the following:

> I remind myself that I am not to substitute my view of the situation for that of the issuing judge. The issue is whether on the basis of the information provided whether the warrant could have been issued.

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[46] *R. v. Reid*, 2016 ONCA 524 at paras. 39–41; *R. v. Youvarajah*, 2013 SCC 41 at para. 46, [2013] 2 S.C.R. 41. See also *R. v. Warsing*, [1998] 3 S.C.R. 579 at para. 16 (L'Heureux-Dubé J., dissenting in part). See *e.g. R. v. Boukhalfa*, 2017 ONCA 660 at paras. 107–108, 111, 114, 119, 124–128, 143–145, 154; *R. v. Jacobs*, 2014 ABCA 172 at paras. 21–28; *R. v. Myette*, 2016 SKCA 11 at pars. 6–7.

[47] *R. v. Varga*, 18 O.R. (3d) 784 at 793, 795, 1994 CanLII 8727 (C.A.).

Justice Rogin later recognized that s. 11 requires there to be reasonable grounds that "evidence" is in the place to be searched. He then concluded that there were simply no reasonable grounds to believe that the warrant could have issued on February 26, 2016, because there was "no evidence before the Justice of the Peace that the information [relied on by the affiant] was current." Justice Rogin was aware that there were concerns about establishing reasonable grounds to believe that *any* evidence would be found in the Lexus. Indeed, defence counsel referred to this issue in the application materials and during submissions.[48]

58. The majority of the Court of Appeal was correct in concluding that the trial judge did not confine his analysis to the probability that drugs, as opposed to other evidence of drug dealing, would be found, given his reference to the need under s. 11 of the *CDSA* to establish that "evidence" would be found. His use of the word "contraband" was a compendious fashion of referring to the argument made to him, which did not distinguish cocaine from other evidence of drug trafficking.[49]

59. Simply put, Justice Rogin's use of the word "contraband" does not establish that he only assessed the probability of finding drugs.

60. Second, and probably more to the point, the Appellant hasn't pointed to any evidence in the ITO that could establish that there actually were grounds to believe drug-related evidence would be found in the Lexus weeks after the last information related to "Primo"—or at all.

61. The ITO contained absolutely no evidence to support the belief that drug-related items would be found in the Lexus ever. The ITO did not establish that the Respondent was dealing drugs exclusively or even regularly out of the Lexus. In fact, the ITO associated the Respondent with multiple vehicles. It is not a matter of common sense or judicial notice, and significantly, the affiant never asserted (based on experience or training) that it was reasonable to believe that persons who use a vehicle to deliver drugs on one occasion would also keep their debt lists, cell phones, and other items with him in that vehicle (a tenuous claim at best).

62. In short, there is nothing in the ITO to support the belief that the Respondent kept debt lists, cell phones, or packaging in the Lexus on February 3, 2016, let alone on February 26, 2016. Even if it was accepted that Justice Rogin should have more explicitly addressed whether there were

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[48] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 3, 8, 11; Notice of *Charter* Application, Appellant's Record, Volume 1, **Tab 9B** at paras. 27–29, 31; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at 17, 20, 23, 32, 53, 56, 61.
[49] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 25.

reasonable grounds to believe that drug-related items would be found in the vehicle on February 26, 2016, such grounds simply did not exist.

d) There was no 'Pattern' of Drug Dealing; Any "Pattern" is Irrelevant

i) The Appellant is Barred from Challenging the Factual Finding

63. The Crown's appeal cannot be allowed on the basis of a claim that the trial judge erred in finding that the ITO did not reveal a pattern of drug-dealing behaviour, because Justice Rogin's conclusion was a finding of fact, and s. 676 of the *Criminal Code* limits the Crown's right of appeal to issues of law alone.[50]

64. Nordheimer J.A. did not explain how the trial judge's finding that there was no evidence to establish a pattern of drug-dealing activity amounted to an error of law alone. With respect, he erred in framing this issue as an issue of law.[51] In his analysis, Nordheimer J.A. simply reweighed the evidence in the ITO to a different factual finding. This is the category of appellate review barred by s. 676.[52]

ii) The ITO Did Not Provide Reasonable Grounds to Believe that the Respondent Exhibited a Pattern of Drug-Dealing Behaviour

65. Even if the Crown could challenge the trial judge's factual finding, there is no basis upon which to infer that the Respondent was involved in a "pattern" of drug dealing behaviour. The ITO does not establish reasonable grounds to believe that any pattern existed, and certainly not the sort of pattern that would permit the inferences the Appellant requests be made here. The ITO only referenced "Primo" in relation to two potential drug transactions and even it only alleges that <u>*one*</u> of those transactions actually took place. This single transaction (or if stretching it, two) cannot be said to amount to the sort of pattern that could justify the open-ended inference the for which the Crown argues.

66. The Respondent's dated criminal record (for an offence that predates 2007 at the least) cannot sweep in to save the inference the Crown needs about what the Respondent was doing in 2016. That record was a decade old when the warrant was sought (maybe even older if the last drug offence was in 2003 as opposed to 2007).

