Citation: [redacted], 2014 ONCJ 628

ONTARIO COURT OF JUSTICE

Old City Hall - Toronto

BETWEEN:

HER MAJESTY THE QUEEN	**C. Leafloor** **For the Crown/Respondent**
— AND —	
[redacted]	**A. Stastny** **For the Defendant/Applicant**
	Heard: September 22 and 23, 2014

REASONS for RULING

(Charter ss. 8 and 24(2) Application to Exclude Evidence)

MELVYN GREEN, J.:

A. INTRODUCTION

[1] The applicant, [redacted], was arrested during the course of a search executed by the Toronto Police Service (TPS) at a dwelling house at [redacted] in Toronto in the early hours of July 31, 2012. The search was authorized by a telewarrant issued pursuant to the *Controlled Drugs and Substances Act* (CDSA). The police located approximately 86 grams (about

three ounces) of methamphetamine, twelve Percocet pills and $2,400 in cash. As a result of these seizures, the applicant was charged with two offences under the CDSA (possession of both methamphetamine and Percocet for the purpose of trafficking) and one under the Criminal Code (possession of the proceeds of crime). He has elected to conduct his trial before me in the Ontario Court of Justice. The prosecution's case rests on the admissibility of the drugs and money located during the execution of the search warrant.

[2] By way of an application for relief under the Charter, the applicant claims standing to challenge the constitutional validity of the search. If granted, he further claims:

- that the search, by virtue of an improvidently issued warrant, violated his rights under s. 8 of the Charter to be secure against unreasonable search and seizure;
- that the just and appropriate remedy for the alleged breach of his s. 8 rights is an order excluding the seized drugs and other property from admission at his trial; and
- with respect to matters material solely on the question of remedy, the right to cross-examine the affiant of the sworn Information to Obtain (ITO) upon which the telewarrant is premised.

[3] As directed by *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.), the Crown redacted the ITO before its disclosure to the defence in order to protect the identity of a confidential informant ("CI"). On this hearing, Crown counsel does not invoke "Step 6" of a "*Garofoli* application" so as to permit a sufficiency review based on the original unedited ITO while disclosing judicially authorized summaries of the redacted portions to the defence. (See *R. v. Learning* (2010), 258 C.C.C. (3d) 68 (Ont. S.C.J.) and *R. v. Rocha* (2012), 292 C.C.C. (3d) 761 (Ont. C.A.).) Rather, he takes the position that the redacted version meets s. 8 constitutional standards, rendering reasonable the search and seizures that followed. In any event and if necessary, in the alternative the Crown maintains that a proper *s.* 24(2) analysis favours the admission of the seized evidence. As

the search and seizures were conducted pursuant to a judicially issued warrant, the burden of establishing their unreasonableness and, if successful, the appropriateness of a remedy of exclusion rests on the defence on a balance of probabilities.

[4] I granted the applicant standing to pursue the Charter motions. The 29-year-old applicant testified. The targeted address is his parents' residence. He had lived there since he was three. He had a key to the premises. He considered his upstairs bedroom his home and private space. Crown counsel did not challenge the applicant's evidence.

[5] After hearing argument respecting the s. 8 issue, I ruled (with reasons to follow) that that the redacted ITO fell short of constitutional norms and, as a result, the applicant's privacy rights had been infringed. I permitted counsel for the applicant to cross-examine the ITO affiant in a select number of areas bearing on the question of remedy. I then reserved my decision regarding the admissibility of the items seized from the applicant's home.

[6] The evidence grounding this motion can be readily partitioned. The redacted ITO serves as the evidentiary platform for the applicant's attack on the sufficiency of the information underlying the warrant. The same evidence, along with the examination of the affiant and certain uncontested representations, is germane to the contingent challenge to the admissibility of the seized items. Accordingly, I first review the contents of the redacted ITO and set out my reasons for determining that it fails to pass constitutional muster. Finally, I canvass the affiant's testimony and then conduct the necessary s. 24(2) analysis based on the entirety of the relevant record.

SUFFICIENCY OF THE INFORMATION TO OBTAIN (ITO)

(a) The Contents of the Redacted ITO

[7] ITOs are frequently drafted in circumstances of urgency. Their authors are rarely lawyers. They are not measured by the standards applied to an assessment of legal pleadings. That said, the ITO before me is an all too typical illustration of unnecessary redundancy, mindless template merging, and conclusory overstatement. No one of these drafting irritants is constitutionally fatal.

[8] The ITO is sworn by the affiant, PC Stephen Douglas, late on July 30, 2012. Douglas is a very experienced member of the Toronto Drug Squad and a current member of its "Expert Witness Pool". He avers that he subjectively believes on reasonable grounds that unlawful drugs that will afford evidence of specified offences under the CDSA are at a dwelling house at [redacted] in Toronto. The "reasonable grounds" set out in support of both Douglas' subjective belief and the objective basis for a justice of the peace's issuance of the warrant rest on four categories of information: that obtained by Douglas when speaking to a single confidential informant (CI) at some unspecified time during the month of July 2012; police knowledge bearing on the CI's creditworthiness; a review of various police databases; and police surveillance conducted between 7 and 10pm on July 30, 2012.

[9] The information provided by the CI can be succinctly summarized:

1. A man named "[redacted] is selling Crystal Methamphetamine from his house located at [redacted]";
2. A method [redacted] by which "one could reach this address";
3. A physical description of [redacted] (approximate age, height and build, hair colour and style, and a tattoo on one forearm) and his ethnicity ([redacted]); and
4. "[redacted] owns a small white [redacted] that is always parked in the driveway" as [redacted] "licence is currently under suspension" because he "has recently been arrested" for driving while impaired.

While each of these assertions is repeated several times, no additional information is attributed to the CI in the redacted ITO before me.

[10] The CI has "not been previously used" by the TPS. He does not have a criminal record for perjury, fraud or public mischief. If he has been convicted of any other offences they are not detailed in the ITO. The CI, it is said, "provided the information in hopes of [redacted portion]". If the CI's information proved "successful" the investigators would request consideration from "Covert Operations" on his behalf. The commonplace assertion that the CI was cautioned to tell the truth and warned of the potential legal consequences of failing to do so does not appear in the ITO.

