

*Case Name:*

**R. v. [REDACTED]**

**Between  
Her Majesty the Queen, and**

**[REDACTED]**

[2018] O.J. No. 6496

Information No. 4811-998-17-15009673-02

Ontario Court of Justice  
Toronto, Ontario

**M.G. McLeod J.**

Heard: December 4, 2018.  
Oral judgment: December 4, 2018.

(41 paras.)

**Counsel:**

Diana Lumba, Counsel for the Federal Crown.

Andrew Stastny, Counsel for [REDACTED]

George Gray, Counsel for [REDACTED]

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**REASONS FOR JUDGMENT**

1 M.G. McLEOD J. (orally):-- On December 5th, 2017, the police sought a warrant to search apartment [REDACTED] in the City of Toronto, a residence they had grounds to believe was occupied by [REDACTED]. The express purpose for the search was to locate firearms, ammunition, and related evidence. The basis for believing that Mr. [REDACTED] would have firearms, ammunition, and related evidence in his residence was information provided by a confidential source. The relevant paragraphs of the information to obtain that was submitted in support of the

application for a warrant provided as follows.

**2** Under the heading background or [REDACTED], paragraph 16 provided a detailed description of [REDACTED] based on information culled from police files. Including the reference in paragraph 16(b) to outstanding charges for offences alleged to have occurred between December 7th and December 10th, 2017. This was, obviously, in the future and appears to have related to an incident described in paragraph 16(e) as having occurred on October 10th, 2017 when a search warrant was executed on the same apartment and [REDACTED] was found inside along with "a quantity of drugs and currency".

**3** Under the heading grounds to believe an offence has been committed, paragraphs 17 to 24 indicate that between November and December, 2017, a confidential source provided information that a man was "known to be in possession of a firearm", that the source was believed to be reliable and would not provide "false information to police". And the police subsequently identified the man in question as [REDACTED].

**4** Under the heading grounds to believe the items to be searched for are at the location to be searched, paragraphs 25 to 36 reprised the statements made in paragraphs 17 to 24 and adds statements in paragraphs 31 to 33 about the affiant's experience. That people who possess illegal firearms often keep them in "private concealed locations" such as residences or storage lockers. Paragraphs 34 and 35 were redacted from the copy of ITO that was disclosed.

**5** Under the heading conclusion, the affiant restated the information outlined in paragraphs 17 to 35 as the basis to believe that firearms will be found in Mr. [REDACTED] apartment or the associated storage locker.

**6** In the statements and conclusions offered in appendix C of the information to obtain are rooted in the statements made in appendix D which contains the information about, and provided by, the confidential source.

**7** In paragraphs 1 through to 17 under various headings, provides the information relative to the source's reliability in relation to the information provided to police about criminal activities.

**8** Under the heading information provided by the confidential source, only a very few statements were left unredacted. These statements indicate that the source stated that he knew a man named "Clyve" who was selling cocaine. The source described Clyve as being "male, black, 5 feet, 10 inches tall, with a slim build" and said he lived at [REDACTED] in Toronto. The balance of the information in paragraph 19 of appendix D was redacted. The redacted portions of paragraph 19 of the information to obtain were outlined in a judicial summary for purposes of this application. Essentially, the eight paragraphs in question established that the source provided details as to two matters involving the man identified as Clyve which contained compelling details to support reasonably based grounds to believe that he would be in possession of one or more firearms. The balance of the redacted portion of appendix D was information as to what police did to corroborate

aspects of the information provided by the source.