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[50] *Criminal Code*, R.S.C., 1985, c. C-46, s. 676.
[51] Court of Appeal Dissenting Reasons, Appellant's Record, Volume 1, **Tab 3** at paras. 52, 54, 56.
[52] See Court of Appeal Dissenting Reasons, Appellant's Record, Volume 1, **Tab 3** at paras.54–60, 66, 71–75.

67. The Appellant suggests that the trial judge erred by failing consider MD's references to "Primo" as his "guy" and to a previous drug purchase from Primo. MD's references to "Primo" were all limited to discussions in relation to planning the December 18, 2015, and (unfinished) February 3, 2016 transactions. The trial judge clearly considered the evidence that attempted to link the Respondent to both of these transactions; he specifically noted that the Respondent was only mentioned in relation to the dates of December 18, 2015, and February 3, 2016. The fact that he did not refer to MD's other comments about "Primo" is not a reviewable error, because, again, he was not required to detail every step of his reasoning process.[53]

68. The ITO did not establish – or even allege - that the Respondent was a kilo-level cocaine dealer. There is a single reference in the ITO that supposedly connects "Primo" to this amount of cocaine. On February 3, 2016, the police agent reported that MD was planning to buy a "key" off of "Primo". This information doesn't establish that "Primo" was dealing in kilograms. This information is double or triple hearsay. The police never observed a drug transaction involving a kilogram (or any other amount for that matter) between MD and the Respondent. There is no evidence to suggest that MD actually bought a kilogram of cocaine from "Primo" or anyone else. While hearsay is admissible in warrant applications, "the authorizing judge is required to assess the nature and quality of the sources for the deponent's evidence to ensure that reasonable grounds have been made out." MD and the police agent were both questionable characters. Justice Rogin acknowledged that nothing in the ITO was confirmed except by inference and noted that MD had a motive to be disingenuous and to mislead. This double hearsay comment is, therefore, not reliable evidence that the Respondent was dealing in drugs at the kilogram level.[54]

69. Not only is this piece of evidence insufficient to establish that "Primo" was dealing in kilograms of cocaine, but there is evidence in the ITO to suggest that MD was looking to ***find*** a cocaine supplier who could provide kilograms of cocaine. During the investigation, MD asked the

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[53] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9A** at paras. 56(o), 77(d) and (f), 88(d); Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at p. 9; *H.S.B.*, *supra* at para. 8 citing *R.E.M*, *supra*.

[54] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9A** at paras. 88(d); *Canada (Attorney General) v. Ni-Met Resources Inc.* (2005) 74 O.R. (3d) 641 at para. 18, 2005 CanLII 8670 (C.A.) cited in *R. v. Clarke*, 2016 ONSC 351 at para. 35; Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at p. 7.

Undercover Operator to reach out to his contacts to find someone who could provide MD with kilograms of cocaine, something inconsistent with this police theory.[55]

70. The *absence* of evidence about "Primo" is even more stark when the length and nature of the case are considered. The police conducted their investigation into weapons and drug trafficking with a focus on MD for over 14 months. MD was under surveillance as early as June 2015. MD's communications were intercepted beginning in early December 2015. A police agent, who permitted the police to intercept his communications and to collect video observations, was engaged in November 2015. Notwithstanding this extended, intense scrutiny, precious little evidence was surfaced about "Primo". If there was any basis to think that "Primo" was truly engaged in an ongoing pattern of drug-dealing, the police would have collected more evidence than what they actually uncovered in this case.[56]

iii) Any Pattern of Drug-Dealing is Irrelevant to the Analysis in this Case

71. Even if the ITO did demonstrate that the Respondent was engaged in a pattern of drug-dealing activity, the ITO did not permit the issuing judge to rely on profile reasoning as a basis for the issuance of the warrant. As previously discussed, the ITO must establish the characteristics of an identified class of drug dealers and evidence of the target's membership in that class in order to rely on propensity reasoning.

72. The ITO in this case did not allege, let alone establish, the characteristics of the class of drug dealers that to which the Crown could say the Respondent belonged. In the absence of

i. a claim that drug-dealers similar to the type that the Respondent is alleged to be would have drugs or drug-related items weeks after their last known involvement in any drug activity; *and*

ii. some sort evidentiary support for such profile reasoning

in the ITO, a generic belief that the Respondent was a drug dealer (even if more well-grounded than the thin basis offered in this case) is not a proper basis to establish reasonable grounds to believe that drugs would be located in the Lexus *more than three weeks after the last mention of a drug transaction associated with "Primo"* in the ITO.[57]

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[55] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9A** at para. 41(k).
[56] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at paras. 16, 26, 32, 35, 41, 43, 48, 51, 56, 54, 61, 67, 77, 88, 91, 93–94.
[57] *Morelli, supra* at paras. 73, 82.