[11] A check of various police databases confirmed that a [redacted] (the applicant) has resided at [redacted] (most recently documented on January 7, 2012) and that his description "matches" that provided by the CI. Equipped with a police photo of [redacted], members of the TPS attended the area over the course of about three hours on the evening of July 30, 2012. They "confirmed the address exists" and recorded the license plate of a white [redacted] parked in the driveway. They also observed a man they identified as [redacted] exit the front door of the house and sit on the front porch with an unknown female. No other observations deriving from police surveillance are set out in the ITO.

[12] The police records checks disclosed that [redacted] was:

- Charged with impaired driving and fail to comply with probation on January 1, 2012.
- Convicted of "B+E and Theft" on December 24, 2009 and "Theft Under" on September 20, 2004.
- Arrested for a number of drug related offences on November 2, 2009. This followed the execution of a CDSA search warrant at [redacted] resulting in seizures of cocaine, marihuana, Ecstasy, Oxycodone and Canadian currency. Despite the passage of the nearly three years, the ITO is silent as to the resolution or even status of these charges.

- Arrested for a number of drug related offences on May 29, 2009. Cocaine, methamphetamine and cash were seized after the applicant was stopped for the investigation of a traffic infraction. Despite the passage of more than three years, the ITO is again silent as to the resolution or even status of these charges.
- Investigated on March 14, 2009 when found to be a passenger in motor vehicle stopped for a Highway Traffic Act investigation.

"These Police computer checks", avers the affiant, "have corroborated the information provided by the Source [the CI], and the surveillance conducted by members of the Toronto Drug Squad".

[13] In summarizing the "grounds to believe", the affiant several times states that as a result of the "thorough" police investigation initiated by the information obtained from the CI "it has become apparent that Crystal Methamphetamine is being sold regularly from a house located at [redacted]" and that [redacted] lives at that address and (in bold lettering) that he "has an extensive history with the Police that involves numerous drug trafficking related offences". (The latter assertion is set out in bold lettering in each of its iterations.) Further, says the affiant, "it is believed that Crystal Methamphetamine is regularly being sold" by [redacted] "out of a house" at that same address "and therefore, Crystal Methamphetamine is currently inside the house".

(b) <u>Sufficiency Analysis of the Redacted ITO</u>

(i) <u>The Analytical Framework</u>

[14] As in the application before me, Charter grounded challenges to the validity of a search warrant are ordinarily founded on a claim of insufficient probable cause for their issuance. The Charter review is not a *de novo* hearing. The test on review, rather, is whether the issuing justice "could" – not "would" – have issued the warrant on the basis of the sworn ITO before him or her. The case of *R. v. Morelli* (2010), 252 C.C.C. (3d) 273, at para. 40, affords one of many Supreme Court re-affirmations of these long-settled propositions:

> The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

(See, also, *R. v. Araujo* (2000), 149 C.C.C. (3d) 449 (S.C.C.), at para. 54; *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, at 188, and *R. v. Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.), at 195 and *R. v. Campbell*, [2011] 2 S.C.R. 549, at para. 14) Where, as here, the ITO has been redacted and not otherwise summarized, edited or amplified, the subject matter of the s. 8 Charter sufficiency inquiry is solely the redacted ITO.

[15] Whether an ITO dependent on information from a confidential source can amount to reasonable ground to authorize a search depends on consideration of "the totality of the circumstances". This doctrine, first developed in this context by Martin J.A for the Court of Appeal in *R. v. Debot* (1986), 30 C.C.C. (3d) 207, esp. at 219, has been adopted and consistently applied by the Supreme Court of Canada. (See, for example, *R. v. Debot*, *infra*, *R. v. Greffe* (1990), 55 C.C.C. (3d) 161; *R. v. Garofoli, supra*; and *R. v. Plant, infra*.) For Martin J.A., four considerations are germane to a "totality" inquiry founded on a police informer's tip:

> Highly relevant to whether information supplied by an informer constitutes reasonable grounds … 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. [Underscoring added.]

[16] These four criteria were distilled down to three more general factors or "concerns" on further appeal to the Supreme Court: *R. v. Debot* (1989), 52 C.C.C. (3d) 193. As there said by Wilson J., at p. 215:

> At least three concerns must be addressed in weighing whether or not the evidence relied on by the police justified a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, 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. [Underscoring added.]

The "three Cs" – "compelling", "credible" and "corroborated" – have since become the legal shorthand for review of the constitutional sufficiency of searches founded on informer tips. As helpfully explained by Code, J. in *R. v. Greaves-Bissesarsingh*, [2014] O.J. No. 3892, at para. 35:

> It appears from Wilson J.'s reasons in *Debot*, and from the subsequent jurisprudence, that the term "compelling" refers to considerations that relate to the reliability of the informer's tip such as the degree of detail provided and the informer's means of knowledge, that is, whether the informer made first-hand observations or merely relied on second-hand hearsay, rumour, or gossip. The term "credibility" would appear to capture considerations such as the informer's motivation, criminal antecedents, and any past history of providing reliable information to the police. The term "corroboration" refers to any supporting information uncovered by the police investigation.

These three considerations are relevant to the sufficiency assessment of tips received from both anonymous and, as in the instant case, known but unidentified informants. The Supreme Court made clear in *R. v. Plant* (1993), 84 C.C.C. (3d) 203, at para. 28, that "the factors enunciated [in *Debot*] demonstrate principled concerns with the use of informants in general".

(ii) Applying the Law

[17] Any s. 8 sufficiency analysis must begin with asking the correct question. (See *R. v. Muller*, 2014 ONCA 780.) In the context, as here, of the lawful basis for the issuance of a search warrant, the appropriate question is framed by the scope of the search for which judicial authorization was sought and granted. The question, then, is whether the ITO (as redacted) sets out grounds from which the issuing justice could reasonably conclude that methamphetamine was present in a dwelling house at [redacted] and that it would afford evidence that [redacted] committed the offence of possessing the drug for

the purpose of trafficking on or about July 30, 2012. As the ITO relies on information provided by a confidential source, the CI, the answer to this question commands consideration of the totality of the circumstances.