**9** Without getting into the prohibited detail of the information provided by the source, the unredacted record provides a reasonable basis to believe that the subject of the information received from the confidential source, was in possession of one or more firearms. The aspects that are questionable have to do with the identification of that subject as being [REDACTED] and the target location as being his apartment in the building located at [REDACTED]

**10** The information to obtain contained ample identification of [REDACTED] drawn from police records. The extent and detail of that information stands in contrast to the detail of the information provided by the source about Clyve. The affiant's statement in paragraph 19(f) of the ITO as to the source's description of Clyve was "male, black, 5 feet, 10 inches tall with a slim build" which looks to me like a police officer's rendition of a physical description. Earlier in the ITO, at paragraph 16(a)(vii), the affiant set out the description of [REDACTED] culled from police records as "male, black, 6 feet tall, 185 pounds, dark complexion, muscular build, black short hair, brown eyes" and attached a police booking photo taken on October 11th, 2017. The names given were clearly different and the common elements between the two descriptions are extremely general. While the limited detail as to build, that could be described as distinguishing, was inconsistent. Otherwise, the information relied on to confirm that the subject the source identified as Clyve was the person the police identified as [REDACTED] was indirect.

**11** In the application made for a warrant authorizing the search of [REDACTED] residence on October 7th, 2017, details were set out as to the earlier investigation and information received from a reliable confidential sources, did appear to be relevant in material to the assessment of whether the information in the present application was sufficiently compelling and corroborated in identifying the subject described by the confidential source, in this matter as Clyve, who is a person known to the police, as [REDACTED].

**12** The target individual and location were exactly the same as was the fundamental allegation that the target was engaged in drug trafficking. And that evidence in relation to that activity would be found in searching his residence and the associated storage locker and the timing was compellingly current.

**13** But the ITO in this matter made only oblique references to what happened on October 7th, 2017, including the apparent mis-identification of the offence dates in paragraph 16(b) and a reference to a search which took place on October 7th, 2017 described in paragraph 16(e) as the most recent example of "43 documented contacts with the Toronto Police Service". Even if the justice at first instance related the offence described as having occurred on or between December 7th and December 10th, 2017, with the search described as having occurred on October 17th, 2017, these scanty references to a highly relevant prior occurrence were totally inadequate for purposes of full, frank, and fair disclosure.

**14** This finding alone would have a serious impact on the assessment of the constitutional

compliance of the process used to obtain the warrant that resulted in the seizures of drugs and money in the present case. The present record has been amplified by providing this court with a copy of the ITO used to obtain the warrant on October 7th, 2017. And I'm also aware that, as a result of the execution of this earlier warrant, police searched both the same apartment and the same storage locker as figure in the present matter and seized drugs, money, and other evidence in relation to drug trafficking, but no evidence in relation to firearms offences of any kind.

**15** The information outlined in the application for a search warrant on October 7th, 2017 identified [REDACTED] and [REDACTED] of [REDACTED] as being engaged in drug trafficking. The information to obtain in that matter indicated that police had information from a confidential source about a person identified as "Orc" who was described as "male, black" and a woman named [REDACTED] who was described as "skinny and white" and a phone number. On Saturday, October 7th, 2017, an undercover police officer called the phone number and spoke with a person believed to be Orc about buying a ball of crack cocaine for \$220. A search of records associated with the phone number led police to an occurrence on September 4th, 2017 where [REDACTED] of [REDACTED] gave that phone number as his home phone number. Other police records indicated that Mr. [REDACTED] was identified as a high-risk sex offender who is subject to a lifetime firearms prohibition.

**16** The undercover police officer arranged a meeting with [REDACTED] and completed a drug transaction. Other officers followed the woman directly back to unit [REDACTED]. The undercover officer then recalled the phone number and spoke with the man identified as Orc. The undercover officer subsequently identified the woman he met as [REDACTED] on the basis of photos recovered from police records, which records also confirmed that she was believed to be in a relationship with [REDACTED]. Police then reviewed prior occurrence reports which indicated that [REDACTED] referred to her boyfriend [REDACTED] as also being known as Orca.

**17** On the basis of the totality of this information, police indicated they had reasonable grounds to believe that [REDACTED], also known as Orca, was the same male person contacted as Orc to make the arrangements for the drug transaction carried out by [REDACTED] on October 7th, 2017 and a warrant issued.