73. Regardless, the warrant was still issued without reasonable grounds to believe that evidence of an offence would be found in the Lexus on February 26, 2016. The ITO did not include evidence to show that the Respondent stored cocaine or other drug-related items in the Lexus or that he regularly or exclusively used the Lexus to transport drugs. In fact, the ITO associated the Respondent with multiple vehicles. Further, it provided no evidence that he made regular or predictable trips to Windsor to deliver drugs to MD. In sum, the ITO provided no evidence to believe drugs or other related items would be found in the Lexus on February 26, 2016, even if the Respondent was found to display a pattern of drug dealing behaviour.[58]

ISSUE 2: The Admission of the Evidence Obtained in Violation of Section 8 Would Bring the Administration of Justice Into Disrepute

1) Standard of Review on Appeal

74. The trial judge's analysis under s 24(2) must be afforded deference. This Court has set out the standard of review of a trial judge's findings on s. 24(2) on multiple occasions. "Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination."[59]

2) Test for Exclusion of the Evidence

75. The trial judge applied the correct test when assessing s. 24(2). The test for the exclusion of evidence is not controversial. He was required to determine whether the admission of the evidence would bring the administration of justice into disrepute by balancing the effect of admitting the evidence on society's confidence in the justice system having regard to

i. the seriousness of the *Charter*-infringing state conduct;
ii. the impact of the breach on the *Charter*-protected interests of the Respondent; and
iii. society's interest in the adjudication of the case on its merits.[60]

3) The Admission of the Evidence Would Bring the Administration of Justice into Disrepute

76. Justice Rogin did not disregard relevant factors when completing the required balancing exercise under s. 24(2). This Court must, therefore, show considerable deference to his decision to exclude the evidence. A fresh s. 24(2) analysis is not warranted.

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[58] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E,** at paras. 78(f), 81(a).
[59] *Grant*, *supra* at para. 86. See also *R. v. Côté*, 2011 SCC 46 at para. 44; *R. v. Beaulieu*, 2010 SCC 7 at para. 5.
[60] *Grant*, *supra* at para. 71.

a) The Seriousness of the Breach Favoured Exclusion

77. The trial judge and the majority of the Court of Appeal correctly determined that the breach was serious. The Appellant has not shown that Justice Rogin made any error in his consideration of the seriousness of the breach that would warrant appellate intervention.

i) The Mere Existence of a Warrant did not Necessarily Weigh in Favour of Admission of the Evidence

78. The existence of the warrant does not invariably support the admission of the evidence in this case. Relying on stale information – bolstered improperly by the misleading reference to the 2012 charges - was a deliberate choice that amounted to a wilful or flagrant disregard of the *Charter*. Justice Rogin was, therefore, not obliged to conclude that the existence of the warrant weighed in favour of admission of the evidence; the seriousness of the breach was not attenuated by the existence of the warrant.

79. Justice Rogin found as a fact that the police deliberately sacrificed the Respondent's s. 8 right to the larger goals of the project. This finding was open to him on the record. While the decision to delay in searching the Respondent until the larger investigation was complete may have been a legitimate investigation gambit, it does not mitigate the seriousness of the breach—just the opposite.[61]

80. The police were not absolved of their obligation to satisfy the issuing justice that the prerequisites for obtaining a search warrant existed <u>*at the time of the search warrant application*</u> simply because they believed that searching the Respondent on February 3, 2016, would have jeopardized their broader investigation. Rather, as the police approached their target date near the end of February 2016, the police could have and should have attempted to collect current evidence against the Respondent. By choosing to delay the search of the Respondent <u>and</u> failing to conduct any further investigation of the Respondent closer to February 26, 2016, the police sacrificed the Respondent's s. 8 right. This deliberate sacrifice exacerbates the seriousness of the breach.

81. The Appellant also argues that by failing to conclude that the existence of the warrant weighed in favour of admitting the evidence, the trial judge erred, because he did not follow the approach described in the Ontario Court of Appeal's decision in *Rocha*.[62]

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[61] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 10, 11. See paragraph 89, below.

[62] Appellant's Factum paragraph 52. See *Rocha*, *supra*.

82. The Court in *Rocha*, however, held that the existence of a warrant generally weighs in favour of admitting the evidence unless the warrant was obtained through use of false or deliberately misleading information or the drafting of the ITO in some way subverted the warrant process. This Court has said more generally:

> Wilful 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. [emphasis added; citations omitted].[63]

83. The deliberate choice to sacrifice the Respondent's right to be free from unreasonable search and seizure by delaying the search of the Respondent in the interests of maintaining the integrity of a greater investigation and then failing to update the ITO with current information demonstrates a willful and flagrant disregard for the *Charter*. The decision to rely on stale information (bolstered by misleading information about 2012) to obtain a warrant on the basis that there was a "greater cause" subverts the warrant application process, because the police's interests in investigating and arresting a bigger target were deliberately given priority over the Respondent's s. 8 right.

ii) Misleading the Issuing Justice about the 2012 Drug Charges Magnifies the Seriousness of the Breach