1. *"Compelling"*

[18] The first analytical factor concerns the detail of the informant's tip and his or her means of knowledge. On its face, there is nothing that can be fairly characterized as compelling about the information provided by the CI. He or she provides a residential address and the first name ("[redacted]") and description of a man identified as a methamphetamine dealer trafficking from that house. The CI also situates a white [redacted] in the driveway of the house and explains its constant presence there as a result of [redacted] licence having recently been suspended for driving while impaired. This information relates to everyday, static circumstances (a house address, a car and the first name and physical description of a man), knowledge of which is likely available to anyone in the applicant's neighbourhood. There is nothing resembling, as put by Martin J.A, in *Debot*, "sufficient detail to ensure [the CI's account] is based on more than mere rumour or gossip".

[19] The only item of information that rises, if barely, above the mundane or generic relates to the rationale for the car's presence in the driveway: a driving suspension following a recent impaired driving arrest. Yet viewed in the larger context of other information set out in the ITO, this item only detracts from the CI's reliability or, at minimum the currency of his or her knowledge: the affiant spoke with the CI sometime in July, some six to seven months after his January 1st arrest for operating a motor vehicle while impaired and some three to four months after the expiry of the 90-day driving suspension that follows such charge. Put otherwise, the CI's explanation for the car's continuing presence in the driveway in July cannot, on its face, be reconciled with his characterization of the applicant's impaired driving arrest as "recent" and raises some doubt as the

currency of his knowledge about the applicant and his circumstances. Further, and as soon addressed, the CI's information in this regard is clearly a matter of indirect "belief" rather than direct knowledge.

[20] Not only is the detail of the CI's account sparse, but what little there is relates exclusively to innocuous or prosaic events. While the CI also claims "[redacted] is selling Crystal Methamphetamine from his house", there is no information about the applicant's mode or patterns of business. There is nothing about his sources, his customer base, his locus of operations or where he stores his drugs. There is no assertion that the CI has ever been in the targeted house, that he himself has ever purchased drugs from or even been offered drugs by the applicant, or that he has ever witnessed such offers or transactions. Most unusually, there is not even a description of the house at issue. (By way of contrast, see for example the detail and texture of the confidential informer's tip the Court of Appeal found "compelling" in *R. v. Rocha, supra*, at para 18.)

[21] The CI's means of knowledge is equally problematic. As said, in *R. v. Greaves-Bissesarsingh, supra*, the concern is "whether the informer made first-hand observations or merely relied on second-hand hearsay, rumour, or gossip." There is nothing in the information attributed to the CI that necessarily speaks to personal observation or knowledge or beyond what is publically or at least readily available. As noted earlier, no description of the house is attributed to the CI. The information respecting the applicant's recent "impaired" arrest is qualified by the introductory words "[t]he source believes…". Nor is there anything in the unredacted portions of the ITO that addresses the CI's relationship with or connection to the applicant so as to ground his purported knowledge of the applicant's unlawful conduct. Put bluntly, there is nothing in the information provided by the CI that enhances confidence in his claim that the applicant is dealing drugs out of his house.

[22] The information provided by the CI is, in short, not compelling. Jurisprudentially situated, the nature of the tip here falls far closer to that provided in *R. v. Hosie* (1996), 107 C.C.C. (3d) 385 (where the Court of Appeal held the search unconstitutional) than *R. v. Kesselring* (2000), 145 C.C.C. (3d) 119 (where the Court upheld the search).

2. *"Credible"*

[23] As said in *R. v. Greaves-Bissesarsingh*, the second factor, that of credibility, "capture[s] considerations such as the informer's motivation, criminal antecedents, and any past history of providing reliable information to the police". The CI in the matter before me has no "track record": he is not only, as it is sometimes put, "unproven"; he is completely "untested". There is simply no historical, experiential or institutional reason to infer the reliability of the CI.

[24] The CI has a motivation to assist the police. While the reasons have been redacted, it seems likely that the "consideration" he "hopes" to receive relate to his own and pressing difficulties with the justice system. Confidential informers are not typically contenders for sainthood, but the CI's motive is here clearly founded on self-interest rather than any noble cause. Further, and as earlier observed, the ITO does not contain any assertion that the CI was cautioned to tell only the truth or of the legal implications of failing to do so. Indeed, a fundamental concern in relying on information sourced to someone in criminal jeopardy is that an offer, as here, of police assistance provides a strong motive not only to assist the authorities but also to embellish or fabricate. Combined with the absence of any caution, the practical effect of this particular protocol is to afford the CI every incentive to speculate or manipulate the truth without any downside risk of legal consequence for doing so.

[25] The CI, as indicated, had not been convicted of a very narrow category of offenses: perjury, fraud and public mischief. However, the affiant's peculiar locution leaves open, if not directly implies, that the CI has a criminal record,

perhaps including offences of dishonesty other than those specifically identified. (It is, frankly, difficult to imagine the affiant not seizing the opportunity to assert that his source had no criminal antecedents if such was the case.) This disingenuous presentation has been the subject of critical judicial comments. In *R. v. Rocha, supra*, at para. 33, the Court of Appeal inferred that similar drafting was,

> … obviously intended to leave the impression of honesty on the part of the informer. But, perjury and public mischief are not the only types of offences that would fairly bear on the honesty and hence credibility of a confidential informer.

[26] The CI's credibility, standing alone or in combination with my assessment of the probative value of the information reviewed under the head of "compelling", falls well short of the standard of reasonable probability necessary to support the issuance of a warrant. Accordingly, the here significant burden of probable cause rehabilitation rests largely on the rigour of the final consideration, that of corroboration – the supporting information, if any, generated by the police investigation.

3. *"Corroborated"*

[27] There are two primary means by which the police may endeavour to corroborate a confidential informant. The first is through direct surveillance. The second involves a canvass of police databases or other sources, documentary or personal, of settled trustworthiness. The object of each investigative enterprise is to generate independent confirmation of the representations conveyed by the CI and thereby establish confidence in his or her account.