**18** In the present matter, the application for the search warrant on December 5th, 2017 contained no reference whatsoever to the name Orc or Orca in relation to either [REDACTED] or the target location. Similarly, in the application for the search warrant on October 7th, 2017, there was no reference whatsoever to the name Clyde either in relation to [REDACTED] or the target location.

**19** In each case the essential assertion was that the police identified [REDACTED] as being the person known by one of these names, but in each case the names were completely different. The importance of this cannot be diminished on the basis that these were "just" street names, and an unspoken appeal to the assumed practice of people engaged in criminal activity to use various street names for different purposes. That may be the case, but there has to be some evidence indicating

that the man the police identified as [REDACTED] was also known as Orc or Orca and also answered to the name Clyde. If names are to be understood to be as interchangeable as socks, then they are of no use whatsoever as an identifying feature. Absent the name, the remaining means of identifying the subject of the confidential source's information was the description of the subject as "male, black". Despite, or perhaps because of, the ubiquity of this description in criminal proceedings, it is worthless. The term male applies to billions of people and the qualifier black is objectively meaningless. Apparently, it refers to skin tone, but on the understanding that black can mean any skin tone that is non-white while white can mean any skin tone that is non-black. It seems that the police also used the term "black" in a racialized sense to indicate that they think that the person may be of African heritage. And while that may be a commonly accepted way of categorizing people in terms of race, it is useless as a means of identifying an otherwise unknown person in criminal proceedings. Bear in mind that Africa is a continent that embraces more genetic and physical diversity than Europe and that many of the Canadians described as being of African heritage are as far removed from that birthplace, or at least the birthplace of some distant ancestors, as the descendants of the earliest European colonists.

**20** Finally, in the context of paragraph 19(f) of the ITO, the description "male, black" appears to be the affiant's interpretation of the description provided because the expression "male, black" is a peculiarly police usage, particularly when it is followed by an estimated height and description of the man's build. In identification cases we need to get as close as possible to the original information provided. How did the source describe the person in question and how does that description correspond to the man police suspect to be the subject. For this purpose, the value of physical descriptions is measured in terms of identifying details. Features that would distinguish the individual for comparison purposes. And here we run into a significant problem because the description of Clyde, as recorded by the affiant, was that he was "tall with a slim build", but [REDACTED] was described in police files as being 185 pounds with a "muscular build". In this case, we would have to place undo weight on the "male, black" descriptors and ignore the obvious differences in the physical descriptions and accept that the person the source identified as Clyde is probably the same person someone identified by a different source as Orc who is probably the same as the person a third person identified as Orca who is the same as the person the police identify as [REDACTED]. In the complete absence of any indication that either of the original sources thought Clyde was [REDACTED], or Orc was [REDACTED], or that Clyde was Orc, or even if they knew the name Orca that [REDACTED] apparent girlfriend apparently used to describe the subject.

**21** The means used to confirm the identification of the man the source knew as Clyde with the man the police knew as [REDACTED] was indirect. I am constrained in explaining its inadequacies because the police chose to withhold the redacted details. The best I can do is describe it as provisional in the sense that I would have expected some follow-up, particularly given that this was not a case where the subject of interest was unknown to police. To the contrary, the police had current information including accurate and reliable booking photos taken as recently as October 11th, 2017. But, perhaps, the police were reluctant to use this recent booking photo of [REDACTED] because it showed him having a black goatee which was yet another feature distinguishing him from

the person the source described as Clyve.

**22** The investigation that was conducted in October, 2017 was directly related to the investigation that was initiated in December, 2017. To the extent that if it had been packaged differently, it would be identified as a continuing investigation into ██████████ drug trafficking activities.

**23** What was new about the December initiative was the suggestion that because of his drug trafficking activity, ██████████ was in possession of firearms, ammunition, and related contraband and that in all probability he would have one or more firearms readily available in his apartment and the associated storage locker. But the fact that the police investigation conducted in October, 2017 into ██████████ drug trafficking activities disclosed nothing that would suggest that he had a firearm, was clearly relevant in determining the weight to be given to the identification of the subject of the source's information as ██████████. After all, police had just searched the residence and storage locker that they suggested would certainly contain the gun that ██████████ was supposed to have.