84. The failure of the police to note that the 2012 charges against the Respondent were stayed exacerbated the seriousness of the breach. Justice Rogin found as a fact that this omission was misleading. As noted by the majority of the Court of Appeal, there must have been a good reason why the Crown stayed the 2012 charges almost immediately after they were laid. That information would have been readily accessible to the police. While Justice Rogin did not find that the police were acting in bad faith, he also did not conclude that the police acted in good faith. He found that there was "absolutely no excuse for this non-disclosure" and noted that it seemed "strange that the one fact helpful to Mr. James was not disclosed contrary to the duty of the affiant."[64]

85. Without the information that the 2012 charges were stayed, the issuing justice was left with the impression that the Respondent's involvement in the drug trade was more continuous than what all of the evidence, if included, actually would have shown. If the issuing justice had been privy to

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[63] *Grant*, *supra* at para. 75. See also *R. v. Szilagyi*, 2018 ONCA 695 at para. 71; *Rocha*, *supra* at paras. 28–37.

[64] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 7, 14; Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 39.

the fact that the 2012 charges were stayed, it would have been "speculative" to conclude from only the arrest that the respondent was trafficking in drugs in 2012. The inclusion of the fact of the stay, therefore, would have made it clear to the issuing justice that the "pattern" was broken in at least one place, leaving a significant gap in the timeline of the Respondent's alleged drug-dealing activities. [65]

86. The fact that the charges were stayed as opposed to dismissed has no bearing on this analysis. Whether the omission related to staying or dismissing the charges, the failure to include the information would have misled the issuing judge to believe that the Respondent exhibited a continuous pattern of drug-dealing behaviour.

87. Justice Rogin was correct in considering the omission in his s. 24(2) analysis. The failure to disclose that the 2012 charges were stayed is *not* a minor omission, because the underlying theory in this case is that stale information could form the basis for reasonable grounds to believe that evidence would be found in the searched vehicle, because the Respondent exhibited a "pattern" of drug dealing behaviour. The omission, therefore, "bolster[ed] an essentially reputational basis for the search warrant."[66]

iii) *The Police Deliberately Sacrificed the Respondent's Section 8 Right for a "Greater Cause"*

88. Justice Rogin found as a fact that the police deliberately sacrificed the Respondent's s. 8 right "for what the police felt was a greater cause, the investigation and search for firearms going across the border". The Crown's appeal cannot be allowed on the basis that this finding was an error on account of s. 676 of the *Criminal Code*. [67]

89. In any event, this finding was available to Justice Rogin on the record. The following is clear when the ITO is read as a whole:

- MD was the main target of the investigation;
- the Respondent was a peripheral target;
- the police were primarily focused on investigating MD's involvement in cross-border weapons trafficking;
- the investigation was complex and involved the use of a number of investigative techniques;

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[65] ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9E** at para. 103; Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 39.
[66] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 39.
[67] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 12–13.

- the police chose not to search or arrest the Respondent on February 3, 2016, when the evidence relied on (though scant) was current;
- after February 3, 2016, the police did not conduct any further surveillance of the Respondent or otherwise attempt to collect current evidence to support the grounds to believe that evidence would be found in the vehicle occupied by the Respondent on February 26, 2016;
- the police sought warrants to search all of the parties involved at the same time; and
- the police did not apply to search the Respondent or anyone else until the investigation into MD was complete.

Based on this information, it was open to Justice Rogin to conclude that the police delayed in searching the Respondent in order to protect the integrity of the investigation. That is, in fact, the position taken by the Crown in front of Justice Rogin. It was reasonable for Justice Rogin to then conclude that the Respondent's s. 8 rights were sacrificed for the "greater cause" of the weapons trafficking investigation.[68]

90. This is especially true if the Appellant's position with respect to the Respondent's alleged "pattern" of drug-dealing is considered. The police could have easily placed the Respondent under surveillance in the days leading up to February 26, 2016. If the Appellant is correct and the Respondent regularly deals large quantities of drugs, the police would have been able to collect current evidence needed to establish the necessary reasonable and probable grounds. That evidence could have been added to the application seeking the February 26, 2016, warrant.

91. By delaying the search of the Respondent to ensure the continuation of the larger investigation and by failing to update the ITO in relation to the Respondent closer to the execution date, the police clearly prioritized the greater investigation over the Respondent's right to be free from unreasonable search and seizure. Justice Rogin did not err in concluding that this prioritization, which is evident from the ITO, amounted to a sacrifice of the Respondent' s. 8 right.

iv) The ITO Fell Significantly Short of Constitutional Minimal Standards

92. The Appellant's position that the breach was not serious, because the ITO "did not miss by much" is untenable.

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[68] See ITO, Appendix A, Appellant's Record, Volume 1, **Tab 9A**; ITO, Appendix J, Appellant's Record, Volume 1, **Tab 9F**; Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1** at pp. 12–13; Her Majesty's Factum, Appellant's Record, Volume 1, **Tab 12** at paras. 41, 44; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at pp. 77–78, 89.