[28] The first approach, as put by Martin J.A. in *Debot, supra*, relates to whether there is "confirmation of part of [the CI's] story by police surveillance". Its overall effect clearly rests on the degree of confirmation and, most importantly, the materiality and centrality of the parts confirmed through police investigation. This is not to say that there must be corroboration of the actual criminality alleged (see *R. v. Caissey*, [2008] 3 S.C.R. 451), but that police verification of

neutral or trivial claims may well have little value in assessing the reliability of an informant. Scott Hutchison addresses these concerns in "*Canadian Search Warrant Manual 2005*", a respected guide for those involved in drafting and reviewing search warrants (at pp. 123-124):

> The best way for an officer to bolster the value of tipster/confidential informer is to find other material, either in the existing file or from further investigation, that corroborates material elements of what the informer has told the police. This is the one aspect of the informer's evidence that the officer has any control over – the officer cannot make the source more credible or make the information more compelling, but investigation can confirm what the source has said.
>
> … There must be something more than confirmation of innocent facts which might be readily known. This is not to say there must be confirmation of other directly inculpatory evidence, but it does mean that something more than superficial confirmation is needed. [Underscoring added.]

[29] The police in the instant case did conduct approximately three hours of field investigation, including what appears to be the equivalent of drive-by surveillance. They confirmed the existence of a house at the specified address and the presence of a white [redacted] (the license plate of which was recorded) in the driveway. And they confirmed that the applicant (a person matching the physical description of "[redacted]", as provided by the CI) was at that address. Despite the affiant's assertion of computer access to "Vehicle and Driver Information" through the Ministry of Transport (MOT), there is no report of any police effort to confirm that the [redacted] was "owned" by the applicant, as had been represented by the CI. There are no reported observations of any motor or pedestrian traffic to or from the house. There are no observations of the use of cellphones, drug consumption or any surreptitious or otherwise suspicious activity. There was, in short, no conduct or circumstances observed from which one could reasonably infer that the surveilled applicant was either trafficking in drugs or that there was any contraband inside the house. Employing Hutchison's language, the surveillance evidence advanced in aid of establishing the CI's reliability never crests the "superficial confirmation" of "innocent facts". Indeed,

the situation is almost identical to that which led the Court of Appeal, in *R. v. Zammit* (1993), 13 81 C.C.C. (3d) 112, to conclude that,

> The fact that the informer had accurately provided the address of the appellant, a description of the appellant and of his motor vehicle, and the name and address of his workplace did not make the informer credible with respect to information predicting criminal activity. These facts did not address the reliability of the confidential source. They would be known to anyone familiar with the appellant and would not in any way substantiate the allegation that the appellant was involved in drugs.

In short, the police surveillance does nothing to meaningfully enhance confidence in the CI or his or her claims respecting the applicant's criminal conduct.

[30] The second means of corroborating a confidential source is through a review of police files or independent sources. Typically, as in the case before me, this involves a check of various police databases. This exercise confirmed that the applicant historically resided at the particularized address and was most recently associated with it on January 7, 2012. It also confirmed that he had a record of criminal convictions for two offences; both were markedly dated and neither involved drugs or resulted in a sentence of incarceration. The data otherwise excavated from the police files derives from occurrence reports, some of which resulted in criminal charges for drug-related offences. Despite their datedness, the current status of these charges was not disclosed in the ITO.

[31] Together, the information gleaned from the police databases amounts to a form of bad character evidence. The summaries of the applicant's arrest and multiple charges for drug offences invite propensity reasoning to the degree that they paint him as a drug trafficker who, on at least once occasion, maintained a stash at the targeted address. This genus of evidence – whether drawn from reputation or other indicia of character – is part of the totality of circumstances that may be considered is determining the sufficiency of an ITO. As Wilson J. explained in *Debot,* at paras. 56-58, "policy reasons [for excluding bad character evidence at trial] are obviously not as cogent at the investigatory stage where the liberty of the subject is not directly at stake". As a result, she could not "accept the

proposition that the past activities of a suspect are irrelevant". However, it was "surely beyond question that reputation alone would never provide reasonable grounds for a search".

[32] Accordingly, the information regarding the applicant's prior misconduct is potentially corroborative, if abstractly, of the CI. However, common sense suggests that the weight to be assigned such evidence, particularly that related to allegations of prior criminality, depends on the reliability of its source, its recency, whether the earlier allegations resulted in convictions and their nexus to the current accusations. "A background of driving offences, for example, has little relevance to drug trafficking": per Wilson J. in *Debot, supra*.

[33] Subsequent dicta emanating from the Court of Appeal reflect these same and similar concerns. For example, in *R. v. Campbell* (2010), 261 C.C.C. (3d) 1 (Ont. C.A.), Doherty J.A. (writing in dissent, but undisturbed by the majority on this point) observed, at para. 74, that, unlike a criminal record, a mere "list of [the accused's] other 'contacts' with the police had no probative value". In *R. v. Rocha, supra*, para. 6, the Court commented adversely on an ITO that attempted to buff the credibility of an informer by asserting that he or she had "previously provided information to the police that led to persons being 'arrested/charged' and illegal narcotics and stolen property seized" but did "not clearly indicate that any person was convicted as a result of the information provided by the informer". And in *R. v. Vivar*, 2009 ONCA, the Court held that but for its limited and case-specific relevance to confirming a confidential informer's identification of the appellant (and thereby corroborating the informer), any reference to a prior murder allegation for which the appellant was acquitted was "irrelevant and improper" and should be excised from the sufficiency review of an ITO.

[34] Here, the only information drawn from the police databases that potentially probative of the core allegation (that pertaining to the drug-related charges laid in 2009) is also unconfirmed (in the sense that it speaks only to charges rather than

convictions). It also relates to events alleged to have occurred some three years before the ITO was drafted. Further, no explanation is advanced for the absence of any update as to the status of these 2009 charges despite the affiant having accessed the police files respecting these very allegations in a TPS database (the Criminal Information Processing System, or "CIPS") "from which", he avers in the ITO, "all information pertaining to a case can be obtained".

[35] As noted earlier, the Supreme Court, in adopting the test of "totality of the circumstances" to assess whether the standard of reasonableness is met, reasoned that, "Weaknesses in one area may, to some extent, be compensated by strengths in the other two" (*Debot, supra*, at para. 58). Here, the "strengths" of the first two "Cs" – "compelling" and "credible" – are so wanting that the confirmatory value of information culled from the police investigation would have to be particularly formidable to compensate for the deficiencies apparent under the two other analytical heads. It does not, in my view, come close to meeting this standard. Further, and as also said by Wilson J. in *Debot, supra*, "[I]t is somewhat artificial to assume that any one factor, be it reputation or something else, is responsible for turning a previously 'insubstantial' case into a sufficient one". (For one factually similar application of this principle, see *R. v. Castillo* (2011), 238 C.R.R. (2d) 70 (Ont. S.C.).)