**24** By withholding the relevant and material information from the earlier investigation, the police avoided the obvious question, how could they be so confident that, as a drug dealer, ██████████ ██████████ must have a firearm in his apartment and or storage locker when they had just searched both his apartment and storage locker for evidence of drug dealing and found nothing that suggested that a gun was in play.

**25** It's well within the realm of reasonable possibilities that a drug dealer could be the subject of an investigation and search without finding evidence of a firearm and yet be a man who routinely kept a gun handy for purposes of defending his drug trafficking business. But that possibility simply speaks to the need for full, frank, and fair disclosure of all relevant and material information. The issuing justice was entitled to the information necessary to determine whether it was a reasonable possibility. That if the police went back with a second warrant to a place where they formerly had no reason to suspect there might be a gun, that it was probable that they would find firearms, ammunition, and related contraband that wasn't there in October. What comes readily to mind is that by withholding information about the investigation and search conducted in October, the police were able to avoid the necessity of answering difficult questions or providing explanations that would impact on the strength of the grounds asserted in December.

**26** The principles that apply to this case are well understood. As Justice Fish put it in *R. v. Morelli*, [2010] 1 SCR 253,

When seeking an *ex parte* authorization such as a search warrant, a police officer -- indeed, any informant -- must be particularly careful not to "pick and choose" among the relevant facts in order to achieve the desired outcome. The informant's obligation is to present *all material facts, favourable or not*. Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer

must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.

**27** As I have already outlined in some detail, the officer who prepared the information to obtain in this case, left out a significant body of information that was clearly relevant and material. With the result that it appears that he was picking and choosing in order to achieve the desired outcome. Whether or not this was his deliberate objective is of no moment. My obligation on this review, is to consider whether or not the warrant could have issued on the record, as amplified to include the additional information and evidence.

**28** Once again, my ultimate finding is anticipated by my earlier comments and analysis. The principal issue is not the credibility of the source or whether the information provided was sufficiently compelling as it related to the subject identified as Clyve. It is whether or not there was a reasonable basis to identify Clyve as ██████████ to the extent required to support the issuance of a search warrant for ██████████ personal residence.

**29** On the face of the statements made in the original ITO in this case, there was no evidence of a connection between the confidential source and the person the police knew to be ██████████. And the means used to try to establish a link between the person the source described as Clyve and the appearance of ██████████, was indirect. Given what the police actually had to work with, it is concerning that they followed the process outlined in redacted paragraph 20. It was problematic and in retrospect, the problem was aggravated by the fact that its inadequacies were obscured by the fact that the police chose to include a body of reliable identifying details about ██████████, reproduced from police records, to supplement the information provided by the source about Clyve. There was a real danger that someone reading the information to obtain would simply accept the assumption of the police that the person whose photo, description, and police history are set out in the first part of the information to obtain, must be the same person who is the subject of the information received from the confidential source. And it is hard not to conclude that this was the intent. It is only on a careful reading of the balance of the information to obtain that it would become clear that the crucial identification of ██████████, as the person the source knew as Clyve, depends completely on the indirect process described in redacted paragraph 20.

**30** In light of the information disclosed on the amplified record, the value of the identification described in paragraph 20 is minimal. As has already been noted, key elements of the information obtained and used in the other investigation to identify ██████████ as Orc, were completely inconsistent with the information identifying the subject known as Clyve. Moreover, there was nothing in the record of the earlier investigation that suggested ██████████ routinely carried a firearm or that it was probable that police would find one in his apartment or the associated storage unit. In fact, a reasonable reviewer would think that the arrest and execution of a search warrant on ██████████, at his apartment in October, would have substantially diminished the likelihood that he would be keeping a firearm there in December.

**31** In short, I find that the application to obtain the warrant to search Mr. ██████ residence was based on a flawed information to obtain and that the process itself was compromised by the fact that the police withheld highly relevant and material information and, consequently, the warrant ought not to have issued.