93. The failure of the police to update the evidence relied on to establish reasonable grounds to believe is not an example of the police barely missing the mark. It was a "failure to comply with mandatory statutory requirement, to establish reasonable grounds that evidence would be found in the place sought to be searched."[69]

94. The police should be well-acquainted with the "present tense" requirement. Like all constitutional minimum standards, it should be at the forefront of each search warrant application. Contrary to the Appellant's position and to Nordheimer J.A.'s comments in dissent, the police in this case ***can be*** faulted for believing that information that was weeks old was not stale for the purposes of the ITO. The police have a constitutional obligation to ensure that the ITO provides reasonable grounds to believe that evidence ***is*** at the place to be searched. The failure to comply with the very basic "present tense" prerequisite is a serious breach of the Respondent's constitutional rights.

95. The Appellant suggests that the trial judge formed an impression that the ITO was weaker than it actually was by ignoring significant information in the ITO, which is simply not the case. As already discussed, the trial judge neither focused his decision only on whether the issuing judge could have issued a warrant to search for drugs nor erroneously ignored evidence that supposedly demonstrates that the Respondent was in involved in a pattern of drug-dealing.

96. The ITO *for the day and place to be searched* was based ***exclusively*** on reputational reasoning. Reasonable grounds to believe that evidence would be found in the place to be searched simply cannot be made out in this case unless the issuing judge were to accept that

i. because there was some evidence that the Respondent was involved in the drug trade in the past,
ii. it was reasonable to conclude that evidence of an offence would be found in the vehicle weeks after the last reference "Primo" in the ITO.

97. The Appellant has perpetuated this type of profile reasoning in this appeal. The Appellant suggests that the ITO was not based on reputational evidence, because the ITO included information related to the police's beliefs that the Respondent recently supplied cocaine to MD and that he used a Lexus to do so. The Appellant goes on to say that "[u]ndoubtedly, for some period of time following the transaction there was a reasonable likelihood that at least drug-related items would be found in the car." But this very logic is an example of impermissible profile reasoning.

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[69] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 41.

The underlying premise of the Appellant's argument here is that because the Respondent could be connected to a drug deal earlier in the month, it was reasonable to believe (or even just likely) that the Lexus would contain evidence of an offence at the end of month. This is profile reasoning. And without any evidence in the ITO to support such conclusions, the reliance on reputational evidence is impermissible.[70]

98. The police's attempt to rely on profile reasoning exacerbates the seriousness of the breach, because such conduct allows the police to forgo the constitutional requirements that were established in *Hunter v. Southham Inc.* and that are now codified in s. 11 of the *CDSA*. It permits the police to avoid collecting evidence to establish the required reasonable grounds to believe that evidence is located in the place to be searched when targetting persons with a dubious reputation. As this Court wrote in *Morelli*, "to permit reliance on broad generalizations about loosely defined classes of people is to invite dependence on stereotypes and prejudices in lieu of evidence." Surely, persons who have criminal antecedents or are otherwise known to have negative reputations are to be afforded the same level of s. 8 protection as other members of society—the police must still be required to include evidence in the ITO that establishes that the constitutional prerequisites for the search have been met. The decision to skirt around these requirements by relying on the Respondent's reputation when it would have been quite easy to attempt to collect updated information is a serious breach of s. 8.[71]

b) The Breach Significantly Impacted the Respondent's Charter-Protected Interests

99. The Respondent's privacy was invaded, and his bodily integrity and human dignity were violated by the search. The Appellant concedes that if there was a breach of s. 8 in this case, then the impact on the Respondent's interests was significant.[72]

100. The Appellant suggests, however, that Justice Rogin considered the effect of the breach to be greater than what it actually was. But Justice Rogin did not commit any errors in his analysis of the second *Grant* factor that would support that conclusion.[73]

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[70] Appellant's Factum at para. 56; *Morelli, supra* at para. 82.
[71] *Morelli, supra* at para. 79.
[72] Appellant's Factum at para. 60.
[73] Appellant's Factum at para. 60.

i) The "Dynamic" Arrest of the Respondent

101. Justice Rogin's comments on the "dynamic" detention of the Respondent do not amount to reviewable error. The term "dynamic arrest" or "dynamic takedown" is consistently used in the case law to refer to the accused being taken to the ground and/or handcuffed. The definition of "dynamic" in this context is so notorious or generally accepted that it is not the subject of debate among reasonable persons.[74]

102. The Appellant's reliance on *Woychyshyn* and *Manoharan* for the proposition that there is no universal understanding of the word "dynamic" when used to describe an arrest is misplaced. When those cases are read more carefully, it is clear that the word "dynamic" was used in its literal sense—to denote the constantly changing-nature of the police interactions at issue in those cases—and not in its legalese form. For example, the word "dynamic" in *Woychyshyn* was used to describe the fact that the justification for and the nature of the accused's detention changed over time. In. *Manoharan*, the word "dynamic" was clearly used to describe the fluid nature of the investigation.[75]