[36] Only the CI's claim that the applicant "is selling Crystal Methamphetamine from his house" (and, then, only if found sufficiently credible) would ever merit police resort to search warrant powers in this case. For the reasons recited, I conclude that the information provided by the CI is not compelling, his or her credibility is not only unproven but highly suspect, and the cumulative evidence of police corroboration does not foster confidence in either the CI or the single material claim of criminal conduct made by him or her. On the basis of the redacted ITO before me, I cannot find reasonable grounds to infer the core trafficking allegation or, therefore, to grant the impugned search warrant. Nor can I

conclude that the issuing justice could reasonably have come to any other conclusion on the same redacted record. Accordingly, the telewarrant is set aside. The search of the applicant's home and the seizures therefrom are violative of his s. 8 privacy rights.

[37] I am also of the view that the ITO is insufficient to support the warrant on a second and alternative basis.

[38] The "minimum standard, consistent with s. 8 of the *Charter*, for authorizing search and seizure", as said in the seminal case of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 168, are "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" (underscoring added). The statutory authorization for a warranted search for prohibited drugs obliges no less: CDSA, s. 11(a).

[39] Accordingly, even were there an evidentiary basis to reasonably believe that the applicant had trafficked methamphetamine from his home, I am of the view that the ITO (as redacted) renders it impossible to determine whether the CI's allegation is fresh or stale-dated – that is, whether the constitutional requirement of currency is here met so as to reasonably permit the inference that evidence of the alleged offence was at the applicant's home at the time the police applied for the warrant.

[40] The CI's debriefing is sometime in the month of July 2012. The ITO in which the affiant asserts "there are grounds to believe the items to be searched for are in the place to be searched" is sworn on July 30th of the same month – anytime within one to thirty days of the affiant's meeting with the CI. Given the mobile, commercial and readily disposable nature of the targeted drugs, given the absence of any investigatory confirmation of trafficking or any other criminality, and given the three-year hiatus since the last allegation of drug-related misconduct (the status of which remained unknown or, at minimum, unreported), there are no

reasonable grounds to infer the currency of the substance of the CI's claim (regular, and therefore present, trafficking at the applicant's house) or, as a result, draw the critical circumstantial inference (that the applicant presently maintains a stash of methamphetamine at that house from which he services his customers). The potential month between the CI's expression of his or her allegation of trafficking and the presentation of the ITO is far too uncertain and lengthy a gap to permit, as said by the Supreme Court in *Morelli, supra*, "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 (underscoring added). Accordingly, a Charter claim of a s. 8 breach is made out for these reasons as well.

B. SECTION 24(2): THE REMEDY OF EXCLUSION

(a) Introduction

[41] By way of remedy for the infringement of his s. 8 rights, the applicant seeks an order excluding the evidence unlawfully seized from his home on the basis that its admission "would bring the administration of justice into disrepute": Charter, s. 24(2). In *R. v. Grant* (2009), 245 C.C.C. (3d) 1, the Supreme Court set out the contemporary analytical framework for the application of s. 24(2). As summarized at para. 71 of that decision:

> [W]hether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. … [A] court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the

> circumstances, admission of the evidence would bring the administration of justice into disrepute.

As is often the case in drug prosecutions, the second factor (the impact of the breach on the applicant's Charter-protected interests) here favours exclusion while the third factor (societal interests in a merit-based adjudication) pulls in the direction of admission of the seized drugs and money. The determination of remedy thus falls primarily to the first consideration (the seriousness of the Charter-infringing conduct) and its role in the balancing of the concerns encompassed by all three lines of inquiry.

[42] The evidentiary foundation for this exercise rests on the redacted ITO as supplemented by the applicant's cross-examination of the affiant and his uncontested representation that the respondent Crown's office declined his requests for disclosure of the CI's criminal record (if extant) or any outstanding charges he or she might be facing. A summary of the affiant's testimony (which was not subject to re-examination) follows.

(b) The Affiant's Testimony

[43] The affiant, Det. Cst. Stephen Douglas, had worked on about fifteen other Informations to Obtain before being tasked with the one before me. He had also completed several courses that included training with respect to the preparation and drafting of search warrants.

[44] Douglas had run a criminal records check on the CI. He testified that it was not TPS practice at the time to disclose the CI's record in an ITO. The practice had since changed; the full record of a CI would now be set out in an ITO.

[45] Douglas had not made specific inquiries as to the outcome or status of the two sets of drug charges for which the applicant had been arrested in 2009. Again, the TPS practice had changed since the time he swore the ITO that is the subject of this application. Douglas' present practice is to set out the current status of each outstanding charge. He would still report any charge for which a target or suspect had been found not guilty, but he would also reference the acquittal in the

ITO. Even if the applicant had been acquitted of all the drug-related charges arising in 2009, Douglas would still have included in his ITO his bold-lettered assertion that the applicant "has an extensive history with the Police that involves numerous drug trafficking related offences".

[46] Douglas understood that the 90-day suspension of driving privileges that accompanied the applicant's January 1, 2012 arrest for impaired driving would expire at the end of March of that year. He could not recall, however, whether he did or did not make any inquiries of the MOT as to the current status of the applicant's driving privileges. He did not see the relevance of obtaining such information.

[47] Finally, Douglas explained that the repeated references in the ITO to the targeted drugs being listed in Schedules I and II to the CDSA were a result of his having drawn this misinformation from other files. At the time, Douglas did not know that methamphetamine is included in Schedule I to the CDSA.

(c) Analysis: Applying the *Grant* Test

(i) Introduction: The Second and Third *Grant* Factors

[48] As noted earlier, counsel agree as to the s. 24(2) implications of the second and third lines of inquiry under *Grant*: the impact of the breach and the society's concern for a determination on the merits. I address each of these summarily and then turn to assessing the seriousness of the breach, the first and here most challenging of the *Grant* considerations.