**32** In *R. v. Grant*, [2009] 2 SCR 353, the Supreme Court stated, "that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence". But it is often pointed out that in *R. v. Blake*, 2010 ONCA 1 (CanLII), [2010] O.J. No. 48, the Ontario Court of Appeal indicated that police conduct that violates *Charter* standards may be excused if the police recognize the need for a warrant and acted accordingly. An action that is described as being in good faith. It is suggested that in such situations, a finding tantamount to bad faith would be required before the reviewing judge should gut the prosecution's case by excluding the contraband seized from the accused. But in *R. v. Blake*, what the Court of Appeal said was that,

The police conduct in this case is somewhat analogous to the conduct considered in cases where the police have gathered evidence according to the law as it was understood at the time the evidence was gathered only to have the law changed or declared unconstitutional at some subsequent point, but before the evidence is tendered at trial.

**33** This would apply only in what the Ontario Court of Appeal described as analogous situations. This case, like so many of the others decided since *R. v. Blake*, is not one.

**34** While police conduct is found to have failed to conform to prevailing constitutional standards may be excused where it was undertaken in good faith, that excuse will not be available simply because the police meant well or were trying to do the best they could.

**35** As the Ontario Court of Appeal recently confirmed in *R. v. Szilagyi*, 2018 ONCA 695 (CanLII), [2018] O.J. No. 4380, "A conclusion as to good faith cannot be grounded on a lack of bad faith".

**36** In *Charter* litigation, a finding of good faith would rarely, if ever, be justified where the police were either negligent or slipshod in the execution of their duty to make full, fair, and frank disclosure of material facts or where they presented an information to obtain that failed to disclose an objectively discernible constellation of facts sufficient to support a reasonably based belief.

**37** The Supreme Court stated in *R. v. Paterson*, [2017] 1 S.C.R. 202,

... that negligence in meeting *Charter* standards cannot be equated to good faith. Even where the *Charter* infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct.



**38** In the recent case of *R. v. St. Clair*, 2018 ONSC 5173 (CanLII), [2018] O.J. No. 4714, Justice Campbell weighed in on the good faith argument, charting out a carefully worded position describing the operative conduct of the police on a spectrum spanning from inadvertent or minor mistakes at one end to willful or reckless conduct at the other, leading to a finding that the evidence secured in that case ought not to be excluded, but Justice Campbell conceded that,

Even where the breach of the accused's *Charter* rights is not the result of any "wilful disregard" for those rights, if the *Charter* violation constitutes a significant departure from the standard of conduct expected of police officers, such conduct cannot be condoned by the courts, and this aspect of the inquiry will lean in favour of the exclusion of the evidence.

**39** In *R. v. Szilagyi*, the Ontario Court of Appeal confirmed that negligence in the preparation of the information to obtain which resulted in "serious and significant deficiencies", cannot be construed as anything but an absence of good faith, the seriousness of which is not mitigated by the finding that the officer who prepared the application was doing the best he could with the information that was available. Submitting an application that does not meet the standard of full, frank, and fair disclosure, is "police conduct that falls at the more serious end of the spectrum favouring exclusion of the evidence" regardless of whether the evidence would support a finding that the police intended to mislead the issuing justice.

**40** In this case, I'm compelled to find that the violation of the applicant's *Charter* protected rights was particularly serious, and that it had a serious and significant impact on his *Charter* protected right to privacy, and this leads inevitably to a finding that the evidence seized must be excluded regardless of the impact that has on the public interests in a trial on the merits. This is the approach that was mandated by the Supreme Court and the Ontario Court of Appeal in *R. v. Côté*, [2011] 3 S.C.R. 215, *R. v. Morelli*, [2010] 1 S.C.R. 253 and *R. v. McGuffie*, 2016 ONCA 365 (CanLII), "If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility".

**41** There shall, therefore, be an order excluding the evidence seized as a result of the search of Mr. ██████████ residence. Thank you.

...WHEREUPON THESE PROCEEDINGS WERE CONCLUDED