103. Unlike those cases, the word "dynamic" in this case was clearly not used as a simple adjective to refer to a continually changing police interaction. It was obviously used to refer to the type of arrest that is commonly understood in legal circles to be "dynamic" —a physical takedown of the Respondent. This is evident from the references to a "high-risk takedown" on a public street referenced in the Application materials, which went unchallenged by the Crown during the *Charter* application.[76]

104. The Appellant is mistaken in suggesting that the issue of the dynamic arrest was only brought to the attention of the judge while the Respondent was making submissions on a technical argument on s. 8. The Respondent's counsel specifically argued that high-risk takedown of the Respondent on a public street seriously impacted his *Charter*-protected interests in oral submissions. This argument was also included in the Respondent's Notice of Application. The

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[74] See *R. v. Griffith*, 2018 ONSC 6471; *R. v. Baxter*, 2018 ONCJ 608; *R. v. Roberts*, 2018 BCPC 358; *R. v. Williams*, 2018 ONSC 3654; *R. v. Find*, 2001 SCC 32, at para. 48 [2001] 1 S.C.R. 863. See also *R. v. Othen*, 2018 ABPC 38 at para 110.

[75] *R. v. Woychyshyn*, 2017 ONCJ 663 at paras. 76–80; *R. v. Manoharan*, 2016 ONSC 2655 at paras. 180, 210.

[76] Notice of *Charter* Application, Appellant's Record, Volume 1, **Tab 9B** at para. 40; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at p. 61.

Appellant's fairness concerns are, therefore, unfounded; the Crown had ample notice of the Respondent's position on the impact of the dynamic arrest on the s. 24(2) analysis.[77]

105. The Crown also had the opportunity during the submissions on s. 24(2) to explain that the "dynamic stop" had no bearing on the s. 24(2) analysis. The Crown did not do so. The Crown's response to Justice Rogin's question related to the dynamic arrest amounts to a concession that the arrest of the Respondent was "dynamic" in the way that is commonly understood in legal terminology.[78]

ii) The Remarks about Racism were Misplaced, but are not a Reviewable Error

106. The Respondent acknowledges that the trial judge should not have commented on the inclusion of the racial slurs in the ITO.

107. The criticism by the trial judge for including this language in the ITO was, however, "collateral to his s. 24(2) reasoning." Read as a whole, it is clear that he did not base his analysis of the impact of the s. 8 breach on the Respondent's protected interests solely, or even significantly, on the inclusion of the racial slur. [79]

iii) Justice Rogin's Comment Regarding the "Weak" Connection between "Primo" and the Respondent is not a Reviewable Error

108. The Appellant does not explain how Rogin J.'s comment on the "weak" connection between "Primo" and the Respondent in the s. 24(2) analysis can be converted into a reviewable error. Neither the majority nor Nordheimer J.A. considered this comment to be an error.

109. When the comment is taken in its proper context, it is clear that it did not affect the s. 24(2) analysis in any way. Justice Rogin's reasons provide no indication that the "weak" connection somehow led to the exclusion of the evidence or to some other improper use of that fact. Just the opposite—he noted his conclusion on this issue as an acknowledgement that he did not consider the Respondent's argument that the police did not establish reasonable grounds to believe in the identity of "Primo" as increasing the seriousness of the breach (*i.e.* to acknowledge that he did not consider the breach to be more serious as a result of multiple failures on the part of the police to establish reasonable grounds).

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[77] Notice of *Charter* Application, Appellant's Record, Volume 1, **Tab 9B** at para. 40; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at p. 61.
[78] Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at p. 113.
[79] Court of Appeal Majority Reasons, Appellant's Record, Volume 1, **Tab 3** at para. 43.

iv) The Trial Judge Properly Considered the Lower Expectation of Privacy in Vehicles

110. The Appellant has not pointed to any error related to the trial judge's assessment that would permit appellate review. Justice Rogin acknowledged at the outset of his s. 24(2) analysis that the Respondent had a lower expectation of privacy in the vehicle.[80]

c) The Appellant Has Not Established an Error in the Trial Judge's Assessment of Society's Interest in Adjudication on the Merits

111. The Appellant has not pointed to any error in the trial judge's assessment of this factor. The trial judge acknowledged that the charges were serious and that the evidence was crucial to the Crown's case. He exercised his discretion to exclude the evidence despite society's interest in adjudication on the merits, because the admission of the evidence would tend to bring the administration of justice into disrepute.[81]

112. The Appellant appears to suggest, without pointing to any error made by the trial judge, that this factor should be re-assessed.[82]

d) The Trial Judge Did Not Err in the Balancing Exercise

113. The trial judge considered all the relevant factors and properly concluded that the admission of the evidence would bring the administration of justice into disrepute.