[49] As to the *impact of the infringement on the applicant's Charter-protected interests*, it is long-recognized that a home commands sedulous s. 8 protection by virtue of it sheltering an individual's most intimate and personal activities and records. In *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140, the Supreme Court declared that, "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'". The Court has consistently re-affirmed this proposition: *R. v. Evans*, [1996] 1

S.C.R. 8, at para. 42; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 43; *R. v. Tessling*, [2004] 3 S.C.R. 432, at paras. 19-22; *R. v. Grant, supra*, at para. 78; *R. v. Morelli, supra*, at paras. 104-105 and 109; *R. c. Coté*, [2011] 3 S.C.R. 215, at para. 85. It is of no mitigation that the unedited ITO tendered by the police in aid of the telewarrant may have established probable cause. As said by the Court of Appeal in *R. v. Blake* (2010), 251 C.C.C. (3d) 4, at para. 29,

> The Crown chose to proceed on the redacted information. The assessments of whether there was a breach and of the impact of that breach on the appellant must be measured against the substance of that redacted information. Assessed from that perspective, this was an extensive, unjustified search of the appellant's home.

In short, the fact it was the defendant's home that was the subject of the unlawful search and seizures enhances the severity of the breach and, thus, the cause of exclusion.

[50] On the other hand, *society's interest in an adjudication on the merits* clearly favours admission of the evidence. The seized evidence is real and its exclusion would effectively terminate the Crown's case. However, one must not lose sight of the prospectivity rationale for the exclusionary remedy. As recently said by Abella J. on behalf of a unanimous Supreme Court in *R. v Taylor* (2014), 311 C.C.C. (3d) 285, at para. 38:

> It goes without saying that the public has an interest in an adjudication of the merits of a case where, as here, the evidence sought to be excluded is reliable and key to the case. But as this Court has consistently said, most recently in *R. v. Spencer*, 2014 SCC 43, at para. 80, the public also has an interest "in ensuring that the justice system remains above reproach in its treatment of those charged with these serious offences".

See also, *R. v. Grant, supra*, at para. 84; *R. v. Burlingham* (1995), 97 C.C.C. (3d) 385 (S.C.C.); and *R. v. Greffe* (1990), 55 C.C.C. (3d) 161 (S.C.C.).

[51] While the long-term repute of the administration of justice is crucial to any s. 24(2) analysis, it remains clear that the second and third *Grant* factors pull in opposing directions on the question of exclusion. Much turns, then, on the first line of inquiry, to which I now attend.

(ii) The Seriousness of the Charter-Infringing State Conduct

[52] In *Grant*, at para. 73, the Supreme Court directs that this first line of inquiry "necessitates an evaluation of the seriousness of the state conduct that led to the breach". And, at para. 72:

> The more severe or deliberate 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.

Accordingly, this facet of the exclusionary calculus requires locating the impugned state conduct along what is sometimes called a s. 24(2) "fault line". (The Court of Appeal employs the synonymous metaphors of "continuum of misconduct" in *Blake, supra*, at para. 23, and "spectrum of seriousness" in *Rocha, supra*, at para. 15.)

[53] The "conduct" at issue under this first head of inquiry is that of the affiant in drafting the ITO. The police effort to secure a warrant and their execution of the search under its judicial auspices attracts no constitutional complaint. As said by Fish J. for the majority in *R. v. Morelli, supra*, at para. 99,

> The search and seizure were unwarranted, but not warrantless: they were conducted pursuant to a search warrant by officers who believed they were acting under lawful authority. The executing officers did not wilfully or even negligently breach the *Charter*. These considerations favour admission of the evidence. To that extent, the search and seizure cannot be characterized as particularly egregious.

However, as Fish J. then immediately made clear respecting the matter under appeal: "The opposite is true on considering the ITO upon which the warrant was obtained". As was the situation in *Morelli*, it is the conduct of the "officer who *prepared* the ITO" (emphasis in *Morelli*) that attracts constitutional scrutiny in the instant case.

[54] In *Blake*, as here, the evidentiary foundation for a *voir dire* to determine the admissibility of drugs seized during the execution of a search warrant was an ITO

redacted to protect various confidential sources. Defence counsel in *Blake* did not challenge the Crown claim of confidential informant privilege, contend that the editing was extravagant or apply to the trial judge to review the unredacted ITO and provide judicial summaries to the defence as contemplated by the "Step 6" procedure outlined by Sopinka J. for the Supreme Court in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at 1460-1461. In the view of Doherty J.A., writing for the Court in *Blake*, "these positions taken [by the defence] have significance in the s. 24(2) analysis". Indeed, as Doherty J.A. concluded, at para. 27, with respect to the first line of inquiry under *Grant*:

> The appellant has not availed himself of the various options open to him that would potentially have allowed further assessment of the police conduct. In these circumstances it would be inappropriate to presume that the police did anything other than conduct themselves in accordance with the applicable legal rules.

Without reference to *Blake*, the British Columbia Court of Appeal took a very similar approach in *R. v. Bacon*, 2012 BCCA 323, at para. 27.

[55] As suggested earlier, the historically overlooked Step 6 enjoyed something of a revival following the Court of Appeal's release of *Rocha* in mid-2012 and, in particular, the concurring opinion of two of the presiding justices that strongly "encouraged" more frequent utilization of the Step 6 procedure. (*R. v. Greaves-Bissesarsingh, supra, R. v. Boussoulas*, 2014 ONSC 5542, *R. v. Ricketts*, 2014 ONSC 3210 and *R. v. Herdsman* (2012), 272 C.R.R. (2d) 307 (Ont. C.J.) are but a few examples of Crown adoption of the *Rocha* court's guidance.) The concurring reasons of Juriansz J.A. and O'Connor A.C.J.O. repeatedly affirm, as said by Sopinka J. in *Garofoli*, that it is "the Crown" – not the defence – that "may apply" to invoke Step 6. Indeed, as said at paras. 55 and 56 of *Rocha*, the procedure "permits the Crown to apply to have the reviewing judge consider as much of the excised material as is necessary to support the search warrant", and where the redacted "information is significant … there can be no advantage to the Crown in defending the issuance of a warrant on less than all the information that

supports it". Simply put, the failure to request a Step 6 mechanism redounds to the detriment of the Crown, not the defence: para. 58.

[56] In my respectful view, following *Rocha* the fact that a defendant's counsel, as here, does not advance a Step 6 application in the course of his or her challenge to the sufficiency of an ITO cannot be said to tell against the defence in the s. 24(2) analysis. Further, the applicant's counsel did make efforts (if futile), through correspondence with the Crown for further disclosure of the redacted ITO and of information related to the credibility of the CI. He also applied for and was granted leave to cross-examine the affiant respecting his drafting of the ITO. Applying the language of Doherty J.A. in *Blake*, the applicant "*has* availed himself of various options open to him that potentially allow further assessment of the police conduct". Step 6 is not one of these options. While there is no presumption of bad faith on the part of the police, the determination of where the affiant's conduct falls on the s. 24(2) fault line is not affected by the "positions" taken by the defence on this particular application.

[57] (Speaking more generally, I think it wrong to assume, as some courts do, that the Crown's failure to advance a Step 6 application is always and exclusively driven by principled concerns arising from *R. v. Leipert, supra*. The decision to forgo Step 6 may also be informed by tactical considerations where, for example, the Crown concludes that the ITO, even in its unedited state, is constitutionally fragile. The Crown may then reason that the likelihood of achieving a favourable result (that is, one that preserves the fruits of the impugned search) is optimized by formally or effectively conceding a s. 8 breach and then relying on the redacted record on the s. 24(2) inquiry that follows to salvage the admissibility of the seizures, rather than submitting the entirety of the ITO to close judicial scrutiny. Drafting warts, hyperbole and even palpable misrepresentations, if any, in those portions of the ITO properly excised to protect confidential sources would then remain forever veiled from constitutional review, let alone sanction.

See, for example, *R. v. Ivy and Bailey*, 2013 ONSC 4581, at para. 49, where Corrick J. held, that it was the state's "redacting of the ITO" and failure to proceed with a Step 6 application that "rendered it impossible for the defence to examine the good faith of the officers".)

[58] The correct "approach", as said in *Rocha*, at para. 29, where, as here, the issue is the conduct of the affiant,

> … should be to look at the ITO and consider first if it is misleading in any way. If so, the court should then consider where it lies on the continuum from the intentional use of false and misleading information at one end to mere inadvertence at the other end.

[59] The approach recommended in *Rocha* is largely animated by the Supreme Court's reasoning in *Morelli, supra*, and, in particular, its forceful reminder, at para. 102, that,

> The repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct. Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in *ex parte* proceedings. In discharging those duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. They must refrain from concealing or omitting relevant facts. And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant.

See also: *U.S. v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.); *R. v. Araujo*, *supra*, at para. 46; *R. v. Sutherland* (2000), 150 C.C.C. (3d) 231 (Ont. C.A.); and *R. v. Hosie, supra*, at p. 398, where the Court of Appeal held that wording in an ITO that risked misleading an issuing judicial officer, even if only a product of carelessness, "strikes at the core of the administration of justice".

[60] As in *Morelli*, the conduct of the affiant in the case before me was "neither reasonably diligent nor mindful of his duty to make full and frank disclosure" (para. 100). DC Douglas's failure to disclose the criminal record of the CI, for example, is virtually identical to the institutional practice that, as earlier noted, was censured by the Court of Appeal in *Rocha*, at para. 33:

> The entire record was not placed before the justice of the peace; rather, there was the oddly worded statement that the informer did not have a record for perjury and public mischief. This paragraph ... was obviously intended to leave the impression of honesty on the part of the informer. But, perjury and public mischief are not the only types of offences that would fairly bear on the honesty and hence credibility of a confidential informer. ... [T]his was a ... decision rooted in a systemic [police] practice ... .

The "practice" of selective disclosure of a CI's criminal antecedents was one of several "problems with the wording" in the ITO that, as said at para. 32 of *Rocha*, were "so significant as to situate the conduct ... toward the serious end of the [misconduct] continuum". Given its departure from the obligation of full and fair disclosure imposed on all parties engaged in *ex parte* applications for judicial authority, the dearth of specific prior judicial condemnation did not reduce the gravity of the crafting error in *Rocha*, nor does it in the instant case. More recently, in *R. v. Greaves-Bissesarsingh, supra*, the risk attending a similar omission ("the only poorly drafted passage" in the ITO) was held, at para. 29, to be somewhat compensated by the affiant's disclosure that the confidential informant in that case was "involved in criminal activity" – a material averment that is conspicuously absent from the ITO before me. (See, also, *R. v. Herdsman, supra*, at para. 38.)

[61] The affiant's presentation of the applicant's criminal antecedents attracts at least equally critical comment, particularly given his repeated, bold-font assertions that he, the applicant, "has an extensive history with the Police that involves numerous drug trafficking related offences". As with his statement respecting the CI's criminal antecedents, there is an "oddly worded", as put in *Rocha*, quality to this assertion that speaks more to the affiant's advocacy than his obligation to neutrally tender the available information to a justice of the peace. In fact, the applicant's record consists of only two convictions, both of which were theft-related, very dated and resulted in sentences of probation. Neither conviction bears any relationship to the criminal allegations advanced by the CI, and, accordingly "has little relevance", as said by Wilson J. in *Debot*, to the

corroborative exercise. (The impaired driving charge laid on January 1, 2012 is similarly immaterial but for its confirmatory utility, if such, arising from the CI's claim respecting the s ensuing driving suspension, a matter to which I soon return.) The affiant's further reference to the applicant being a passenger in a vehicle stopped for an HTA investigation in 2009 is of "no probative value" (*per* Doherty J.A., in *R. v. Campbell, supra*) and ought never to have been included in the ITO.

[62] The only other reference to the applicant's criminal antecedents, and by far the most potentially probative and prejudicial, are those related to his arrests in May and November 2009 for drug-related offences including, in the former instance, methamphetamine. Even in the congested courts of Toronto, serious drug charges such as these do not lie unattended for three years. Yet DC Douglas, an experienced member of the Toronto Drug Squad, made no effort to determine the resolution, trajectory or even current status of any of the offences for which the applicant was arrested in 2009. Instead, he left the reader of the ITO to infer guilt from charge – as did the affiant himself in his repeated assertions that the computer checks "corroborated" both the information provided by the source" and the applicant's "extensive history with the Police that involves numerous drug trafficking related offences". The use of the word "offences", rather than "charges", is particularly expressive of the affiant's improperly tendentious approach to the task of applying for an *ex parte* order. The affiant's choice of language is beyond careless; it reflects a dereliction of duty. To repeat Fish J.'s language in *Morelli, supra*, at para. 102:

> Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in *ex parte* proceedings. In discharging those duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. … And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant.