114. The Appellant has not established that Justice Rogin committed an error that would warrant a fresh 24(2) analysis. This Court must afford deference to his conclusion, as a result.[83]

e) Even on a Fresh Section 24(2) Analysis, the Admission of the Evidence Would Bring the Administration of Justice into Disrepute

115. Even if a fresh s. 24(2) analysis was warranted, the only conclusion available on a proper application of the balancing test from *Grant* is that admitting the evidence would bring the administration of justice into disrepute.

i) The Breach was Serious

116. The first *Grant* factor weighs heavily against the admission of the evidence. The breach was serious, and if the evidence is admitted despite the seriousness of the breach, the admission may send the message to the public that the justice system condones serious state misconduct.[84]

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[80] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1**, at p. 12.
[81] Ruling on *Charter* Application, Appellant's Record, Volume 1, **Tab 1**, at p. 14.
[82] Appellant's Factum at paras. 70–72.
[83] *Grant*, *supra* at para. 86. See also *Côté*, *supra* at para. 44; *Beaulieu*, *supra* at para. 5.
[84] *Grant*, *supra* at para. 71.

117. For tactical reasons unrelated to the Respondent, the police ***deliberately*** delayed seeking a warrant until the information related to the Respondent was stale. By then, they did not have grounds to believe that there would still be evidence in the vehicle. The police's choices to "hold off" against the Respondent in the interests of protecting their investigation against their true target and then to fail to update the ITO aggravates the seriousness of the breach. Additionally, the police had nothing but suspicions that the Respondent would be in possession of evidence on February 26, 2016. If the police "charge ahead" and search a suspect on the basis of suspicion alone, the *Charter* violation is "more serious than it would be otherwise".[85]

118. The breach is exacerbated by the fact that the police misled the issuing justice. As noted by the majority in *Morelli*, "the repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct," which includes "making statements that are likely to mislead the justice of the peace." An assessment of whether the ITO was misleading does not require a determination that the ITO was intentionally misleading. Additionally, as noted by the Ontario Court of Appeal in *Szilagyi*, a warrant issued on the basis of a negligently prepared or misleading ITO does not weigh in favour of admission of the evidence obtained through a search warrant.[86]

119. The ITO in this case was calculated to mislead the issuing justice on several fronts.

120. First, the affiant failed to note that the 2012 charges against the Respondent were stayed and did not specify the dates of the Respondent's *CDSA* convictions. These omissions were especially serious given that the basic theory underlying the warrant was that a person who is "once a drug dealer, is always a drug dealer". The ITO led the issuing justice into believing that the Respondent was involved in drug dealing from 2003 through to and including 2012.

121. The ITO was also misleading, because it was negligently drafted. The affiant essentially buried most of the information related to the Respondent in a global ITO principally intended to be used to apply for warrants to search other targets of more serious offences. Combining the evidence related to multiple accused and multiple offences without clearer delineation in Appendix A tended to mislead the issuing justice on the reasonable grounds to believe that the Respondent had committed a crime and would be in possession of evidence.

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[85] Her Majesty's Factum, Appellant's Record, Volume 1, **Tab 12** at paras. 41, 44; Transcript of Proceedings, Appellant's Record, Volume 2, **Tab 13** at pp. 77–78, 89; *Grant*, *supra* at para. 75; *R. v. Kokesch*, [1990] 3 S.C.R. 3 at 29.

[86] *Morelli*, *supra* at para. 102. See *Szilagyi*, *supra* at para. 71.

122. Appendix "J", which was directed specifically at the Respondent, was also misleading, because it included conclusory statements that were not supported by the evidence. Appendix J stated "Franco Marentette-Derose has advised the police that 'Primo' is his cocaine supplier" and that "[p]olice have confirmed that Justin James is the male Marentette-Derose refers to as 'Primo'". The police may have believed for investigative purposes that "Primo" supplied MD with cocaine and that the Respondent was "Primo", but these declarations were not established facts. The presentation of this information as established facts would have misled the issuing justice.[87]

123. The unjustified extended execution period also increased the seriousness of the breach. As noted by the Ontario Court of Appeal in *Saint* "warrants that are not executed within a reasonable time, whether because of delayed execution or because an unreasonable time frame is expressly authorized by the warrant, have long attracted judicial disapprobation." The authorization to execute the warrant in this case beginning any time over 4 days was unreasonable, because the ITO does not provide any evidence to reasonably support the extended execution period.[88]

ii) The Breach Significantly Impacted the Respondent's Privacy, Dignity, and Bodily Integrity Interests

124. The section 8 breach and ensuing arrest had a severe impact on the Respondent's *Charter*-protected interests. Section 8 serves to protect a number of interests, including privacy, human dignity, and bodily integrity. All of these interests were significantly violated in this case.

125. While the Respondent had a lower expectation of privacy in the vehicle, the impact of the breach on his privacy interests is still significant. As noted by the Ontario Court of Appeal in *Harflett*, the impact of a s. 8 breach related to a vehicle is not automatically "minimal" because the subject of the search had a lower expectation of privacy in a vehicle. Rather, "the impact of an unjustified search is magnified where there is a total absence of justification for it." Here, there were no reasonable grounds to justify the warrant to search the Lexus. As a result of the total absence of a justification for the search, the impact of the breach on the Respondent's privacy interests was significant.[89]

126. Additionally, the police's conduct infringed the Respondent's dignity. For example, the police's decision to sacrifice the Respondent's s. 8 rights in the interests of protecting the broader investigation demonstrated that, at least to the police, the Respondent was not worthy of respect or

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[87] ITO, Appendix J, Appellant's Record, Volume 1, **Tab 9F** at paras. 7–8.
[88] *R. v. Saint*, 2017 ONCA 491 at para. 9.
[89] *R. v. Harflett*, 2016 ONCA 248 at paras. 48, 56.

fair treatment. Human dignity is also harmed by unfair treatment based on reputation alone, which the Respondent was subjected to in this case.

127. His privacy, dignity, and bodily integrity were also infringed by the unjustified "dynamic" arrest in public. The "dynamic" arrest in public, which arose from the unconstitutional search, clearly would have interfered with the Respondent's privacy, bodily integrity, and dignity regardless of the exact details of the arrest. Even if the specifics of the arrest are not known and cannot be inferred, the fact remains that a "dynamic" arrest in public will certainly have had a more significant impact on the Respondent than a routine arrest would have.

128. The second *Grant* factor, therefore, also weighs heavily against admission of the evidence. Admission of the evidence would send the message to the Respondent and to the public that the individual rights of privacy, dignity, and bodily integrity "count for little."[90]

iii) Society's Interest in the Adjudication of these Charges is Not High

129. The Respondent acknowledges that the charges are serious and that the evidence obtained through the search is crucial to prosecuting the Respondent.

130. But in this case, the seriousness of the charges weighs in favour of exclusion of the evidence. This Court has acknowledged that the seriousness of the offences "has the potential to cut both ways" in the s. 24(2) analysis. While the public has an interest in the adjudication of the charges, it also has a "vital interest in having a justice system that is above reproach".[91]

131. Even in cases involving persons who unlawfully carry firearms, the public "expects those engaged in law enforcement to respect the rights and freedoms we all enjoy by acting within the limits of their lawful authority." This Court emphasized in *Grant* that the long-term repute of the justice system is the focus of s. 24(2). The "short-term public clamour" for a conviction in a firearms case "must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice."[92]

132. In this case, the seriousness of the charges weighs in favour of the excluding the evidence not only because the penal stakes for the Respondent are high, but also because society has an interest in having a justice system that does not allow the rights of an individual to be sacrificed

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[90] *Grant*, *supra* at para. 71.

[91] *Grant*, *supra* at para. 84. See also *R. v. Paterson*, 2017 SCC 15 at pars. 55–56, [2017] 1 S.C.R. 202.

[92] *Grant*, *supra* at para. 84. See *R. v. Reddy*, 2010 BCCA 11; *R. v. Ahmed-Kadir*, 2015 BCCA 346; *R. v. Caron*, 2011 BCCA 56; *R. v. Dhillon*, 2010 ONCA 582.

for the interests of a broader investigation. When the police are conducting an extensive investigation involving many players engaged in serious criminal activity, society has an interest in ensuring that the investigation is conducted thoroughly and constitutionally and not at the expense of an individual's rights.

133. To admit the evidence in the face of the s. 8 breach in this case would not only "send the message that when the charges are serious, individual rights count for little", but would also convey to the public that when the police are interested in a taking down a bigger target, they are entitled to ignore the *Charter* rights of the peripheral individuals caught up in the broader investigation. [93]

iv) When The Factors Are Balanced, It is Clear that Admission of the Evidence would Bring the Administration of Justice Into Disrepute

134. Even if the third factor weighs in favour of the admission of the evidence, society's interest in the adjudication of these charges does not outweigh the seriousness of the *Charter*-infringing conduct and the significant impact the breach had on the Respondent's *Charter*-protected interests in this case. The "third line of inquiry cannot turn into a rubber stamp where all evidence is deemed reliable and critical to the Crown's case at this stage." Where the first and second inquiries make a strong case for exclusion, as they do in this case, "the third inquiry will seldom if ever tip the balance in favour of admissibility". This case is not one of those rare cases.[94]

135. When the three *Grant* factors are properly assessed and balanced, it is clear that the evidence must be excluded for its admission would bring the administration of justice into disrepute.

PART IV: COSTS

136. The Respondent makes no submissions as to costs.

PART V: ORDER REQUESTED

137. The Respondent respectfully requests that this appeal be dismissed.

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[93] *Ahmed-Kadir*, *supra* at para. 111; *Grant*, *supra* at para. 71.
[94] *R. v. McGuffie*, 2016 ONCA 365 at para. 63; *R. v. Le*, 2019 SCC 34 at para. 142; *Paterson*, *supra* at para. 56.

PART VI: IMPACT OF ANY ORDER, RESTRICTION, OR BAN

138. This Part is not applicable. This matter is not subject to any sealing, confidentiality order, or publication ban, and the information in the file is not classified as confidential under any legislation or restricted from public access.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 28th DAY OF AUGUST 2019.

per Scott C. Hutchison
Kelsey Flanagan

Counsel for the Respondent

PART VII: TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

Jurisprudence	**Paragraph(s)**
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