[63] The affiant's failure to pursue the status of the 2009 charges is particularly disturbing. The negative picture the affiant sought to paint of the applicant may have been very different if all, or even some, of the charges had been dismissed – a risk the affiant appears not to have wanted to assume by making appropriate inquiries. Indeed, DC Douglas' all-too-telling appreciation of the prejudicial impact of detailing prior charges and his abject failure to appreciate the legal implications of an acquittal is eloquently demonstrated by his evidence that he, as an affiant, would now check for and report any acquittals while continuing to recite the original charges and using them to assert a target's "extensive history with the police". I addressed a similar concern in *R. v. East*, 2011 ONCJ 502, at para. 29:

> [A]bsent a successful Crown appeal and some probative purpose other than proclivity reasoning from repudiated suspicions of prior misconduct, it would be most improper to include in an ITO detailed information about the allegations underlying a previous charge for which the target of a proposed search had been acquitted at trial. The verdict of "not guilty" conclusively determined to the accused's advantage all the factual issues in question at that trial: *Grdic v. The Queen*, [1985] 1 S.C.R. 810 and, as applied to the doctrine of issue estoppal, *R. v. Mahalingan*, [2008] 3 S.C.R. 316, esp. at paras. 18-26. A closing notation in an ITO that the accused was found not guilty of certain charges hardly purges the prejudice that inevitably flows from the detailing of those factual allegations that were inevitably resolved in the accused's favour through his or her acquittal. In short, no reference should be made in an ITO to such charges following an accused's acquittal of them or, in particular, the evidence said to underlie them. The fruits of the earlier inquiry may, of course, factor into a subsequent police investigation of the same person but, in my view, they can no longer form part of the constellation of circumstances that may be legitimately advanced for consideration at trial or in any other proceeding for which judicial sanction is sought.

The Court of Appeal is obviously of the same view, holding, as it did in *R. v. Vivar, supra*, that any reference in an ITO to a target's prior acquittal is "irrelevant and improper" absent some probative value other than propensity.

[64] The affiant's treatment of the CI's claims respecting the [redacted] in the driveway is also troubling. The police confirmation of the location, colour and model of the car is of very small corroborative value. Potentially more

persuasive of the CI's reliability were his claims that the applicant owned the car and that its constant presence in the driveway reflected the applicant's current driving suspension following his recent arrest for impaired driving. But for part of a single three-hour window of surveillance, the police made no effort to determine whether the vehicle was, as alleged, "always parked in the driveway". Despite having digital access to the MOT, the affiant did not determine whether the applicant "owns" the car or whether "his license is currently under suspension". The latter was a matter of some relevance: given the date of the applicant's impaired driving charge (January 1, 2012), the CI's claim some six months later (in July 2012) that his driving privileges were then suspended raised a legitimate concern about the currency of the CI's information respecting the applicant and his drug-related activities and, thus, about the CI's reliability more generally. DC Douglas' failure to make any effort to confirm the suspension-related allegations reflects a negligent approach to his obligations as affiant and casts doubt on the integrity of his repeated assertions (again in bold font) that the Drug Squad "corroborated the information provided by the [confidential] source".

[65] I note, as well, that this is not a case where extenuating or pressing circumstances may serve to excuse the omissions, overstatement, conclusory opinions and improper tenor of advocacy that characterizes the ITO. The affiant was a veteran drug officer with training and experience in the drafting of warrant applications – factors that speak to systemic rather than idiosyncratic problems that bear on the s. 24(2) analysis. There were no circumstances of urgency: no suggestion of weapons, imminent violence, or risk of the alleged drugs or the applicant disappearing – no reason, in short, not to conduct a more thorough police investigation than that reflected in the mere three hours of surveillance dedicated to generating corroborative evidence. And, finally, there is a distressing carelessness to the affiant's preparation of the ITO. His failure to cite the proper CDSA Schedule respecting methamphetamine is one example. His merging of various templates so as to several times repeat his "Grounds" is another. His

inclusion of the following factually and legally irrelevant paragraph as justification for authority to conduct a night-time search (when no special authority is required under s. 11(1) of the CDSA) affords yet another particularly hapless illustration:

> Further, this warrant has been applied for during the night time hours to ensure that the males responsible for these offences are arrested and the dangerous chemicals to which they are selling are seized and safely stored as soon as practicable.

As said of similar drafting inattention in *Rocha*, at para, 35, "this error is also symptomatic of the lack of care that is demonstrated by the wording of important parts of the ITO".

[66] As the preceding analysis should make patent, I am of the view that the conduct of the affiant falls towards the serious end of the metaphorical fault line. While I do not find deliberate falsities or intentional misrepresentations, the affiant's carelessness, lack of diligence and repeated failure to conform to long-settled norms governing the preparation of *ex parte* applications commands disassociation from the impugned conduct. As said in *Morelli*, at para. 102, "The repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct".

(iii) The Balancing

[67] In *R. v. Blake*, a case in which the insufficiency of a redacted ITO was conceded, defence counsel's failure to challenge the state's conduct was factored into the Court of Appeal's disposition of the s. 24(2) inquiry. Nonetheless, the Court, at para. 33, held that,

> If there were a taint of impropriety, or even inattention to constitutional standards, to be found in the police conduct, that might well be enough to tip the scales in favour of exclusion, given the very deleterious effect on the accused's legitimate privacy interests.

Here, as I have found, the affiant's drafting defects amount to far more than mere "inattention to constitutional standards". At the same time, the impact of the Charter breach on the applicant and the state's interest in a trial on the merits are

effectively the same as those that obtained in *Blake*. In the end I am persuaded that admitting the unlawfully obtained evidence in this case would, on balancing the *Grant* considerations, bring the administration of justice into disrepute. Accordingly, the seizures resulting from the execution of the warrant at the applicant's home are excluded from his trial.

C. CONCLUSION

[68] For the reasons here set out, the evidence of drugs and money seized from the applicant's home is ordered excluded from his trial.

Decision rendered on November 17, 2014.
Reasons released on November 21, 2014.

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Justice Melvyn Green